

**ENFORCING, SECURING, AND CLARIFYING
PROPERTY DIVISIONS
(AVOIDING THE THORNS WHILE PICKING THE ROSES)**

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Attorney's Fees and Contracts -	2001 Family Law Seminar, Corpus Christi
Discovery Tracking Systems -	2000 Ultimate Trial Notebook
Law Office Management -	2000 Advanced Family Law Course
Attorneys= Fees and Contracts -	2000 Marriage Dissolution Course
Characterization and Tracing -	1999 Family Law Practice Seminar, University of Houston Law Center
Division of a Privately Owned Business - (with Randall Wilhite)	1999 Advanced Family Law Course
Characterization and Tracing -	1998 Advanced Family Law Course
Characterization of Property -	1998 Family Law Practice Seminar University of Houston
Dealing Effectively with the Mental Health Experts (for You, against You, and Court-Appointed) (with Robert S. Hoffman) -	1997 Advanced Family Law Course
Trying a Custody Case on a Shoestring -	1997 Marriage Dissolution Course
Course Director	1995 Advanced Family Law Drafting Course
Course Director	1993 7th Annual Trial Institute, Texas Academy of Family Law Specialists
QDROS -	1995 Advanced Family Law Course
Attorney's Fees: Negotiating the Fee,	1994 Family Law Practice Seminar, University of Houston Law Foundation
Fee Arrangements and Collecting Your Fee -	1994 Marriage Dissolution Course
A Survey of Family Law Clients -	1994 and 1995 Family Law for the General Practitioner and Legal Assistant, South Texas College of Law
Office Practice & Procedure In	1993 Advanced Family Law Course
Handling the Typical Family Law Case -	
Attorney's Fees - Interim and Final -	
Exercise and Nutrition, Balanced	
Moderation for Total Well-Being -	1993 Advanced Family Law Course
Attorney's Fees in Family Law Cases -	1993 Family Law Practice Seminar, University of Houston Law Foundation
Interesting Cases -	1992 Marriage Dissolution Course
Enforcing Family Law Decrees -	1991, 1992, and 1994 General Practice Institute

Table of Contents

I. INTRODUCTION1

II. THE IMPORTANCE OF GOOD DRAFTING1

A. DECREES MUST BE SPECIFIC 1

B. ORDERS PERTAINING TO PERFORMANCE4

C. ANCILLARY DOCUMENTS ATTACHED AS EXHIBITS TO DECREES4

III. THE AWARD OF PROPERTY IN DECREES5

A. AWARD OF HOUSEHOLD FURNITURE AND PERSONAL EFFECTS5

B. AWARD OF CASH AND MONEY ON ACCOUNT IN BANKS, ETC.6

C. AWARDS OF AUTOMOBILES, BOATS, AND OTHER VEHICLES7

D. AWARD OF LIFE INSURANCE POLICIES8

E. AWARD OF BUSINESS ENTITIES9

 1. *Sole Proprietorships*9

 2. *Closely-Held Businesses*10

 3. *Joint Ventures and Partnerships*.....10

F. AWARD OF PUBLICLY-TRADED STOCKS AND BONDS10

G. AWARD OF EMPLOYEE AND RETIREMENT BENEFITS12

 1. *Benefits Awarded All to One Spouse*12

 2. *Benefits Divided Between the Parties*.....12

 3. *Pre-Qualifying the QDRO*13

H. AWARD OF REAL PROPERTY13

I. ORDERS FOR JOINTLY-OWNED PROPERTY14

J. CONFIRMATION OF SEPARATE PROPERTY14

IV. MONEY JUDGMENTS14

A. AVOIDING THE NECESSITY OF JUDGMENT LANGUAGE14

B. DRAFTING PROPER JUDGMENT LANGUAGE15

C. JUDGMENTS FOR ATTORNEY’S FEES16

 1. *Fees Paid from a Designated Source*.....16

 2. *Record or Docket Entry To Support the Award*.....16

D. ENFORCING A MONEY JUDGMENT - THREE NECESSARY STEPS16

 1. *The Abstract*.....16

 2. *The Writ of Execution*17

 3. *Garnishment*17

E. EQUITABLE LIENS17

 1. *Specific Equitable Liens on Community Property*.....18

 a. Error Not To Secure Judgment?18

 b. Injunction in Addition to Lien Prohibited.....18

 2. *Specific Equitable Liens on Marital Estate*18

 a. Texas Family Code §3.406 – Equitable Lien18

 b. Three Interpretations as Found in Caselaw19

 3. *Implied Equitable Vendor's Liens on Community Property Homestead*.....19

 4. *Specific Equitable Liens Upon Homestead Property*.....20

 a. Equitable Liens on Separate Property Homesteads20

 b. Equitable Liens on Community Property Homesteads20

V. REAL ESTATE CONVEYANCES20

A. SPECIAL WARRANTY DEED20

B. OWELTY DEED OF PARTITION21

C. QUITCLAIM DEED21

D. DEED OF TRUST TO SECURE ASSUMPTION21

E. REAL ESTATE LIEN NOTE.....21

F. DEED OF TRUST22

G. DRAFTING REAL ESTATE DOCUMENTS.....22

 1. *Obtain the Legal Description*22

 2. *Use the State Bar Forms*.....22

 3. *Record the Deed*22

VI. AWARD OF MONEY TO ACHIEVE AN EQUITABLE DIVISION OF PROPERTY, SECURED BY STOCK IN CLOSELY-HELD CORPORATION22

A. DRAFTING CONSIDERATIONS.....22

B. SECURITY INTERESTS23

 1. *Security Interests - Generally*23

 2. *Attachment of Security Interest*.....23

 3. *Perfection of Security Interest*23

 4. *Obligations of the Secured Party*.....23

 5. *Important Points To Protect the Secured Party*.....23

C. PAPERWORK REQUIREMENTS RELATED TO THE AWARD OF CORPORATION STOCK.....24

 1. *Resignation as Officer and Director*.....24

 3. *Stock Power*24

 4. *The Representation Letter*.....24

 5. *Collateral Pledge Agreement*.....25

 6. *Escrow Agreement*25

VII. CLARIFICATION AND ENFORCE-MENT PROCEDURES25

A. THE TEXAS FAMILY CODE.....25

 1. *Filing Deadlines*25

 2. *Jury*.....26

 3. *Another Option*26

 4. *Enforcement and Clarification of Property Division*.....26

B. CLARIFICATION ORDER27

 1. *Modification of Property Division, Not Clarification*.....27

 2. *Clarification, Not Modification of Property Division*.....28

 3. *Rules of Construction*28

C. DELIVERY OF PROPERTY29

D. REDUCTION TO MONEY JUDGMENT29

E. CONTEMPT29

F. ENFORCEMENT OF SETTLEMENT AGREEMENTS30

 1. *Rule 11 Agreements*30

 2. *Enforcement of Mediated Settlement Agreements*30

G. THE "TURNOVER STATUTE"31

H. ATTORNEY'S FEES AND COSTS31

VIII. CONCLUSION - CLOSING THE FILE32

ENFORCING, SECURING AND CLARIFYING PROPERTY DIVISIONS (AVOIDING THE THORNS WHILE PICKING THE ROSES)

I. INTRODUCTION

Enforcing, securing and clarifying property divisions in divorce decrees commences with the proper drafting of the divorce decree in a manner so as to be capable of enforcement and not need later clarification. This article will explore drafting enforceable orders and provide examples of both enforceable and non-enforceable orders. There will be a discussion of securing the property division to ensure the party actually receives the property division awarded in the decree. Texas Family Code Sections 9.001 through 9.014 provide procedural steps to enforce and clarify the property division in a decree of divorce.

I would like to acknowledge and thank Tom Ausley of Austin and Sherri S. Evans of Houston for generously and graciously allowing me to utilize significant portions of their papers on this topic.

II. THE IMPORTANCE OF GOOD DRAFTING

You spent the last several weeks or months preparing your client's case, the parties have not reconciled, and so the case is being resolved by one of these three means: 1) you have reached a settlement agreement; 2) you have concluded a successful mediation; or 3) you have tried the case and the judge has ruled. Rarely does the client realize just how much work occurs after the Judge says, "Jane Doe and John Doe are hereby divorced and the marriage between them is dissolved." If the divorce decree and other transfer instruments or securing instruments are not prepared and executed properly, your client may not receive the money or claim the property that is rightfully his or hers. Furthermore, if you do not draft your documents with enforcement in mind, you may leave the court without the means to help you in the event the opposing party defaults on his or her obligations under the agreement of court's ruling.

