

# **DRAFTING ENFORCEABLE ORDERS**

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State Bar of Texas  
**FAMILY LAW 101**  
August 11, 2019  
San Antonio

## **CHAPTER 8**



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“Closing the File,” Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 17, 2003.

“Post Trial Basics & Closing the File,” Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 8, 2004.

“Effective Use of ADR in Family Law Cases,” 2005 Poverty Law Conference, Texas Lawyers Care, March 30 - April 1, 2005.

“Closing the Friendly and Unfriendly File,” Advanced Family Law Drafting Course, State Bar of Texas, December 8-9, 2005.

“Traveling Light: Collaborative Law Without Paralegals or Assistants,” Collaborative Law Spring Conference 2008, State Bar of Texas, February 28-29, 2008.

“Collaborative Law,” Alternative Dispute Resolution Course, University of Texas Law School, Professor Cynthia Bryant, March 6<sup>th</sup>, 2008.

“Child Support (What Do Judges Do in Various Counties) Above & Below the Guidelines, the High Income Earners (Death of the Obligor),” Marriage Dissolution Institute, State Bar of Texas and Family Law Section, April 17-18, 2008.

“Closing the File,” Summer School - State Bar College, State Bar of Texas, July 17-19, 2008.

“Closing Documents Other than QDROs,” Advanced Family Law Drafting Course, State Bar of Texas, December 4-5, 2008.

“Putting Agreements on Paper,” Collaborative Law Course 2010, State Bar of Texas and Collaborative Law Institute of Texas, March 4-5, 2010.

“Closing the File,” Advanced Family Law Drafting Course, State Bar of Texas, December 9-10, 2010.

“We’re Done! (Or are we?) - Closing the File,” Advanced Family Law Drafting Course, State Bar of Texas, December 5-6, 2013.

“Closing the File 101,” Marriage Dissolution 101 Course, State Bar of Texas, April 23, 2014.

“Closing the File 101 – The Long Good-Bye,” Marriage Dissolution 101 Course, State Bar of Texas, April 8, 2015.

“Proving Significant Impairment,” Advanced Family Law Seminar, State Bar of Texas, August 1-4, 2016.

## **LECTURER**

“Creative Discovery,” Family Law Essentials, Family Law Council, Nacogdoches, Texas, June 4, 2004.

“Post Trial Basics & Closing a File,” State Bar Convention - Boot Camp, June 25, 2004. “Closing Out Your File,” Williamson County Family Law Seminar, October 29, 2004. “How to Study for and Pass the Board Certification Exam,” Advanced Family Law Course, State Bar of Texas, August 10, 2005.

“Trends in Family Law,” 2009 Statewide Assistant Attorneys General Conference, Austin, Texas, July 10, 2009.

“Changes in SAPCR Issues and Trends for the Future,” 35<sup>th</sup> Annual Advanced Family Law Course, State Bar of Texas, August 3-6, 2009.

“Collaborative Law,” Travis County Family Law Section Luncheon, January 6, 2010. “The Paradigm Shift,” Nuts & Bolts of the Collaborative Process Course, State Bar of Texas and the Collaborative Law Institute of Texas, March 3, 2010.

“Characterization & Tracing: An Overview,” Advanced Family Law Course, State Bar of Texas, August 4, 2011.

“Know When to Hold Them, Know When to Fold Them: Settlement Agreements, Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements,” Author: Jimmy Vaught, Marriage Dissolution, State Bar of Texas, April 19, 2013.

“Know When to Hold ‘Em, Know When to Fold ‘Em, Accepting and Firing Clients,” The Austin Bar Family Law Section Spring CLE, May 13, 2016.

“Parental Alienation – Analyzing/Reassessing the Problems and Solutions,” Advanced Family Law Seminar, State Bar of Texas, August 7-10, 2017.

“Navigating Your Family Law Matter When Someone with a Personality Disorder Is Involved,” Advanced Family Law Seminar, State Bar of Texas, August 13-16, 2018.

“Breaking the Log Jam in Your Case,” 12<sup>th</sup> Annual Course Collaborative Law: Avoid Breaking Bad When Breaking Up, State Bar of Texas, March 7-8, 2019.

“Property Case Update,” Marriage Dissolution, State Bar of Texas, April 25-26, 2019.

“40-Hour Mediation Training,” AAML, June 23-26, 2019.

#### **COURSE DIRECTOR/PLANNING COMMITTEES:**

Planning Committee – Collaborative Law Course 2010 Planning

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Planning Committee and Course Director – Marriage Dissolution 101 Seminar,

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## **ADMITTED**

State Bar of Texas 2013

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Family Law

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Recognized as a Rising Star by Super Lawyers – 2017, 2018, and 2019

## **PROFESSIONAL ACTIVITIES AND PUBLICATIONS**

- CLE Speaker, “Modifications” – Victoria Family Law Essentials Seminar, 2019
- CLE Speaker, “Divorce 101” – Williamson County/WLS Presentation Series, 2018
- Co-Author, “Which Way Do We Go?” – Drafting Considerations in Jurisdiction, Advanced Drafting 2017
- Contributor, Texas Family Law Foundation’s *Annotated Texas Family Code 2017*
- Vice President, Women Lawyers Section, Williamson County Bar Association
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- Member, Travis County Women Lawyers Association
- Member, Austin Young Lawyers Association
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Basic Interdisciplinary Training, Collaborative Divorce Texas – 2019  
New Ways for Families, Williamson County Bar – 2015  
40-hour mediation training – 2012





A special thank you to Kelly Caperton Fisher and Angie Rolong Cormier for use of their Advanced Family Law Drafting 2017 paper, “Securing the Deal.”