A. Decrees Must Be Specific

A decree must set out the division of property, and each party's duties and obligations

related to the division of property, in clear, specific, and unambiguous terms. The parties must be able to determine from the decree the obligations they have under its terms. Ex parte Slavin, 412 S.W.2d 43 (Tex.1967) is the cornerstone case that sets forth the bedrock requirements for drafting an enforceable divorce decree. The drafting requirements set forth in Slavin establish the foundation of a well crafted decree of divorce. Although Slavin involved a child support case, Slavin has been cited numerous times involving the enforcement of property divisions in decrees of divorce. The Slavin requirements for an order to be enforceable by contempt are that the language of the order must (1) spell out the details of compliance in (2) clear, (3) specific, (4) unambiguous, (5) certain terms, (6) in command language, which does not rest upon implication or conjecture and (7) which is not subject to more than one interpretation or meaning. The fact that Slavin represents the bedrock case setting forth the foundational requirements of enforceable divorce decrees is evidenced by the fact that Slavin has been cited by *Shepard's Texas Citations* in excess of 130 times.

If the attorney does a good job of drafting, the decree will be enforceable by contempt (with certain exceptions, as discussed in the following paragraph). It makes no difference whether the decree embodies 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 that memorializes the outcome of trial. McCray v. McCray, 584 S.W.2d 279 (Tex. 1979).

Orders for the payment of debts are not enforceable by contempt, as such would violate Article I, Section 18, of the Texas Constitution (no debtors' prisons in Texas). Ex parte Yates, 387 S.W.2d 377 (Tex. 1965). Also, a person cannot be held in contempt for failing to perform an act he is incapable of performing. Ex parte Gonzales, 414 S.W.2d 656 (Tex. 1967). Even if contempt is not available as a remedy, 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).

The Texas Family Law Practice Manual offers guideline language and numerous forms for the attorney to use in preparing Decrees, Agreements Incident to Divorce, and other documents necessary to effect the division of a community estate or to confirm a party's separate property. The form language provisions are intended as guidelines and are no substitute for specificity in drafting to fit each client's particular case. Assets should be described in such detail that a third party (such as a banker, broker, title company representative, or auto dealer) who reads a decree, deed, or other transfer instrument has sufficient proof that an asset was awarded to your client. The following specific information should be included in each decree:

- (1) Full and complete legal descriptions of real property and oil and gas or mineral interests.
- (2) Vehicle identification numbers for automobiles, farm equipment, boats, watercraft, recreational vehicles, and the like.
- (3) Names of financial institutions, account numbers, types of accounts (such as checking, savings, I.R.A.), 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 for all life insurance policies.

When drafting family law decrees containing provisions for the division of property and delivery of property, the **who, what, where, when** and **how** approach and the Slavin test must be applied to the decree language in order for the decree to be enforceable by contempt. The following selective cases illustrate this point:

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

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

"1.The house located at 2911 Nashville, Nederland, Jefferson County, Texas, more specifically described as Lot 19, Block 13, Helena Park IV subdivision to the City of Nederland, Jefferson County, Texas;

"2.All contents of home;

"3.TheOldsmobile automobile;

"4.150 shares of Texaco stock, now held in the Texaco Savings Plan, in the name of Respondent;"

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

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

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

"Sign and execute any required instruments necessary to convey 150 shares of Texaco stock to Juanita Holley Choate, and sign and execute any required instruments necessary to transfer title of the 1978 Oldsmobile automobile from Respondent to Movant, Juanita Holley Choate.

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

The Court of Appeals observed that even in the contempt order authorizing Alton's imprisonment, there was no description of the particular action required of Alton. The Court ruled in connection with the order to sign the required instruments to convey the Texaco stock and the Oldsmobile that the contempt order can have as its base only the language in the decree requiring the parties to "execute all instruments

necessary to accomplish final execution and disposition of this judgment." Citing the Slavin case, the Court held,

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

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

The drafting problems set forth in the Choate case can easily be avoided by using language similar to that set forth in Volume 2 of the Texas Family Law Practice Manual, Chapter 17, which when adapted to the Choate case would read as follows:

"IT IS ORDERED AND DECREED that ALTON CHOATE shall appear in the law office of GREGORY & CONNER, 303 N. Carroll Blvd., Suite 100, Denton, Texas, at 2:00 p.m. on August 15, 2001, and shall execute, have acknowledged, and deliver to MIKE GREGORY for the benefit of JUANITA CHOATE the following instruments:

"1.Special Warranty Deed conveying the home located at 2911 Nashville, Nederland, Jefferson County, Texas, more specifically described as Lot 19, Block 13, Helena Park Four Subdivision to the City of Nederland, Jefferson County, Texas, in the form attached to this Decree of Divorce as Exhibit A;

"2.Certificate of Title to 1978 Oldsmobile automobile, VIN JG349G98348KLJH543, in the form attached to this Decree of Divorce as Exhibit B;

"3.Seller, Donor or Trader's Affidavit for the 1978 Oldsmobile automobile, VIN JG349G98348KLJH543, in the form attached to this Decree of Divorce as Exhibit C;

"4.Stock Transfer Certificate to convey the 150 shares of Texaco stock, now held in the Texaco Savings Plan, Plan No. 12345, in the name of ALTON CHOATE, whose

employee number and Social Security number is 455-77-6722, in the form attached to this Decree of Divorce as Exhibit D."

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

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

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

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

Schedule I was captioned "PROPERTY AWARDED TO MARIAN McINTYRE" and contained a list of personal property items awarded to her, some of which were in the possession of Relator and were the items Relator refused to surrender to her. The Court of Appeals held that the decree of divorce divided the property of the parties, but did not order Relator to deliver any personal property items to his wife or to undertake any action with regard to them. The decree of divorce did not contain "command" language as required by Slavin. Therefore, the Appellate Court found that the trial court erred in finding that Relator was in contempt of court for failing to surrender the property items to his wife.

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

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

One 40" RCA color television set, serial no. 772777, which is now in the possession of Respondent, JOHN DOE, which shall be delivered to JANE DOE."

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

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

One 40" RCA color television set, serial no. 772777, which is now in the possession of Respondent, JOHN DOE.

"IT IS FURTHER ORDERED AND DECREED that Respondent, JOHN DOE, shall deliver the 40" RCA color TV, serial no. 772777, to JANE DOE at her residence, 1714 N. Elm, Denton, Texas, at 6:00 p.m. on Thursday, August 16, 2001."

B. Orders Pertaining to Performance

Decrees should include specific dates on or by which ancillary closing documents must be signed or property must be delivered to the opposing spouse. The attorney should keep a checklist for each file that lists the acts remaining to be done, so that the attorney can follow the closing requirements to completion or be made aware immediately if an enforcement issue arises. A suggested checklist form is included with this article as "Appendix A: Attorney's Checklist for Closing the File," (Jim Loveless: ADrafting Transfer Documents - Business,@ Advanced Family Law Drafting

Course, 1995). Orders related to performance should include the following points:

(1) If the order pertains to the signing of documents, the decree should state the date on which the document must be signed (or, if a date certain cannot be determined, then the decree should state that the document will be signed "within [the appropriate number] days from the date this Decree is signed by a District Judge").

(2) If the order pertains to the release or delivery of personal property, such as furniture, the decree should state the date on which the property must be delivered; or, should state specific notice requirements prior to the date the receiving spouse chooses to take possession of the property.

(3) 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.

(4) 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, and the like).

C. Ancillary Documents Attached as Exhibits to Decrees

You can avoid ambiguous orders and conflicts between your decree and a closing document if you attach a true and correct copy of the document to the decree and make it a part of the decree by reference. This practice helps to eliminate or minimize potential disputes in the following ways:

(1) Sometimes you will see a decree that states terms for payment of a secured money judgment which conflict 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.

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

- (3) Making the ancillary documents 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 lessen the chances that some important act or document will "slip through the cracks" and not be performed timely.

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

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

III. THE AWARD OF PROPERTY IN DECREES

The Final Decree of Divorce is the most important document required to effect a division of property in a divorce suit. In complex cases that are settled without the need of trial, or cases involving an alimony contract or other "contractual" (rather than court-ordered) agreements between the parties, some attorneys also choose to prepare an Agreement Incident to Divorce and have the decree refer to and incorporate the Agreement Incident to Divorce. The personal preference in my firm has been that Agreements Incident To Divorce are not necessary if we prepare a very thorough decree. Your decree can contain the contractual agreements that customarily would be set out in an Agreement Incident to Divorce. Furthermore, if only a decree is used, you can include "ordering" language related to the performance of contractual agreements that may help your enforcement efforts in the future, in the event a party reneges on some aspect of the settlement agreement.

Following 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. Chapter 17 of the Texas Family Law Practice Manual provides suggested provisions for all sorts of property division scenarios.

A. Award of Household Furniture and Personal Effects

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

Is this language specific and unambiguous enough to assure your client that he or she will receive all of the things awarded? Yes, if the parties already have 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 personalty in the possession of the other spouse.

If, however, Jane Doe continues to have possession of John Doe's fishing gear 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 Jane Doe's possession, but that are awarded to John Doe, 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 John Doe shows up at Jane Doe's residence expecting to take possession of his grandfather's antique fly rod, only to find that it was sold for \$5.00 at a garage sale. Now you, as the attorney who drafted his divorce decree, will hear about this problem.