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## DRAFTING ENFORCEABLE ORDERS

### I. INTRODUCTION

After months or even years of working toward a resolution for your client, you are finally near the end. Maybe the mediator on your case is hurrying you through your review of the final version of the agreement, or you realize the judge is not addressing all of the issues in your Proposed Disposition of Issues. As a young lawyer, it can be intimidating to push mediators or judges, but this is often a make-or-break time for your case. Your ultimate goal is a clear order that explicitly lays out the details parties need to know to follow the rules, and, if one party does not follow the rules, the order needs to be clear enough to allow for relief through enforcement.

Cases are concluded by only three means: non-suiting the case after the parties reconcile or drop the case for other reasons; settlement agreements—whether negotiated informally, through the collaborative law process, or through mediation; or the issues are put before a judge or jury to decide in final trial. Regardless of the method for determining the ultimate outcome, your excellent negotiating skills and/or diligent trial preparation will be forgotten if your client does not end up with the assets awarded to him or her, or if the opposing party does not perform duties laid out in the order and your client is harmed by that failure.

Even good lawyers make mistakes in mediation. For a cautionary tale, consider *Jonjak v. Griffith*, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin April 12, 2019) (mem. op.). In this case, the mediated settlement agreement awarded a percentage or a dollar amount from husband's 401(k) and failed to award wife interest, dividends, gains, or losses from the date of the MSA. The decree granted gains and losses on the amount awarded to wife, but the Court of Appeals later amended the decree to remove the award of gains and losses.

This article is designed to give you basic tips for drafting enforceable orders, and it will focus on divorce decrees. Retirement, complicated property issues, and child-related issues will be addressed in depth by several other speakers at the Advanced Family Law Course.

### II. BEGIN WITH THE END IN MIND

Maybe you have mediated successfully, or you litigated and have a judge's ruling. To your client, it may seem like the hard work is done, but careful drafting is often the most important part of the process. When a client hears, "you are hereby divorced and the marriage is dissolved," most clients believe the case is finished.

If the divorce decree, transfer documents, or security instruments are not prepared and executed properly, your client may not receive the money or the

property that is rightfully his or hers. Draft your documents with enforcement in mind, or you may leave the Court without the means or ability to assist you in the event the opposing party defaults on his or her obligations under the agreement or Court's ruling. Enforceability is key!

#### A. Be Specific

A decree must clearly identify and divide property and set out each party's duties and obligations related to the division of property in clear, specific, and unambiguous terms. The parties must be able to determine from the decree the obligations they have under its terms. *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967).

With proper drafting, the decree will be enforceable by contempt (with certain exceptions). Regardless of whether the decree reflects an agreed property settlement or a judge's ruling at the conclusion of trial on the merits, the provisions of an agreed decree are just as enforceable as a decree which memorializes the outcome of trial.

When considering remedies, it is important to note that orders for the payment of debts are not enforceable by contempt. Article I, Section 18, of the Texas Constitution provides that there are no debtors' prisons in Texas. *Ex parte Yates*, 387 S.W.2d 377 (Tex. 1965). Additionally, a person cannot be held in contempt for failing to perform an act that he is not capable of performing. *Ex parte Gonzales*, 414 S.W.2d 656 (Tex. 1967). Even if you do not have contempt as an available remedy, however, you still may have contractual remedies to enforce the terms of an agreed decree. *Robbins v. Robbins*, 601 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

An invaluable tool for young lawyers, especially solo practitioners, is a formbook. The *Texas Family Law Practice Manual* contains guideline language and numerous forms for an attorney to use in preparing final orders and documents necessary to divide the community estate or confirm a party's separate property. Provisions within formbooks are intended as guidelines and are no substitute for specificity in drafting to fit each client's particular case; however, the language within the *Texas Family Law Practice Manual* is so widely used that many mediators will include language that the drafting of specific clauses should reflect the *Texas Family Law Practice Manual*, which is something for young lawyers to consider when building a practice library.

Assets should be described in clear detail that provides a third party (banker, broker, title company representative, auto dealer, etc.) who reads the document sufficient proof on its face that your client was awarded an asset. The following specific information should be included in each decree: (1) Full and complete legal descriptions of real property and oil

and gas or mineral interests; (2) vehicle identification numbers for automobiles, farm equipment, boats, watercraft, recreational vehicles, and the like; (3) names of financial institutions, the last few digits of account numbers, types of accounts, and any identifying names (if not held in the names of the parties) for checking, savings, and brokerage accounts; (4) certificate numbers, accurate security names, and types of securities (common stock, preferred stock, bond, etc.) for securities such as stocks and bonds not held in brokerage accounts; (5) proper legal names of the carriers and accurate policy numbers (the last few digits only) for all life insurance policies.

While the information provided in the decree should be detailed enough to provide clarity for third-party providers, it is important to consider that decrees are available to the public (unless in a case that is sealed), and we have the obligation to keep a client's sensitive data safe. Provide enough information to effectuate the transfer without revealing too much of your client's sensitive information.

## B. Orders Requiring Performance

The best practice for ensuring that a task is completed by an opposing party is to require the task completion prior to entry of the decree. It is almost always easier to get a party to do something before the decree is entered than it is afterward. In situations where performance prior to execution of the decree is not feasible or impossible, decrees should include specific details regarding dates on or by which documents must be signed or property must be delivered to the opposing spouse. Keep a checklist for each file that lists the acts remaining to be done, so you can follow the closing requirements to completion or be made aware immediately if an enforcement issue arises. Orders related to performance should include the following points:

- (1) **Signing Documents:** If the order pertains to the signing of documents, the decree should state the date on which the document must be signed. It is often helpful to add the location and time at which the documents should be signed, especially if a party is ordered to appear at an attorney's office to execute a document before a notary.  
If a date certain cannot be determined, then the decree should state that the document will be signed "within [x] days from the date this Decree is signed by the Judge of this Court").
- (2) **Release or Delivery of Personalty:** If the order pertains to the release or delivery of personal property, such as furniture, the decree should state the date on and preferably a window of time in which the property must be delivered or should state specific notice requirements

for release and delivery of the property. If documents or property are to be delivered to the opposing spouse, the decree must state the specific location (name of recipient, street address, city, and state) where delivery is to be made.

The decree should state any other requirements or conditions related to the transfer of the documents or property (such as which party is responsible for moving expenses, copying charges, etc.).

## C. Attach Documents as Exhibits

You can avoid ambiguous orders and conflicts between your decree and a closing document if you attach a copy of the unexecuted closing document to the decree and make it a part of the decree by reference.

Occasionally, a decree that states terms for payment of a secured money judgment conflicts with the terms as set out in the real estate lien note that is prepared to effect the terms of the decree. By attaching a copy of the note as it is to be signed by the maker, and referring to the terms of that note rather than reciting the terms in the body of the decree, you can avoid a conflict between the two documents.

Attaching the specific documents and ordering a party to sign them "in the form attached to this decree as Exhibit [x]" provides you with the remedy of enforcement by contempt in the event the opposing party refuses to sign a note, deed, or similar instrument.

Including the ancillary documents as a part of the decree and requiring that they be signed as a package deal provides a more efficient closing timetable for the file and lessens the chances that some important act or document will not be performed timely.

## III. AWARDING PROPERTY IN DECREES

The Final Decree of Divorce is the most important document to divide property in a divorce suit. Below are some drafting suggestions that apply to the typical categories of assets that most often comprise parties' community estates. These suggestions are offered to help you draft decrees that can be enforced by contempt, if necessary; or, at the very least, to help your drafting become as clear, specific, and unambiguous as possible.

### A. Furniture and Personal Effects

Almost every divorce decree contains the following provisions in the sections which specify the assets awarded to each party:

"All household furniture, furnishings, fixtures, goods, appliances, antiques, artworks, and equipment in the possession of or subject to the sole control of Petitioner/Respondent."

"All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner/Respondent."

Is this language specific and unambiguous enough to be sure your client will receive all of the things awarded? Yes, if the parties have already divided their household goods and personal effects to their satisfaction, or the Court has stated its orders in these exact terms and there will be no further opportunity for a spouse to take possession of items in the possession of the other spouse.

If, however, Petitioner continues to have possession of Respondent's record collection and high school yearbooks, and he assumes they will be returned, then this Court order has just divested him of those items. Any items that remain in Petitioner's possession, but that are awarded to Respondent, must be described specifically in the decree or in an exhibit that is incorporated by reference into the decree.

You will encounter this problem frequently in seemingly amicable settlement agreements. It simply may not occur to the parties that they will have a disagreement over pots and pans, until the day Respondent shows up at Petitioner's residence expecting to take possession of his grandfather's mint condition jazz albums, only to find that Petitioner sold the lot for \$2.00 at a garage sale. Now you, as the attorney who drafted his divorce decree, get an earful about it.

If your client truly wants the grand piano, but he is living in an efficiency apartment until the divorce is final, then describe the grand piano in the decree and award it to Respondent. Recommend to your client that the parties set a specific date and time (or ask the Court to order it) that Respondent will be expected to appear at Petitioner's residence to take possession of the household goods and personal effects awarded to him, and then state that in language similar to the following:

"PETITIONER is ORDERED to release to RESPONDENT between the hours of 3:00 and 5:00 o'clock p.m. on Saturday, December 14, 2019, all of those items listed on Exhibit 'A' ("Schedule of Household Goods and Personal Effects Awarded to Respondent"), which is incorporated into this decree by reference and made a part of it for all purposes. RESPONDENT shall be solely responsible for any expenses related to the packing and moving of the items listed on Exhibit 'A.'"

If the parties cannot schedule the date and time of the property exchange when the decree is signed or the Judge pronounces the orders, specify (or ask the Judge to specify) specific notice requirements that both parties must follow, such as:

"PETITIONER is ORDERED to release to RESPONDENT all of those items listed on Exhibit 'A' ("Schedule of Household Goods and Personal Effects Awarded to Respondent"), which exhibit is incorporated into this decree by reference and made a part of it for all purposes. RESPONDENT shall give at least forty-eight (48) hours' notice to PETITIONER of the date and time he will take possession of the items awarded to him."

When drafting these clauses, consider your client's emotional state, the level of animosity or friendliness between the parties, and the "hot-button issues." Anticipate potential problems and address them in the decree, rather than attempt to deal with damage control or enforcement after the decree has been signed. If the opposing party has exhibited tendencies toward procrastination, you may want to include a protective clause so that your client will not have to safeguard, move, dust, or otherwise deal with the former spouse's Star Wars figurines for the next two decades, such as:

"In the event RESPONDENT does not take possession of the items awarded to him within 30 days from the date this decree is signed by the Judge of this Court, then RESPONDENT forfeits his ownership of these items and they shall become the sole and separate property of PETITIONER."