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

"JANE DOE is ORDERED AND DECREED to release to JOHN DOE between the hours of 3:00 and 5:00 o'clock p.m. on Saturday, July 3, 1999, all of those items listed on Exhibit 'A' ("Schedule of Household Goods and Personal Effects Awarded to John Doe"), which exhibit is incorporated into this Decree by reference and made a part of it for all purposes. JOHN DOE shall be solely responsible for any expenses related to the packing and moving of the items listed on Exhibit 'A.'"

Or, if the parties cannot schedule the date and time 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:

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

You are familiar with your client's emotional state and the level of animosity or friendliness that has existed during the course of the case. 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 bowling trophies for the next 25 years, such as:

"In the event JOHN DOE does not take possession of the items awarded to him within 30 days from the date this Decree is signed by a District Judge, then JOHN DOE forfeits his ownership of these items and they shall become the sole and separate property of JANE DOE."

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 prod a procrastinator to take care of matters in a timely manner.

B. Award of Cash and Money on Account in Banks, Etc.

Your decrees also 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/Respondent or subject to his/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/Respondent's name or from which the Petitioner/Respondent has the right to withdraw funds or which are subject to the Petitioner's/Respondent's sole control."

Is this language sufficient and specific enough to assure your client that he or she will receive the accounts awarded to him/her? Possibly so, if your client always maintained his or 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. However, even in those events, if you can state the specific financial institution, type of account, and account number, such detail is strongly preferred. I recommend that these decree provisions be drafted as follows:

"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:" [and then list each account in detail, such as "Bank of America Checking Account No. 1234567 held in the name of _____"].

As you draft your closing papers, it is a good idea to have your client check with each particular 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. Most individual retirement accounts ("I.R.A.s") can be awarded successfully under this provision; however, it is especially important with I.R.A.s 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 John Doe is awarded "all money on accounts in banks, . . . held in John Doe's sole name or subject to his sole control," then you have just rewarded Mr. Doe for his cleverness in hiding money in his Cayman Islands savings account.

C. Awards of Automobiles, Boats, and Other Vehicles

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 (Jane Ann Doe or Jane A. Doe, for example). Often, the parties may continue to owe money on a vehicle and, thus, do not have a negotiable title. In this instance, you have nothing for the opposing spouse to "sign over," and you must use a "Power of Attorney To Transfer Automobile." The power of attorney must state the opposing spouse's name exactly as it appears on the title, and the 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. (Again, attach a copy of the power of attorney, as you want it signed,

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/her sole name.

The award of a vehicle or similar asset should be addressed in the decree as follows:

"The 1999 Ford Expedition vehicle, Vehicle I.D. No. ABCD123456XYZ, together with all prepaid insurance, keys, title documents, and warranties and service contracts."

The specific award of prepaid insurance and service contracts could be very valuable indeed, in the event the parties' auto insurance premium was paid annually or semi-annually or if they purchased an extended warranty when they purchased the vehicle.

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." (Then, the "Division of Debts and Liabilities" section of the decree should include a specific "ordering" provision that sets out the opposing spouse's obligation for this debt.) If the vehicle is awarded to a spouse along with its debt, the award language stated above should state as follows: ". . . together with all debt secured by said vehicle."

When a boat and trailer are awarded to a party in a decree of divorce, too often the description in the decree is simply a 1997 19 foot Wellcraft boat, serial number 1234567. The description of the boat is terribly deficient because it omits the description of the motor and motor serial number, the boat trailer and the trailer serial number, as well as the various equipment and accessories frequently found on or in a boat such as water skis, life jackets, fishing gear, fire extinguisher, and various depth gauges and fish finders. It is much better to be thorough in drafting the decree than try to explain to your client why they do not have property they were supposed to get and why their spouse is not being held in contempt of court for failure to deliver the property.

D. Award of Life Insurance Policies

Preparers of decrees often use the following language in connection with the award of life insurance policies:

"All life insurance policies insuring the life of Petitioner/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? 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. When such a requirement exists, the life insurance award should contain the following qualifying language: ". . . , subject to Petitioner/Respondent's obligation to maintain life insurance [in an amount not less than \$_____ 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 spouse, 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.

IMPORTANT NOTE: Texas Family Code '9.301 provides that 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 spouse paying child support (the "obligor") to designate the other spouse as beneficiary of life insurance so that the child support obligation will be paid in the event of the obligor's death. A spouse may be required to maintain life insurance in

favor of his/her former spouse as protection for some other obligation related to the property division, such as compensation for loss of retirement benefits if there is no survivor annuity to protect the former spouse. Or, wife may be awarded one of husband's life insurance policies simply as a part of the division of property, so that wife becomes both 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, the attorney should include an order that **the insured must 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 her. Read Texas Family Code '9.301 for the specific requirements regarding designation of beneficiaries.

The attorney must 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.

IMPORTANT NOTE: Texas Family Code §9.302 has language similar to §9.301, except that it deals with the designation of a spouse as a beneficiary under an individual retirement account, employee stock options plan, stock options, or other form of savings, bonus, profit sharing, or other employee plan or financial plan. If, prior to the divorce, a spouse has designated the other spouse as the beneficiary of the death benefit under the retirement plan, and the parties then divorce, the designation provision is no longer effective unless: (1) the decree designates the former spouse as the beneficiary; (2) the designating former spouse re-designates the other former spouse as a beneficiary after the rendition of the decree; or (3) the other former spouse is designated to receive the proceeds or benefits in trust for, or on behalf of, or for the benefit of a child or dependent of either former spouse.

However, Texas Family Code §9.302 appears to have been pre-empted by the recent United States Supreme Court case, Egelhoff vs. Egelhoff, ___ U.S. ___, 121 S.Ct. 1322, 69 USLW 4206(2001). Egelhoff is a Washington state case involving a Washington statute that provides that the designation of a spouse as a beneficiary of a nonprobate asset, defined to include a life insurance policy or employee benefit plan, is revoked automatically upon divorce. While David A. Egelhoff was married, he designated his wife as beneficiary of a life insurance policy and pension plan provided by his employer and governed by the Employee Retirement Income Security Act of 1974 (ERISA). Shortly after Petitioner, Ms. Egelhoff, and Mr. Egelhoff divorced, Mr. Egelhoff died intestate. Respondents, Mr. Egelhoff's children by a previous marriage, filed separate suits against Petitioner in state court to recover the insurance proceeds and the pension plan benefits. The Egelhoff children relied on the Washington state statute that provides that the designation of a spouse as a beneficiary of a life insurance or employee benefit plan is revoked automatically upon divorce. Respondents argued that in absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's statutory heirs under state law. The United States Supreme Court held that ERISA's pre-emption section 29 U.S. §1144(a) supercedes Washington state law and that Petitioner, the former Ms. Egelhoff is still the named beneficiary of the life insurance proceeds and pension plan benefits.

David Gray's comment on Egelhoff is that it applies to Texas Family Code §§9.301 and 9.302. David states, "If your divorce client has an ERISA insurance policy tell him/her in writing to run, not walk, to his/her Plan Administrator and file a change of beneficiary form. The same is true for any other ERISA benefit plans; this case will also apply to other financial plans derived from employment, not withstanding what §9.302 says. If you do not do this, call your malpractice carrier."

Despite David Gray's advice, be careful of what you instruct your client to do regarding change of beneficiaries if there is a TRO or Temporary Injunction in effect prohibiting your client from taking such action.

Jack Sampson, Editor of the State Bar Family Section Report, makes these comments on Egelhoff:

"In addition to §§9.301-.302, the Texas Family Code has other provisions to those struck down here, §7.003 (Retirement & Employment Benefits), and a related provision, §7.005 (Insurance). Insofar as ERISA-covered benefits are concerned, I don't see a way around Egelhoff other than for the divorce attorney to carefully instruct a client to reconsider the beneficial designation. Section 7.003 seemingly will continue to have vitality insofar as a private IRA is concerned, as well as other retirement plans not covered by ERISA. And, of course, privately obtained life insurance and other insurance not connected with employment will continue to be governed by §§ 7.005 and 9.301."

E. Award of Business Entities

1. Sole Proprietorships

The Texas Family Law Practice Manual states the following general provision for the award of business entities:

"The sole proprietorship known as [proper name of business], including, but not limited to, all furniture, fixtures, machinery, equipment, inventory, cash, receivables, accounts, goods, and supplies; and all rights and privileges, past, present, or future, arising out of or in connection with the operation of such business."

If the business entity is a sole proprietorship, include specific awards of the following assets that the parties may consider as "assets of the business," but which may be titled in a party's name individually:

(1) Vehicles and heavy equipment (such as tractors, trailers, construction machinery, and the like), identified by vehicle identification number, year, manufacturer, and any other information that would make the asset easily identifiable to a third party or the court.