It is uncertain whether or not this provision would be enforceable, however, so use it with caution. The inclusion of such a condition could be the incentive necessary to encourage a procrastinator to take care of matters sooner rather than later.

## **B. Financial accounts and money**

Decrees should specify which accounts in financial institutions are awarded to each party. Many decrees contain the following blanket statement awarding money and accounts to a spouse:

"Any and all sums of cash in the possession of the Petitioner or subject to her sole control, including money and other assets on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the Petitioner's name or from which the Petitioner has the right to withdraw funds or which are subject to the Petitioner's sole control."

Is this language sufficient and specific enough to assure your client that she will receive the accounts awarded to her? Possibly so, if your client always maintained her own accounts without the name of the other party

appearing as joint owner or signatory on the account, or in a case in which the parties closed any joint accounts during their separation and opened new accounts solely in each party's separate name. Even in those events, however, if you can state the specific financial institution, type of account, and account number, such detail is strongly preferred. Consider drafting decree provisions as follows:

"The following sums of cash in the possession of the Petitioner or subject to her sole control, including money and other assets on deposit, together with accrued but unpaid interest, in the following banks, savings institutions, or other financial institutions, or other financial institutions: Bank of America Checking Account No. ending in x1234, held in the name of Petitioner."

It is a good idea to have your client check with each financial institution to determine whether or not the institution has its own set of forms or other releases required to transfer a joint account into the sole name of one spouse or to close a joint account and divide the proceeds. Many brokerage firms, for example, do require such transfer forms. If you request these in advance, you can make signing the forms a part of the closing, along with signing the decree and other documents, which is especially advisable if you anticipate the opposing party being obstructive. If the institution does not have a specific form, a general form, a "Letter of Authority" stating the specific request may be used. Most individual retirement accounts ("IRAs") can be awarded successfully under this provision; however, it is especially important with IRAs that the financial institution's forms also are executed, including the change-of-beneficiary forms.

Listing accounts by financial institution and number also protects your client in the event the other party has not disclosed all of the assets within that party's control. If you prepare your decree with the sweeping generalization that Respondent is awarded all money on accounts in banks, held in Respondent's sole name, or subject to his sole control, then you have just rewarded Respondent for his cleverness in hiding money in an undisclosed bank account.

### C. Planes, Trains, and Automobiles

Most divorces include an award of a motor vehicle of some sort. When drafting decrees, you must review the title documents pertaining to the vehicle or similar asset awarded to your client. In the event of a dispute over title, it is important that the description in your decree is identical to the description on the title, including the manner in which the parties' names are set out (First Middle Last or First M. Last, for example). Often, the parties do not have a negotiable title because

they continue to owe money on a vehicle. In this instance, you have nothing for the opposing spouse to "sign over," and you must use a Power of Attorney to Transfer a Motor Vehicle. The power of attorney must state the opposing party's name exactly as it appears on the title, and the make, model, year, and vehicle identification number also must be identical to the title information. The decree should order the opposing spouse to sign the power of attorney on or by a specific date. Consider attaching a copy of the power of attorney to the decree as an exhibit. Later, when the lien has been fully paid and clear title is issued, the client who was awarded the vehicle can present the signed power of attorney and apply for a new title in his or her sole name. The specific award of prepaid insurance and service contracts could be very valuable if the parties' auto insurance premium was paid annually or semi-annually or if they purchased an extended warranty when they purchased the vehicle.

The award of a vehicle or similar asset should be addressed in the decree as follows: "The 2019 Ford Explorer, Vehicle Identification Number AB123456XYZ, together with all prepaid insurance, keys, title documents, and warranties and service contracts."

If the vehicle is not encumbered, or if the opposing spouse is ordered to pay the debt encumbering the vehicle, the award language stated above should also include the following phrase: "... free and clear of all liens and encumbrances on this vehicle." In the "Division of Debts and Liabilities" section of the decree, include a specific ordering provision that sets out the opposing party's obligation for this debt. If the vehicle is awarded to a paid along with its debt, the award language stated above should include: "... together with all debt secured by said vehicle."

### D. Life Insurance Policies

Decrees often include the following language in connection with the award of life insurance policies:

"All life insurance policies insuring the life of Respondent, together with all cash surrender value and all other incidences of ownership of such policies."

Is this language sufficient to effect the award of life insurance policy? In this instance, probably so, yet this language is not sufficient if there are certain other requirements or conditions related to a party's life insurance coverage.

For example, the party who will be obligated for child support payments to the other spouse may be ordered to maintain life insurance that will pay the child support obligations in the event that party dies while he or she continues to have a child support obligation. Similar requirements are also typical to secure



contractual alimony obligations. When such a requirement exists, the life insurance award should contain the following qualifying language: “subject to Respondent's obligation to maintain life insurance in an amount not less than \$[x] to protect his child support obligations ordered in this decree” or “in an amount sufficient to protect his child support obligations ordered in this decree,” whichever selection is appropriate.

If a party is awarded a life insurance policy which insures the opposing party, the decree should state clearly who is to be responsible for paying the policy premiums. Written notice must be given to the carrier that ownership of the policy is being transferred and the attorney must take care to see that all forms required by the carrier are executed. As with the transfer of brokerage accounts, each life insurance company likely has its own transfer forms or releases that must be executed by the owner to transfer ownership of the policy.

Under Texas Family Code §9.301, the designation of a spouse as primary beneficiary of a life insurance policy becomes null and void upon divorce. In many cases, the decree requires the party paying child support (the “obligor”) designate the other party as beneficiary of life insurance so the child support obligation will be paid if the obligor dies while child support is still payable under the order. Or Petitioner may be awarded one of Respondent's life insurance policies simply as a part of the division of property, so that Petitioner becomes owner and beneficiary of the life insurance policy. In all of these instances, the decree must designate the insured's former spouse as the beneficiary or designate the insured's former spouse to receive proceeds in trust for, on behalf of, or for the benefit of a child of the parties.

To be safe, you should include language ordering that the insured re-designate the former spouse as the primary beneficiary of the life insurance policy after the date of divorce. Simply leaving the prior designation of that beneficiary without reaffirming it may be insufficient. This is especially important if the insured remarries and a subsequent spouse claims the life insurance proceeds should be paid solely to him or her.

It is best practice for the attorney to follow up, preferably within the 30-day period following the date of divorce, to make certain that the life insurance designations have been made properly and that all confirmations and authorizations required of the insured have been given to the insurance carrier. It may be helpful to also include a reminder to the client to re-designate their former spouse as beneficiary in your closing letter at the conclusion of your representation.

## E. Employee and Retirement Benefits

While the issue of Qualified Domestic Relations Orders (QDROs) will not be addressed in depth here, the division of employee and retirement benefits must be addressed in the decree. When dealing with retirement division that requires QDROs, it is always best to enter the QDRO simultaneously with the decree. The Court loses plenary power after 30 days, and the QDRO needs to be entered before that time, or extra steps are required to get the QDRO entered. **Do yourself a favor and consider adopting a policy that you will not enter a decree without a completed QDRO.**

### 1. Benefits Awarded All to One Spouse

If the employee spouse is to receive all of his or her employee or retirement benefits, then a Qualified Domestic Relations Order is not required, and it is recommended the following language be used:

"The following sums, whether matured, 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, disability plan, or other benefits existing by reason of [name of employee spouse]'s past, present, or future employment, including but not limited to following: a. 100% of the [exact name of plan] held in the name of [employee spouse] from [his/her] employment with [exact name of company]."

### 2. Benefits Divided Between the Parties

If the non-employee spouse is awarded a share of the employee spouse's employee or retirement benefits, then the Qualified Domestic Relations Order should set out the particulars of the division of these benefits, and the decree should contain a provision in the list of assets awarded to the non-employee spouse similar to the following:

"A portion of [name of employee spouse]'s retirement benefits in the [exact name of plan] arising out of [name of employee spouse]'s employment with [exact name of company], as more particularly defined in that certain Qualified Domestic Relations Order ("QDRO") signed by the Court concurrently with this decree."

In addition to stating that the non-employee spouse is awarded a portion of the employee spouse's employee or retirement benefits, do not forget to confirm that the

employee spouse is awarded the remainder. Include a provision similar to the following:

"SAVE AND EXCEPT that portion of [name of employee spouse]'s benefits in the [exact name of plan] awarded to [name of non-employee spouse] in this decree, the remainder of all sums in [exact name of plan], whether matured, 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, disability plan, or other benefits existing by reason of [name of employee spouse]'s past, present, or future employment with [name of employer], and more particularly defined in that certain Qualified Domestic Relations Order signed by the Court concurrently with this decree."

If the decree states the QDRO is entered concurrently with the decree, be sure it is entered concurrently. Another benefit of completing the QDRO and entering it at the time of the decree is that you can ensure that the language of the QDRO is exactly reflected in the decree, and vice versa.

### 3. Pre-Qualifying the QDRO

Always try to have your QDROs pre-qualified. Determine the name and address of the Plan Administrator where QDROs for the plan are to be submitted and then contact that person well in advance of trial or mediation. Ask for the plan description and any published rules or guidelines for drafting QDROs applicable to that particular plan. Most companies have their own "model" QDROs that will make your drafting job much easier. Use of the model developed specifically for that plan usually will guarantee acceptance and approval of the QDRO if followed to the letter. Use the guidelines or model and prepare a rough draft of the proposed QDRO as soon as possible after trial or a settlement agreement is reached, and submit the rough draft to the Plan Administrator. Ask for a written opinion as to whether or not the Plan Administrator anticipates that your draft will be approved once it becomes an official Court order. Make sure you understand what the Plan Administrator requires—most require a certified copy of the QDRO, but some also require a certified copy of the entire decree. The regulations of some plans specify that the QDRO provisions must be a part of the decree itself, rather than prepared in a separate document, and the drafter certainly needs to know that before the decree is completed and presented to the Court.

By taking these planning steps, you may avoid additional trips to the courthouse to submit amended QDROs long after all other aspects of the case have been concluded. Another word of advice: While the buck stops with you as the attorney of record, consider outsourcing the QDROs to attorneys who primarily focus on QDROs.

### F. Award of Real Property

Real property awards require high levels of specificity. Early in the case, as your client gathers information for you, you should insist that the client give you a copy of the real estate documents (particularly the Deed of Trust) for any piece of real property owned by the parties or claimed by your client as separate property. The legal description in the decree should match that shown on those real estate documents, as this consistency helps to avoid confusion when filed of record. In many counties, you can obtain deeds online, which is what I advise, whether or not your client provides you documents. Many times the documents provided by clients are not the most recent.