(2) Bank accounts, identified as specifically as you would identify the non-business accounts awarded to each party.

(3) The name of the business itself, especially if it is a registered trademark (but even if not a trademark to avoid future competition from a former spouse).

(4) The business phone number(s) and phone system.

(5) The ownership of the web site and the rights to the web site name. This issue may become increasingly important in divorce suits in the future, as use of and reliance on the internet increases for business and commerce purposes.

2. Closely-Held Businesses

The award of a spouse's community interest in a closely-held or Sub-Chapter S corporation must be set out clearly in the decree and is effected by awarding the stock of the corporation. The decree should award all shares of stock to the appropriate party and set out ordering language that requires the spouse being divested of his/her interest in the business to perform all acts necessary to effect the award of the business to the other spouse. In the case of a closely-held corporation, the decree should include the following:

- (1) The correct legal name of the corporation.
- (2) The number of shares being awarded and the certificate number(s) of the shares.
- (3) If applicable, descriptions of inventory and real property owned by the corporation.
- (4) Ordering language requiring a party to sign and/or release the stock certificates awarded to the other party and to sign any appropriate stock power for each certificate.
- (5) Ordering a party to take all other actions necessary to divest that party of all interest in the closely-held business, such as submitting a written resignation as an officer or director of the corporation.

In the event a party is to receive payment for his/her interest in the business, all appropriate security instruments, such as the note and security agreement, should be prepared and incorporated into the decree by reference. A more thorough discussion of appropriate security instruments is set out in Section VI of this article.

3. Joint Ventures and Partnerships

Joint ventures and partnerships should be designated by their legal names, and the exact percentage or share of the partnership being awarded should be stated.

In the event a spouse is awarded an interest in a partnership or joint venture whose other partners are part of a particular professional group, such as physicians, the professional spouse should be designated constructive trustee for the benefit of the non-professional spouse.

F. Award of Publicly-Traded Stocks and Bonds

For securities not held in brokerage accounts, I recommend against using broad language that awards "all stocks, bonds, mutual funds," to a party, and prefer the following more specific provision:

"The following stocks, bonds, and securities, together with all dividends, splits, and other rights and privileges in connection with them: [then specify the number of shares, company name, and certificate numbers]@"

If the securities awarded to your client are not held in a brokerage account, you must determine the exact name(s) in which the security is registered. If the security is registered solely in your client's name, then the recitation of this award in the decree is sufficient and no transfer instruments are required. However, if the securities are registered in the opposing client's name or in the parties' names jointly, two steps must be followed to transfer ownership: endorsement and delivery.

(1) Endorsement: For example, the spouse holding title to the security must sign the back of the stock certificate or must execute a "stock power" (a separate instrument referencing the stock transfer for the records of the corporation involved). A stock power is used where the transferring spouse does not have the stock certificates in his/her possession. Both the signing of the back of a stock certificate and the signing of a stock power must take place in the presence of a person who can "guarantee" the signature. A Notary Public

cannot guarantee a signature, and this must be done in the presence of a bank or trust officer, or a member of the New York Stock Exchange. (The same procedure holds true to the transfer of bonds and other negotiable securities.)

(2) Delivery: The transferred shares or stock power, once signed, must be delivered to the receiving spouse, so the attorney must make certain that the client takes possession of these instruments.

Finally, to assure the completion of the transfer, the endorsed certificates or stock power must be forwarded to a transfer agent so that new certificates can be issued in your client's name.

The case of Fox v. Fox, 720 S.W.2d 880 (Tex.App.--Beaumont 1986, no writ), is a good example of vague drafting involving an award publicly traded stock. After you read the facts of the Fox case set forth below, you will be very thankful that you did not represent George Fox.

After George and Mattie Fox divorced on January 3, 1985, a dispute arose because both applied to Texaco for the assets of George's retirement plan. George based his claim to the assets of the plan from the following language in the decree:

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

"9. Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to the profit-sharing plan, pension plan, retirement plan or like benefit program existing by reason of Respondent's past, present or future employment."

The above language is similar to the language in the Texas Family Law Practice Manual when awarding 100% of a retirement plan to one party.

Mattie Fox claimed an interest in the assets of the retirement plan relying on the following language in the decree:

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

"4. The Texaco stock."

Mattie subsequently filed a lawsuit seeking clarification and enforcement regarding the Texaco stock which was held as a part of George's stock ownership and thrift plan. George filed a cross motion for clarification. The trial court held that George was entitled to all of the assets of the plans, including the stock in the plans. On Mattie's appeal, the Beaumont Court of Appeals reversed, reasoning that the decree had divested George of any interest he had in the Texaco stock, whether held in his name or in trust for him within one of his employee benefit plans. The court held,

"Again, the clear effect of the award to Appellate was to vest her with all Texaco stock held in either the parties' name or for the benefit of either party."

The Beaumont Court of Appeals held that the only clarification the trial court could have made under the facts and law was to construe the phrase, "The Texaco stock", to include the stock held in trust for George Fox through the employee stock ownership plan and employee thrift plan.

The necessity of paying more attention to detail and drafting decrees with more specificity is clearly demonstrated by the outcome of the Fox case. Examples of language which would have resulted in a different outcome by the Court in Fox are as follows:

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

Option 1. "The Texaco stock, except for any Texaco stock held in trust for George Fox through the employee stock ownership plan and the employee thrift plan, which have been awarded to George Fox by this decree."

Option 2. "The Texaco stock, which is owned separate and apart from any Texaco stock held in trust for George Fox in any retirement plan or employee benefit plan awarded to George Fox by this decree."

Option 3. "Texaco stock certificate no. 1234567, dated April 29, 1985, representing 200 shares of stock, which constitutes no part of the assets relating to any employee benefit plan or retirement plan awarded to George Fox in this decree."

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:

G. Award of Employee and Retirement Benefits

The issue of Qualified Domestic Relations Orders will not be addressed in depth, as three speakers at this Advanced Family Law Course are presenting papers on that subject. However, the division of employee and retirement benefits also must be addressed in the Decree.

1. Benefits Awarded All to One Spouse

If the employee spouse is to receive all of his/her employee or retirement benefits, then a Qualified Domestic Relations Order is not required, and I recommend the following language:

"All 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."

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 can contain a provision similar to the following:

[In the list of assets awarded to the non-employee spouse] "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")

"All 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, 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 and more particularly defined in that certain Qualified Domestic Relations Order signed by the Court concurrently with this Decree."

IMPORTANT NOTE: In the case of Stephens v. Marlowe, 20 S.W.3rd 250(Tex. App. – Texarkana 2000, no pet.), the decree of divorce awarded wife: "Any and all sums, 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, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses or other benefit program existing by reason of Petitioner's past, present, or future employment, specifically including any IRA in the name of Petitioner." At the time of divorce, wife, who was the Petitioner, was involved in a Class action lawsuit involving her former employer, Continental Can. After the divorce became final, the lawsuit was settled and Petitioner was awarded \$50,000.00 as her portion of the class action lawsuit. Marlowe, former husband, filed a Petition for post-divorce partition of the proceeds, claiming the proceeds

were not divided in the divorce. The trial court partitioned the \$50,000.00 proceeds, one-half to each party. However, the Court of Appeals, stated that the proceeds from the class action lawsuit pending at the time of divorce, were a part of what was awarded to Petitioner in the above quoted language in the decree of divorce.

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 large companies now have their own "model" QDROs that will make your drafting jobs 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.

H. Award of Real Property

The award of real property in a divorce decree should be stated as follows:

"The real property and improvements located at 123 Oak Street, Utopia, Utopia County, Texas, together with all funds on deposit in escrow accounts, prepaid

insurance, utility deposits, keys and garage door openers, blueprints, title documents, and warranties and service contracts, which property is more particularly described as follows:

Lot 1, Block 1, Green Acres, a subdivision in the City of Utopia, Utopia County, Texas, according to the map or plat thereof in Volume 1, Page 1, Plat Records of Utopia County, Texas.

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 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.

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.

DRAFTING TIP: From time to time, you will be involved in cases in which the opposing spouse 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, I recommend that you insert the following phrase 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.

I. 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. Other "tie-breaker" language would involve the appointment of a receiver or the "realtor three-step" in the event the parties are unable to agree on the terms of the sale of the real estate. The "realtor three-step" provides that wife selects realtor, husband selects realtor, the two realtors select a third realtor, and the decision of the three realtors regarding asking price, sales price, and other terms of the sales contract are binding on husband and wife.

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.

J. Confirmation of Separate Property

Just because the parties agree or the Court has found that an asset belongs to the separate estate of the husband or wife does not mean that the asset should not be included in the decree and described specifically. If separate property exists, 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. MONEY JUDGMENTS

One spouse 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 Language

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. This is especially effective if you are representing the client who is to receive a cash settlement and who is less eager than the other spouse to have the divorce concluded. The requirement should be that the decree will not be entered until your client has money in hand.
- (2) Make certain that your client has taken possession of all household goods and personal effects in his/her possession, rather than attempt to force the release of these items at a later date.
- (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, QDROs, 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 and the release of property and documents, particularly if the opposing attorney is inefficient and tends to "piecemeal" the work necessary to close the file.