The decree should state a specific date on which the opposing party must sign any real estate documents related to real property awarded to your client, so that you will have contempt remedies available to you in the event the opposing party does not sign and return the required transfer documents. This is another example of when attaching the documents in the form in which they are to be signed as an exhibit can be helpful.

From time to time, you will be involved in cases in which the opposing party cannot be located or disappears shortly after the divorce is granted, making the follow-up work impossible to complete. In the event you cannot locate the person who must sign a Special Warranty Deed to transfer the property interest to your client, you may file a certified copy of the decree, in lieu of a deed, in the real property records. Although the filing fee may be more expensive, it is well worth the cost to protect your client's interest and your own. This also will work for the transfer of other assets, such as vehicles, if the opposing spouse cannot be located or refuses to sign the title transfer. In such instances, if you anticipate that there will be a problem in obtaining a signed deed, the following phrase should be inserted in the decree: "This decree shall serve as a muniment of title to transfer ownership of all property awarded to either party in this decree."

In order to utilize the decree in this way for the transfer of real property, the full and complete legal description of the real property must be included in the decree; and for transfer of a vehicle, the complete identification numbers, year, and model of the vehicle.

### G. Orders for Jointly-Owned Property

Occasionally, the parties will agree or the Court will order that husband and wife continue to own certain property jointly. Such orders usually involve real property that is ordered to be sold (or that the parties agree should be sold) and the proceeds divided in the future. Remember, these two people are divorcing; therefore, they probably cannot be counted on to agree 100% of the time. The attorneys should anticipate potential problems and make certain the decree contains specific provisions that give the parties a blueprint for resolving disputes as they arise. The decree should prescribe the terms and conditions under which the property is to be sold, who has the authority to accept a contract and/or make a counter-offer, and how the listing and sales prices are to be set. The decree also should provide some sort of "tie-breaker" language, such as a "duty-to-mediate" clause, in the event the parties are unable to agree on any of these issues.

Terms such as "net proceeds" and "reasonable expenses" should be defined specifically, such that a closing officer or other third party can determine the intent of the decree.

The decree also should contain orders specifying who will pay the mortgage payments in the interim, who will pay the utility bills, who is responsible for maintaining the property, and, if applicable, which party is entitled to the use and possession of the property until sold.

Finally, the decree should set out with specificity any calculations relevant to the division of net proceeds, in such sufficient detail that a closing officer can discern the amount that is to be awarded to each party. The issue of potential capital gains taxes related to the sale of jointly-owned property also should be addressed so that the closing officer and a party's tax return preparer can provide the proper reporting information to the Internal Revenue Service.

### H. Confirmation of Separate Property

If separate property exists, and it usually does, a section of the decree should be devoted to the identification of each party's separate property, together with a finding that the property is the sole and separate property of the owner. Failure to include separate property could be a loose end that creates additional problems or future litigation for the parties, if a spouse attempts to show that there are undivided assets still subject to the Court's jurisdiction.

The decree should contain ordering language to require a spouse to sign a quitclaim deed in favor of the spouse whose real estate has been confirmed as sole and separate property.

## IV. REAL ESTATE CONVEYANCES

When drafting decrees and transfer instruments for the award of real property, the following documents are often required:

### A. Special Warranty Deed

The most used real estate document in family law cases is a Special Warranty Deed. The "special" part of the transaction is that the grantor is limiting his warranty to persons who would claim title through the grantor, hence the magic phrase: "I do hereby bind myself, my heirs, executors, administrators, and assigns to WARRANT AND FOREVER DEFEND all and singular the said premises unto the said Grantee, her heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through, or under me, but not otherwise." The deed must contain this phrase in order to be a "Special" Warranty Deed.

The decree should contain ordering language which requires the grantor to sign, have acknowledged, and return the Special Warranty Deed on a specific date.

### B. Owelty Deed of Partition

Clients who wish to be awarded a property in full can seek to purchase the opposing party's interest by refinancing through a third party. The third-party lender will insist upon a lien against the entirety of the property, and not merely a lien against a one-half interest.

### C. Deed of Trust to Secure Assumption

A Deed of Trust to Secure Assumption essentially protects a party who is not awarded the property but remains on the mortgage. The award of all interest in a piece of real property to the client's spouse may not release the client from potential liability for the mortgage on that property. While the terms of the divorce decree are binding on the two parties involved, they are not binding on the lender. If the spouse who is awarded real property defaults on the mortgage or other debt instrument, your client still can be held liable for the debt.

Your client can be protected from liability by having the spouse receiving the property agree to refinance the mortgage within a certain period of time, thus eliminating the note on which your client is liable and replacing it with an obligation imposed solely upon the other spouse. If the lender does agree to refinance the obligation, it likely will require the Owelty Deed of Partition discussed above; however, this solution is not often available, particularly if the party who receives the real property cannot qualify for a home mortgage loan in his or her sole name.

If refinancing the debt is not a possibility, then you should not allow your client to sign a Special Warranty Deed unless the spouse receiving the property also is to

sign a Deed of Trust to Secure Assumption. A Deed of Trust to Secure Assumption, provided it is properly filed in the deed records of the county in which the property is located, requires the lender to notify the beneficiary of any foreclosure proceedings and allows the beneficiary to foreclose on the property in the event he or she must re-assume the debt.