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 Proper Judgment Language

The following language does not give your client a judgment on which she can collect if the funds are not paid:

"JOHN DOE is ORDERED AND DECREED to pay to JANE A. DOE the

sum of One Hundred Thousand and no/100 Dollars (\$100,000.00) on or before the 30th day of June, 2000."

If John Doe does not pay the amount ordered, there is no judgment from which execution may issue. Jane A. Doe 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 (no ticket, no laundry). If payment of the settlement funds is to occur after the date of the decree, then you should use judgment language so that your client will have something with "teeth" in it and 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. Spiva v. Williams, 20 Tex. 442 (1857); Hendryx v. W. L. Moody Cotton Co., 257 S.W. 305 (Tex. Civ. App.--Galveston 1923, no writ).

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 JOHN DOE shall pay to JANE A. DOE 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 JANE A. DOE shall have and recover judgment against JOHN DOE for this sum of One Hundred Thousand and no/100 Dollars (\$100,000.00), plus post judgment interest at the rate of ten percent (10%) 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 10%), 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 Jane A. Doe should be protected.

C. Judgments for Attorney's Fees

If a judgment for attorney's fees has been awarded to you or to your client, the same drafting requirements as stated above apply. To collect on the judgment, the decree should include the following:

1. Fees Paid from a Designated Source

Try to have the Judge order (or the paying party agree) that your attorney's fees will be paid from a specific account, or upon the paying party's receipt of certain anticipated proceeds, or other specific source, and have the decree recite language to that effect.

If possible, have the decree state that the release of certain property held by your client to the paying party is contingent upon the paying party's payment of your attorney's fees.

2. Record or Docket Entry To Support the Award

If awarded a money judgment against the other client, have the Judge state for the record the amount of the award for attorney's fees, whether the judgment is granted to you or to your client, the amount of interest to accrue on the judgment until paid, and the date the judgment will begin to bear interest, and when execution will issue.

A specific finding by the court that the attorney's fees were reasonable and necessary for your client's defense or prosecution, to protect the best interests of the children or as a part of the division of property, may prevent the discharge of the fee judgment in bankruptcy.

D. Enforcing a Money Judgment - Three Necessary Steps

Jane A. Doe was awarded the money judgment described above, but John Doe did not pay the ordered funds on the due date. You have checked the judgment language and found that it

appears to be valid and enforceable. In order for Mrs. Doe to collect, you have three means available:

- The abstract;
- Judgment execution; and,
- Garnishment.

1. The Abstract

The first step is to obtain and record an abstract of judgment pursuant to the Texas Property Code ' ' 52.001-52.004. An "abstract" is an indexing of a judgment by the County Clerk in the county where the debtor resides (or where the debtor may have property). The abstracting of a judgment creates a "first in time" lien on the debtor's non-exempt real property.

Texas Property Code ' 52.003 requires the abstract to show:

- (1) Names of the parties;
- (2) Birth date, driver's license number, and address of the debtor, if known. (If the address is not known, the abstract must provide the nature of the citation and the date and place of service of citation.);
- (3) The cause number and date of the judgment;
- (4) The amount of the judgment and balance due; and,
- (5) The rate of interest specified.

Abstracts may be filed in Texas, and in other states. The original abstract should be sent to the County Clerk in the county where the debtor resides and in each county in which you believe the debtor may have property that could be used to satisfy the judgment. (Note that you are not entitled to an abstract of judgment until 30 days have passed from the date the written decree or order granting the judgment was signed.)

Recording an abstract places a judgment on any real property owned by the debtor (with the exception of a homestead) and puts third parties on notice that a judgment exists. Before the debtor can sell any of the real property (other than the homestead), your client's judgment must be satisfied and a title company usually will not allow clear title to pass until a valid judgment is released.

Important Note: The attorney must be aware that judgments do not survive indefinitely. The lien will expire after ten years. If a writ of

execution is not issued within ten years from the date the court renders judgment, it becomes dormant and execution may not issue unless the judgment is revived. Texas Civ. Prac. & Rem. Code ' 34.001.

2. The Writ of Execution

A writ of execution is issued by the court issuing a judgment. Texas Rules of Civil Procedure 622. The writ allows any sheriff or constable in the State of Texas to levy on the debtor's non-exempt real property located in that official's county.

Request the writ from the District Clerk in the county where judgment was rendered. See Texas Civ. Prac. & Rem. Code ' 34.001, et seq.; Texas Rules of Civil Procedure 621-656. Then, forward the writ (along with a request for a levy of execution), to the sheriff in the county where the non-exempt property is located. The writ is satisfied by a sale of the non-exempt property, and must be returned within a certain time period (30-90 days, depending upon the particular writ). If the writ is returned unsatisfied and the return date is expired, you must request issuance of a new writ.

In order to determine what property may be available to satisfy the judgment, the attorney must be familiar with Chapters 41 and 42 of the Texas Property Code, which set out the types of property that are exempt from forced sale to satisfy a judgment.

3. Garnishment

Postjudgment garnishment allows the judgment creditor to collect a money judgment from the debtor's non-exempt property held by third parties, such as a bank. The writ of garnishment is served on the third party, rather than on the debtor. The writ requires the third-party stakeholder to state what, if any, property the third party holds for the debtor and the writ simultaneously fixes a lien on that property. Texas Civ. Prac. & Rem. Code ' '63.001, et. seq.; Texas Rules of Civil Procedure 657-679.

Although the garnishment proceeding is brought in the court which ordered the judgment, the garnishment is treated as a new cause of action. You may obtain a writ of garnishment if your client (now the plaintiff) has a valid, current judgment and files an affidavit stating that within the plaintiff's knowledge, the

debtor (now the defendant) has no property in Texas subject to execution and/or sufficient to satisfy the judgment. Black Coral Investments v. Bank of the Southwest, 650 S.W.2d 135 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.).

Upon receipt of the writ, the third party (the bank, for example) who is served with a writ of garnishment is prohibited from releasing any assets or paying any debt to the defendant. Not only must the third party "answer," as in any civil suit, but also must answer under oath by the return date "what, if anything, he is indebted to the defendant, and was when the writ was served, and what effects, if any, of the defendant he has in his possession, and had when such writ was served and what persons, if any, within his knowledge are indebted to the defendant or have effects belonging to him in their possession." Texas Rules of Civil Procedure 659.

The attorney also must serve the defendant with a copy of the writ of garnishment "as soon as practicable" following service of the writ on the third party (the "garnishee"). Texas Rules of Civil Procedure 663a.

E. Equitable Liens

A valuable tool available to the family law attorney is the imposition of an equitable lien in favor of the party receiving the award of a money judgment to effect an equitable division of the community assets. In fact, there is no reason why an attorney should not include this "magic" language in a decree to properly secure a money judgment. The advantages of an equitable lien vs. a judgment lien are the following:

(1) An equitable lien is effective on the date the decree is signed; and,

(2) Unlike a judgment lien, an equitable lien may, under certain circumstances, attach both to exempt and non-exempt property, including a homestead.

(3) An equitable lien does not require abstracting, recording, and indexing.

The advantages of an equitable lien are illustrated in Day v. Day, 610 S.W.2d 195, 197-99 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). In this divorce case, Mrs. Day was awarded a money judgment for \$12,500.00 and the Court fixed a lien on Mr. Day's separate property (where the parties had resided during the

marriage). In this case, the judgment awarded to Mrs. Day represented her share of reimbursement due the community estate for payments made to benefit or enhance Mr. Day's separate property. After the date of divorce, but before Mrs. Day filed her abstract of judgment and sought foreclosure of her lien, Mr. Day designated the property as his homestead. Mr. Day sought to bar Mrs. Day from foreclosing. The Court's opinion in this case ultimately held that, despite the trial court's characterization of the lien as a judgment lien, the lien given Mrs. Day "is rooted in equity, does not owe its existence to any statute and can stand independent of any statutory recording requirements, at least as to the parties' divorce."

Thus, the Court determined that Mrs. Day's lien was an equitable lien, and because Mrs. Day's lien was held by her as of the date of divorce, Mr. Day's subsequent designation of homestead did not defeat Mrs. Day's right to enforce her lien.

The three different types of equitable liens imposed in decrees of divorce, and the issue of equitable liens imposed on both separate and community homesteads, are discussed below.

Equitable liens in divorce actions fall into three categories:

- (1) Specific equitable liens placed upon community property;
- (2) Specific equitable liens placed upon separate property; and,
- (3) Implied vendor's liens.

1. Specific Equitable Liens on Community Property

a. Error Not To Secure Judgment?

In Hanson v. Hanson, 672 S.W.2d 274, 278 (Tex. App.--Houston [14th Dist.] 1984, writ dismissed w.o.j.) the trial judge awarded Mr. Hanson valuable real estate, and awarded Mrs. Hanson a cash judgment of \$40,000.00, to be paid in installments over a 6-year period. The Court did not establish any lien or security for the judgment. Mrs. Hanson appealed, stating that the judgment should have been secured. The appellate court found that "a trial court should provide security for money judgments which are granted to achieve an equitable division of a community estate, unless there is some compelling reason to do otherwise. . . "

However, in Wren v. Wren, 702 S.W.2d 250, 252 (Tex. App.-Houston [1st Dist.] 1983, writ dismissed w.o.j.), the appellate court held that a trial court's failure to provide security does not automatically constitute an abuse of discretion.

When arguing at trial for a money judgment in favor of your client, you certainly will want to ask the court to provide security. Or, if drafting a decree for the benefit of the client receiving cash in exchange for property, you must insist upon adequate security for any sums that will not be paid at the time the divorce decree is signed. (An opposing party's unwillingness to agree to provide security, when that party is being awarded property sufficient to provide such security, should set off warning bells!)

b. Injunction in Addition to Lien Prohibited

If you are representing the party who must provide security for a judgment, you should be familiar with the appellate court's ruling in Morgan v. Morgan, 657 S.W.2d 484 (Tex. App.-Houston [1st Dist.] 1983, writ dismissed w.o.j.). In this case, the wife was awarded a judgment lien on the business assets and all real property of the community estate, and enjoined Mr. Morgan from encumbering or otherwise lessening the security in any of the assets securing the lien. The Court of Appeals found that the injunction prevented Mr. Morgan from using any business assets as collateral until the judgment was fully paid, thus requiring him to operate his business solely with the cash on hand. The Court found that unless a statutory authorization existed for a writ of injunction, Mrs. Morgan would have to show an absence of any adequate remedy at law. The Court of Appeals found no such evidence and reversed the trial court's decision.

2. Specific Equitable Liens on Marital Estate

a. Texas Family Code §3.406 – Equitable Lien

Texas Family Code §3.406, Equitable Lien, has been significantly revised and will become law, September 1, 2001. §3.406(a) states, "On dissolution of marriage, the Court shall impose an equitable lien on property of a marital estate to secure a claim for economic contribution in that property by another marital estate." Texas Family Code §3.401, effective September 1, 2001, subsection (4) defines "marital estate" as one of three estates:

- (a) Community property owned by the spouses together and referred to as the community estate;
- (b) The separate property owned individually by the husband and referred to as a separate marital estate; or
- (c) The separate property owned individually by the wife, also referred to as a separate marital estate.

A detailed discussion of the revisions to Texas Family Code Sections 3.401 through 3.410 involving claims for economic contribution and reimbursement, (formerly Equitable Interest), will be dealt with in great detail in papers presented at this Advanced Course by Stewart Gagnon and The Honorable Thomas O. Stansbury.

b. Three Interpretations as Found in Caselaw

The caselaw pertaining to equitable liens on separate property falls into three categories:

(1) Those cases that support the imposition of an equitable lien without limitation. Mullins v. Mullins, 785 S.W.2d 5 (Tex. App.--Fort Worth 1990, no writ). You should note, however, that Mullins is the only case supporting this position which was decided after the Texas Supreme Court cases of Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977) and Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982), which specifically prohibit the courts from divesting a party of title to that party's separate real and personal property. However, the El Paso Court of Appeals has held that the trial court is vested with the authority to affix a lien on the separate property of one spouse to secure the discharge of payments by that spouse to the other spouse. The imposition of such a lien does not constitute the kind of divestiture of separate property forbidden in Eggemeyer. Hirsch v. Hirsch, 770 S.W.2d 924 (Tex. App.--El Paso 1989, no writ). The Hirsch decision appears to be correct if you argue that Eggemeyer prohibits the divestiture of title to separate property.

(2) The opposite extreme: those cases that prohibit placing an equitable lien on the separate property of a party in the division of the community estate. Duke v. Duke, 605 S.W.2d 408, 412 (Tex. Civ. App.--El Paso 1980, writ dismissed w.o.j.). The Texas Supreme Court in Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex.

1984) also addressed, in dicta, the issue of an equitable lien placed on the separate property of one of the parties. In Jensen, the Court found "however, if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather a money judgment may be awarded."

(3) Those cases in which an equitable lien may be imposed against separate property of one spouse to secure reimbursement to the other party for improvements or enhancements to the separate property. Contradictions among cases on this point may be resolved by Texas Family Code §§ 3.401 – 3.410, effective September 1, 2001.

3. Implied Equitable Vendor's Liens on Community Property Homestead

A number of cases have held that in an agreed divorce settlement when a spouse transfers his or her interest in the homestead to the other spouse in consideration of the other spouse's agreement to pay a sum of cash in the future, or for other consideration, an equitable vendor's lien attaches to secure performance by the spouse receiving the homestead.

The leading case concerning implied equitable vendor's liens is McGoodwin v. McGoodwin, 671 S.W.2d 880, 882-83 (Tex. 1984). In the parties' agreed decree, Mr. McGoodwin was awarded real property and agreed to pay Mrs. McGoodwin \$22,500.00 as consideration for her interest in this property. The ex-husband continued to live on this property, but failed to pay Mrs. McGoodwin the money owed to her. Mrs. McGoodwin filed suit to enforce an implied vendor's lien in her favor and the trial court ordered the vendor's lien foreclosed. Although no lien was reserved specifically in the parties' decree or Agreement Incident to Divorce, the Supreme Court held: "Established Texas law holds that when no express lien is reserved in a deed and the purchase money is not paid, a lien nevertheless arises in favor of the vendor to secure payment of the purchase money. That vendor's lien may be enforced in a suit brought for that purpose." Mr. McGoodwin took the position that prior caselaw supported the proposition that Mrs. McGoodwin was not entitled to a lien because none was expressly provided in the settlement agreement. The Supreme Court, however, noted

that Mr. McGoodwin's argument was based upon cases involving court-ordered, not agreed, property divisions in which the trial court had chosen not to impose liens on the properties in question. The Supreme Court made clear, however, that Mrs. McGoodwin's lien was against only her undivided one-half interest, which she had sold, and that it was only that interest which could be sold to satisfy her claim.

4. Specific Equitable Liens Upon Homestead Property

a. Equitable Liens on Separate Property Homesteads

The trial court's discretion is limited with regard to a lien on a separate property homestead. As a general rule, the permitted liens against separate property homesteads include compensation to an ex-spouse for taxes, improvements, and purchase money payments. Falor v. Falor, 840 S.W.2d 683 (Tex. App.--San Antonio 1992, no writ).

The Houston Court of Appeals opinion in Wierzchule v. Wierzchule, 623 S.W.2d 730, 732, 733 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) affirmed the trial court's refusal to place an equitable lien on the separate property homestead of Mr. Wierzchule, and stated: "The homestead character of the property is not destroyed by a divorce if one of the parties to the divorce continues to maintain it as a homestead. In a divorce action a lien may be placed on a spouse's real property homestead only to secure the payment of the amount awarded to the other spouse for that spouse's homestead interest."

Mrs. Wierzchule failed to characterize payments made on the property as separate or community. Had she done so, the ex-wife likely would have been entitled to a judgment for reimbursement which could have been secured by an equitable lien.

b. Equitable Liens on Community Property Homesteads

The court's discretion with regard to placing an equitable lien upon a homestead which was community property during the marriage is much broader. In Brunell v. Brunell, 494 S.W.2d 621, 623 (Tex. Civ. App.--Dallas 1973, no writ) the wife was awarded a specific sum for her equity interest in the community

homestead, plus attorney's fees and a sum for delinquent temporary spousal support payments. Mrs. Brunell was granted a lien against the homestead for the entire amount, including the attorney's fee judgment and the support arrearage. Mr. Brunell argued that the judgment lien was improper to secure payment of the attorney's fees and support arrearage. The appellate court found that the trial court was within its authority to grant an equitable lien on the husband's property to secure payment of the amount found by the trial court to be fair and just compensation for her interest in the homestead. However, the appellate court held that the trial court had exceeded its authority in extending the lien to the payment of attorney's fees and support arrearages, as a homestead interest in land is not subject to the payment of debts such as court costs and attorney's fees.

The most liberal case addressing the imposition of an equitable lien on homestead property is Lettieri v. Lettieri, 654 S.W.2d 554, 558, 559 (Tex. App.--Fort Worth 1983, writ dismissed w.o.j.). In this case, the wife was awarded a \$210,000.00 judgment secured by a lien on the community property homestead (which was awarded to the husband). Mr. Lettieri argued that the trial court had erred in granting a lien to secure a judgment that exceeded the value of the property. The appellate court found that in a divorce action, a lien may be placed upon a spouse's real property homestead to secure the payment of the amount awarded to the other spouse for that other spouse's homestead interest, and that because the lien awarded to the wife was for a sum certain, the homestead property and all other personal property awarded to the husband was made subject to the lien.