#### **D. Deed Without Warranty**

A deed without warranty is used to convey only the grantor's right, title, and interest in the real property described in the deed, but not the real property itself. This instrument is used in the situation where a spouse owned separate real property prior to marriage or acquired separate real property during the marriage by gift, devise, or descent. Although the spouse who owns separate real property has title to that property solely in his/her name, a title company may refuse to close a sale of that property without the former spouse's signature, if the title company learns that the real estate was held during marriage. A deed without warranty will help your client avoid such problems, as it confirms that the former spouse has no claim for reimbursement or other interest in the property.

#### **E. Real Estate Lien Note**

The real estate lien note secures a debt. If your client is to receive funds in exchange for an interest in other assets, you want to obtain adequate security to ensure that the obligation to your client is fulfilled.

The Real Estate Lien Note should recite the terms of the obligation and should attach the Note as an exhibit to the decree. Of course, the decree should contain ordering language that requires the maker to sign the note on a specific date.

#### **F. Release of Judgment**

A Release of Judgment is a legal document that shows that one spouse has been paid all that he or she is owed, based upon the original judgment against the other spouse. Once your client has paid the debt, he or she will want to have the lien removed from their property so that there is no longer a cloud on the title. That way your client is free to sell, or otherwise transfer, the property.

#### **G. Deed of Trust**

This document goes hand-in-hand with the Real Estate Lien Note, and secures the obligation set out in the note. The Deed of Trust does not convey title to real property, but it allows the trustee named in the Deed of Trust to sell the property pledged as security, if the maker of the note defaults on his or her obligations under the note.

### **H. Drafting Real Estate Documents**

#### **1. Obtain the Legal Description**

For some reason, one of the most difficult things to obtain from a client is a legal description for real property. Clients rarely understand the attorney's insistence upon a copy of the actual deed, rather than acceptance of the client's rendition of the legal description. To draft a real estate instrument, you must have the full and complete legal description of the property, including metes and bounds descriptions, if applicable.

#### **2. Use the State Bar Forms**

The forms set out in the *Texas Family Law Practice Manual* and the *Texas Real Estate Forms Manual* provide reliable and accurate forms, which are periodically supplemented to make certain the forms comply with current statutes.

#### **3. Record the Deed**

You always should file the deed in the real property records of the county in which the property is located. Prompt recording of a deed is important for the reason that a subsequent purchaser of the property for value without notice of a prior conveyance acquires title to the property over a person claiming ownership under an unrecorded deed. Tex. Prop. Code 13.001(a).

Likewise your client's lien may be void if not properly recorded so as to give notice to subsequent lien holders of the prior lien.

Remember, if you simply cannot obtain the signed real estate documents necessary to effect the conveyance of the property to your client, you may record a certified copy of the Final Decree of Divorce if it contains the proper legal description.

### **V. MONEY JUDGMENTS**

One party may be awarded money in exchange for his/her community interest in real property, in a closely-held business, or in other assets of the community estate. Because your client may be relinquishing all interest in a home, family business, or retirement benefits accumulated over the course of the marriage, in exchange for a cash payment, you want to do everything possible to insure that your client actually will receive what was awarded or promised. Careful drafting can give you the tools to execute successfully on a judgment, rather than just setting the foundation for a subsequent suit to secure a judgment.

#### **A. Avoiding the Necessity of Judgment**

Whenever possible, try to make certain that all acts required by the settlement agreement or ordered by the Court are completed at the same time you present the Final Decree of Divorce to the Judge for signature. For example: (1) Have all cash payments due and payable on or before the date the decree is presented to the Court.

The requirement should be that the decree will not be entered until your client has money in hand. (2) Ensure your client has taken possession of all household goods and personal effects in his/her possession. (3) If the opposing spouse is to pay all or a portion of your client's attorney's fees, have the provisions for payment follow the same conditions as are set out for the cash payment to your client. (4) Attempt to have all required ancillary documents executed simultaneously with the decree (deeds, QDRO's, auto title transfers, stock certificates, notes, and security instruments). Once the decree is entered and the parties know that they are divorced officially, it becomes increasingly difficult to obtain signatures.

The conclusion of a divorce case is definitely a situation in which a bird in the hand is worth two in the bush. If all duties performable under the terms of the decree are completed prior to or concurrently with the presentation of the decree for approval by the Court or at the time the parties appear for their "prove-up," then you do not have to worry about judgment language and enforcement remedies!

## B. Drafting Judgment Language

Merely ordering an amount payable to your client by date certain does not give your client a judgment on which she can collect if the funds are not paid:

If Respondent does not pay the amount ordered, there is no judgment from which execution may issue. Petitioner is left with a subsequent suit on a judgment in which she would hope to be granted a judgment which then would be enforceable. There is no reason to use this language unless the date set for payment is on or before the date the decree is to be signed by the Judge. If payment of the settlement funds is to occur after the date of the decree, use judgment language so your client can proceed to execute on the judgment in the event of the opposing party's default. The judgment language must be specific enough to provide a definite means of determining the parties' rights such that ministerial officers can carry the judgment into execution without the necessity of first ascertaining facts not contained therein.

The following is suggested language to use in decrees where one spouse is ordered to make cash settlement payments to the other party:

"IT IS ORDERED AND DECREED that RESPONDENT shall pay to PETITIONER at 123 Elm Street, Utopia, Texas, the sum of One Hundred Thousand and no/100 Dollars (\$100,000.00) on or before 5:00 o'clock p.m. on Friday, August 13, 1999, and IT IS FURTHER ORDERED AND DECREED that PETITIONER shall have and recover judgment against RESPONDENT for this sum of One Hundred Thousand and no/100 Dollars

(\$100,000.00), plus post judgment interest at the rate of five percent (5%) per annum, to begin accruing as of [insert appropriate date], for which execution shall issue as of [insert appropriate date]."