V. REAL ESTATE CONVEYANCES

When drafting decrees and transfer instruments for the award of real property, the following documents are 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 not warranting the entire chain of title as in a general warranty deed. 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 (emphasis added)." The deed must contain this phrase in order to be a "Special" Warranty Deed. The proper form for a Special Warranty Deed, with additional language appropriate for transfers pursuant to a divorce decree, is found in Volume 3, Texas Family Law Practice Manual, Form 18-3.

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

Now that Texans may obtain home equity loans for purposes other than home improvements, 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. Quitclaim Deed

A quitclaim deed 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 quitclaim deed 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.

D. Deed of Trust To Secure Assumption

One of the most difficult issues to explain to a client is that 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.

One sure way your client will be protected from liability is to have 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 spouse (now single) who receives the real property cannot qualify for a home mortgage loan in his/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/she must re-assume the debt.

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.

I recommend that the Real Estate Lien Note recite the terms of the obligation and that you 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.

Refer to Texas Business and Commerce Code Sections 3.104 and 3.106 to make certain your note is properly drafted and will qualify as a negotiable instrument.

F. 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/her obligations under the note.

G. 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 State Bar of Texas provides forms for all of the real estate documents listed in this section. Those printed forms can be in-put into your computer forms so that they can be used again and again for each new case. The forms set out in the Texas Family Law Practice Manual and the Legal Form Manual for Real Estate Transactions are reliable sources for accurate forms, as they 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.

VI. AWARD OF MONEY TO ACHIEVE AN EQUITABLE DIVISION OF PROPERTY, SECURED BY STOCK IN CLOSELY-HELD CORPORATION

If the parties own a business or a professional corporation, the spouse who is not as active in the running of the business, or who is a non-professional may be awarded cash payments to achieve an equitable division of the community estate. (For simplicity in drafting this section, I refer to the secured party as the wife and the party retaining ownership of the corporation as the husband.) As security for the obligation to wife, husband is often ordered to execute a promissory note and pledge as collateral all the shares of the corporation.

A. Drafting Considerations

The decree should describe the property being pledged as collateral, and should order the husband to sign the documents necessary to perfect the security interest on behalf of the wife. The decree also should set out that the equalization payments are: (1) related to the division of the community estate; (2) are intended to constitute a form of payment in connection with the divorce for rights or interests of the spouse in the community estate; and, (3) are not intended to represent any form of alimony payments.

A specific statement that the payments are not intended as alimony can be very important, as wife could be subjected to the alimony provisions set forth in Internal Revenue Code '1041.

Some suggested language is as follows:

"These funds ordered to be paid to Jane A. Doe represent owelty required to achieve an equitable division of the parties' community estate, and are not intended to be any form of alimony or spousal support."

If you are representing a client who will be making the equalization payments to the opposing spouse, you will want to see that the decree contains a provision that the payments to

be received by the opposing spouse are non-assignable.

B. Security Interests

1. Security Interests - Generally

In order to protect your client's security interest in closely-held securities, you must be familiar with Sections 8 and 9 of the Uniform Commercial Code ("UCC"), which set forth the requirements necessary to attach and perfect a security interest in securities.

In order to "perfect" a security interest, you must have the following:

- Attachment: the security interest is effective and enforceable between the debtor and the secured party.
- Perfection: you must take possession of the stock.

2. Attachment of Security Interest

Section 9.203 of the UCC sets forth the following requirements that must be met in order to have an attachment:

- (1) An agreement. A "security agreement," as defined in Section 9.105 of the UCC, is an agreement which creates or provides for a security interest.
- (2) The giving of value; and,
- (3) Rights in the collateral by the debtor (meaning "ownership").

3. Perfection of Security Interest

To perfect a security interest in stock, you must take possession of the stock. Once you have attached and perfected a security interest in the stock, your security interest is enforceable against third parties. The secured party must be assured that the debtor actually owns the property pledged as security, and you should make certain your client's security agreement contains warranties as to the debtor's ownership of the collateral.

4. Obligations of the Secured Party

Section 9-207 of the UCC states the rights and duties of the secured party with respect to the collateral in his or her possession, as follows:

- (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument of chattel paper, reasonable

care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed to.

(2) Unless otherwise agreed, when collateral is in the secured party's possession:

- (a) reasonable expenses including the cost of any insurance and the payment of taxes or other charges incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;
- (b) the risk of accidental loss or damages falls on the debtor to the extent of any deficiency in any effective insurance coverage;
- (c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;
- (d) the secured party must keep the collateral identifiable, but fungible collateral may be co-mingled;
- (e) the secured party may re-pledge the collateral upon terms which do not impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections, but does not lose his security interest.

(4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction; or, in the case of consumer goods, in the manner and to the extent provided in the security agreement.

5. Important Points To Protect the Secured Party

a. The secured party should obtain a representation from the debtor that he has not previously granted a security interest in any of its assets to other creditors, or if he has, a list of the names and addresses of those creditors who have previously been granted a security interest. The same information could be requested from the debtor's attorney and a legal opinion

obtained and/or a representation from the debtor's accountant.

b. Security documents should require the debtor to represent that it is not known by any trade name or to list those trade names by which it is known or has been known.

c. A secured party should list the various trade names to ensure that the secured party's interest will be a first lien priority security interest in the assets of the debtor.

d. It is advisable to search under the actual corporate name of the debtor even if the debtor only does business under its trade name.

e. To ensure that the collateral is not subject to a lien created by a prior owner, it is necessary for a secured party to inquire into the chain of title of the assets.

f. The secured party should obtain a representation from the debtor that it has not been known by any other legal name and has not been the subject of merger or other corporate reorganization. (The attorney should review a certified copy of the Articles of Incorporation of the debtor to obtain such information.)

C. Paperwork Requirements Related to the Award of Corporation Stock

In addition to the promissory note and security agreement that are so important to the wife who is giving up her ownership interest in the closely-held corporation, there are numerous paperwork requirements that the attorney for the husband will need to address. If not familiar with the requirements of corporate record-keeping, the attorney should consider retaining a colleague who has experience in corporate or commercial matters to see that the corporation is protected and the corporate record books are brought up to date in a manner consistent with the change in ownership.

1. Resignation as Officer and Director

First, the wife should submit her written resignation as an officer and/or director of the corporation, if she previously held such formal positions.

2. Unanimous Consents of Board of Directors and Shareholders

The corporate record books should reflect that the shareholders have consented to wife's resignation and have elected a new director. The

board of directors should elect new officers with respect to the offices being resigned.

3. Stock Power

The wife must transfer her stock to husband, and in turn, husband must execute an appropriate stock power for each certificate issued by the corporation, evidencing the pledge of shares to wife. Once the wife has transferred her stock back to the husband, the corporation may choose to cancel both stock certificates and issue a new certificate representing all of the shares of the corporation now in the name of the husband. If so, the husband will need to execute only one stock power for the one certificate, evidencing the pledge of the shares to wife.

4. The Representation Letter

The husband must provide a representation letter which states that (a) the representation letter is given in connection with the party's divorce settlement; (b) what percentage of the stock of the corporation is being used as or is being pledged as collateral for the equalization payment; (c) that there are no outstanding options, warranties or other rights to purchase any shares of capital stock of the company; and (d) that the husband owns and has good and valid title to the stock and that the stock is free and clear of any and all liens, claims, voting trusts, voting agreements, mortgages, proxies, encumbrances, charges, assessments, restrictions on transfer, puts, calls, purchase rights, options or other similar rights.

It is also important to have the representation letter provide that the pledge of the stock will not conflict with or result in the breach of any terms, conditions, or provisions of any judgment, injunction, decree, or agreement and that as a result of the pledge, it will not constitute a default or result in the creation or imposition of any lien, charge, encumbrance or restriction of any nature with respect to the stock that is being pledged.

The representation should further state either the date on which the stock will have been held by the husband for a period of three years or more, or that the stock has been held by the husband for a period of three years or more in order to satisfy Rule 144(d) of the Securities Act of 1933.

5. Collateral Pledge Agreement

As stated above, in order to attach and perfect a security interest in closely-held stock, you must have a written agreement which sets forth the actual pledge of the stock in the corporation, which also will evidence the security interest held by the wife in the stock of the corporation. The Texas Family Law Practice Manual provides a form for a collateral pledge agreement. This agreement provides various representations and warranties of the debtor, events of default, the rights of the secured party in the event of default, the application of the proceeds received from the collateral in the event of default, provisions dealing with the voting and dividend rights with respect to the collateral stock and provisions for the appointment of an escrow agent to hold the collateral.