The judgment language must specify the payor, the payee, the amount of money awarded (the "principal"), the amount of any post-judgment interest (currently set at 5%), and the time and place where the judgment is to be paid. Also, that boilerplate language that we always take for granted, "for which let execution issue if not timely paid," is not merely old-fashioned legalese. This phrase sets out the payee's intention of levying on the payor's available property if the judgment is not paid timely. If you will review the sample paragraph set out above, you will see that each element is addressed and Petitioner should be protected.

## VI. ENFORCEMENT PROCEDURES

If you were careful in your drafting of your client's decree and the transfer and security instruments associated with it, particularly if you used proper judgment and ordering language as has been suggested above, you will give the Court the proper tools to use to enforce the orders or agreements. The enforcement issues discussed in this section do not include suits affecting the parent-child relationship.

### A. Filing Suit to Enforce

A party to a divorce decree which divides marital property may seek enforcement of the decree by filing a suit for enforcement in the court that rendered the divorce. Such a suit that is filed after a decree becomes final is brought as an original action in the court that entered the decree and is governed by the Texas Rules of Civil Procedure applicable to original lawsuits. A party whose rights, duties, powers, or liabilities may be affected by the suit is entitled to receive notice of the filing of the suit by service of citation. Mailing a copy of the Motion to Enforce to the attorney who represented the opposing party in the divorce suit does not constitute service.

The deadlines and rules for answering the suit apply as in other civil cases. This is often frustrating for the client who is seeking the enforcement and who cannot understand why the attorney cannot simply run down to the courthouse and get the Judge to order the defaulting party to comply. Review Texas Family Code § 9.001 et seq. when seeking an enforcement action.

### B. Pleadings

As with the original, underlying order: Specificity is key. The petition for enforcement should identify the provision of the decree allegedly violated and sought to be enforced, the manner of the respondent's non-compliance, and the relief sought.

**C. Clarification, Not Modification**

The court cannot amend, modify, alter, or change the division of property awarded or approved in the decree. An order to enforce the prior division of property is limited to clarification of the prior order and may not alter or change the substantive division. However, as long as the substantive division of property is not changed, the court may specify more precisely the manner of effecting the division previously ordered. It may clarify the time, place, or manner of performance.

The Court may clarify an order prior to hearing a motion to enforce or in conjunction with such motion. The Court may find that the prior order is not capable of enforcement as written, and make such changes as needed to carry out the intent of the prior order

**D. Remedies**

The trial court may order a party to deliver specific existing property, whether an automobile, stock certificate, or item of furniture, without regard to whether the property is of especial value, including an award of an existing sum of money or its equivalent.

The court may order a sum of money to be paid to the injured party and include damages for failure to deliver property. The remedy of money judgment can be enforced by any means available to collect a debt.

**E. The "Turnover Statute"**

The "turnover statute" is a post-judgment relief statute which authorizes the court to command a debtor to turn over non-exempt property, documents, and records to the creditor. (Texas Civ. Prac. & Rem. Code Ann. §§ 31.002, 31.0025.)

**F. Attorney's Fees and Costs**

In any proceeding to enforce a property division, the court may award costs as in other civil cases, and the court may order reasonable attorney's fees as costs and may be ordered paid to the Petitioner or directly to the attorney, who may enforce the order for fees by any means available for the enforcement of a judgment for debt.

**G. Filing Deadlines**

A suit to enforce the division of tangible personal property in existence at the time of the decree of divorce must be filed before the second anniversary of the date the decree was signed by the Court or becomes final after appeal, whichever date is later, or the suit is barred.

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 date the decree becomes final, whichever date is later, or the suit is barred.

Note that the two-year statute of limitations applies to enforcement involving tangible personal property. This statute does not apply to property that was not awarded to either party at the time of divorce (undivided property). Such property is subject to be divided by the Court in a division that is considered just and right pursuant to Texas Family Code § 7.001.

**VII. CONCLUSION - CLOSING THE FILE**

The fewer loose ends remaining at the time the divorce decree is signed by the court, the fewer enforcement problems you will have. There is nothing that makes a divorce client unhappier than learning he or she has a continuing—or new—lawsuit against an ex.

If you cannot tie things up at the time the decree is entered, then you must make certain that your decree is specifically and tightly drafted, and that it includes all of the tools necessary to give the court the means to enforce the property division. Double-check to see that all real estate documents are properly recorded, and that the Qualified Domestic Relations Order is submitted to the Plan Administrator and that written confirmation of the approval of the QDRO has been received. It is a good idea to write your client a closing letter to provide a short recap of the provisions in the decree and to remind them of any future actions required by the decree.

The client may not understand why so much work is required after he or she is officially "divorced." Occasionally, the client who is tired of paying attorney's fees will simply refuse to authorize any additional work and will not pay additional fees. If you find yourself in this position and the client specifically instructed you to perform no additional legal services on his behalf, you should withdraw formally from representation of that client. In addition, you must provide the client with a complete copy of his or her file and a detailed letter of instruction as to the steps you believe must be taken to effect the decree or agreement and which have not yet been completed. You also must notify the client in writing of any applicable deadlines or statutes of limitations that could affect the client's ability to obtain the funds and property awarded to that client in the decree.

Attention to detail and follow-through will result in satisfied clients who are pleased with the results and who will recommend you to their friends and acquaintances—and keep you out of the back of the Bar Journal.