6. Escrow Agreement

While the collateral pledge agreement contains provisions for the appointment of the escrow agent and his/her various rights and obligations, you may prefer to have a separate escrow agreement. If so, the escrow agreement should appoint an escrow agent to hold the stock until such time as the payment obligation to wife is satisfied, or until there is an actual default under the terms and provisions of the promissory note and/or the collateral pledge agreement. The escrow agreement also should contain provisions requiring the debtor and the secured party to indemnify and hold the escrow agent harmless from any and all loss, damage, tax, liability, and expense that may be incurred by the escrow agent, except in the event of the agent's willful misconduct or gross negligence, or in the event of acts or omissions that the escrow agent performs which are not in good faith.

7. Receipt Letter from Escrow Agent

Remember, to perfect a security interest under the UCC, the secured party or his/her bailee must actually obtain possession of the stock being used as collateral. Therefore, once the stock has been delivered to the escrow agent, the agent should send a confirming letter to the debtor, acknowledging receipt of the stock certificate(s) and the executed stock power(s).

VII. CLARIFICATION AND 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.

A. The Texas Family Code

Texas Family Code §§ 9.001 through 9.014 provide the procedural basis for the enforcement and clarification of the division of property in a divorce decree. A party affected by a decree of divorce or annulment providing for a division of property may request enforcement of that decree by filing a suit to enforce in the court that rendered the decree. Texas Family Code §9.001(a). The court that rendered the decree of divorce or annulment retains the power to enforce the property division. Texas Family Code §9.002. While the Family Code is normally utilized by the recently divorced spouses, a plain reading of §9.001(a), "a party affected by decree of divorce or annulment providing for a division of property...may request enforcement of that decree...", might easily give standing to any other person affected by the trial court's division of property, such as children, family members, and third-party creditors.

Except as otherwise provided in Chapter 9, a suit to enforce shall be governed by the Texas Rules of Civil Procedure applicable to the filing of an original law suit. Texas Family 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 and shall be commanded to appear by filing a written answer. Thereafter, the proceedings shall be as in civil cases generally. Texas Family Code §9.001(c). **Note:** Mailing a copy of the petition to enforce to the attorney who represented the opposing party in the divorce suit does not constitute service. The Respondent must be served personally.

1. 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 or becomes final after appeal, whichever date is later, or the suit is barred. Texas Family Code §9.003(a). 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 date 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. Texas Family Code §9.003(b). Chavez v. Chavez, 12 S.W.3rd 563 (Tex.App.-San Antonio 1999, no pet.) (Ex-wife's enforcement for proceeds of future sale of stock filed within two years of discovery of sale). The procedures and limitations set forth in Texas Family Code §§9.001 through 9.014 do not apply to existing property not divided at divorce, which are governed by Texas Family Code §§9.201 through 9.205 involving post-decree division of property, and the rules applicable to civil cases generally. Texas Family Code §9.004.

2. Jury

The parties to an enforcement and clarification action are not entitled to a jury trial. Texas Family Code §9.005.

3. Another Option

While Chapter 9 of the Texas Family Code provides a method for enforcement of the property division by allowing the filing of a suit within two years of the signing of the decree, nothing in Chapter 9 vests the trial court rendering the property division with *exclusive* jurisdiction for enforcement, nor does it provide for an exclusive statute of limitations. Other procedures for enforcement exist outside of the Texas Family Code, such as a breach of contract claim or suit for declaratory judgment. "The court which granted the divorce does not have exclusive jurisdiction to hear a suit brought to enforce the property settlement agreement entered into upon divorce." Underhill v. Underhill, 614 S.W.2d 178 (Tex. App.-Houston [14th Dist.] 1981, writ ref'd. n.r.e.).

4. Enforcement and Clarification of Property Division

The court may render further orders to enforce the division of property made in a decree of divorce to assist the implementation of or to clarify the prior order. Texas Family Code §9.006(a). The court may specify more

precisely the manner of effecting the property division previously made if the substantive division of property is not altered or changed. Texas Family Code §9.006(b). An order of enforcement does not alter or affect the finality of the decree of divorce being enforced. Texas Family Code §9.006(c).

A court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce. An order to enforce the division of property 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. Texas Family Code §9.007(a). An order that amends, modifies, alters, or changes the actually substantive division of property made or approved in a final decree of divorce is beyond the power of the divorce court and is unenforceable. Texas Family Code §9.007(b). The power of the court to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending. Texas Family Code §9.007(c). However, despite the power of a court to enforce or clarify a decree being abated, if a supersedeas bond is not filed, other time limits set forth in a decree of divorce continue to run. In the case of English v. English, 44 S.W. 3rd 103 (Tex.App.-Houston [14th Dist.] February 15, 2001(Number 14-00-00093-CV) rehearing overruled(May 3, 2001)), Mr. English timely appealed the case, but failed to file a supersedeas bond. The decree of divorce contained language giving each spouse the option to buy out the other's interest in the homestead "by exercising the option herein granted on or before one hundred eighty (180) days after the court executes this decree..." Mrs. English exercised her option to buy within 180 days of the date the appeal was dismissed for want of prosecution, but not within 180 days from the date the judge signed the decree of divorce. On page 105 of the English opinion, the Court of Appeals interpreted the effect of Texas Family Code §9.007(c) as follows:

"Section 9.007(c) provides: "The power of the court to render *further* orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending." Texas Family Code Ann. §9.007(c) (emphasis added)."

The Court of Appeals further explained at page 106 of the opinion:

“A *further* order requires a prior order or decree. After an initial decree containing a property division, the trial court is legislatively restrained from rendering further orders to assist in the implementation or clarification of the property division pending appeal. The power of the court to do so is abated. Texas Family Code Ann. §9.007(c) The plain statutory language does not stay, supersede or otherwise inhibit the finality of the decree, absent a supersedeas bond. Similarly, the plain language is directed at the power of the court, not the obligations and responsibilities of the parties. Under the statute, the trial court is prohibited from implementing and clarifying the property division by way of further order. However, neither the parties nor the ministerial act of execution of the judgment are proscribed.”

The Court of Appeals concluded that since Mrs. English attempted to exercise her option to buy her husband’s portion of the homestead after 180 days from the date the decree of divorce was signed, she lost her right to do so. Ms. English thought the 180 day period from the date of signing the decree of divorce was tolled by the filing of the appeal. However, absent the filing of a supersedeas bond, the time period was not tolled.

B. Clarification Order

On the request of the 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. Texas Family Code §9.008(a). On a finding of the court that the language in a decree of divorce 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 in the divorce decree. Texas Family Code §9.008(b). The court may not give retroactive effect to a clarifying order. Texas Family Code §9.008(c). See *Zola v. Zola*, 15 S.W.3rd 239, 242 (Tex.App.-Houston [14th Dist.] 2000, pet. denied), holding that a court may not give retroactive effect to a clarifying order in such a way as to subject a party to

contempt immediately. In *Zola*, husband and wife had agreed that husband’s community retirement benefits were payable to wife “if retirement occurs at age 65”; and the decree so provided. At the time husband was 56. The ex-husband actually retired at age 57 and began receiving retirement benefits of a lesser amount, but did not share them with his ex-wife. The ex-wife sought clarification of the decree. The ex-husband responded that the prior order was specific enough to be enforced by contempt as provided in Texas Family Code §9.008(b) and was therefore not subject to clarification. The trial and appellate courts, however, concluded that the ex-husband’s taking early retirement had produced a latent ambiguity in the agreement which the court had the power to clarify and that the divorce court might thereupon adjust the terms of the decree to reflect the consequences of the husband’s early retirement. The court also ordered that the ex-husband pay his ex-wife the benefits already received, though Texas Family Code §9.008(c) provides that “the court may not give retroactive affect to a clarifying order.” The appellate court concluded however, that this provision relates only to enforcement for contempt and does not forbid such a clarifying order. The court shall provide a reasonable time for compliance before enforcing a clarifying order by contempt or in another manner, i.e., specific performance. Texas Family Code §9.008(d).

1. Modification of Property Division, Not Clarification

The following cited cases represent examples where the court exceeded its authority to clarify a property division and was found to have amended, modified, altered, or changed the substantive division of property:

1. Wright v. Eckhardt, 32 S.W.3rd 891(Tex.App.-Corpus Christi 2000, no pet.). (clarification order involving husband’s military retirement benefits was unenforceable as it substantially changed the original property decree)
2. Contreras v. Contreras, 974 S.W.2d 155 (Tex. App.-San Antonio 1998, no pet.) (trial court impermissibly made substantive changes to QDRO)
3. McLaurin v. McLaurin, 968 S.W.2d 947 (Tex.App.-Texarkana 1998, no pet.)

(trial court properly clarified earlier QDRO)

4. Pate v. Pate, 874 S.W.2d 186 (Tex. App.-Houston [14th Dist.] 1994, writ denied) (alteration of division of retirement benefits)
5. Elliott v. Elliott, 797 S.W.2d 388 (Tex. App.-Austin 1990, no writ) (deducting disability benefits from division of retirement pay)
6. Haworth v. Haworth, 795 S.W.2d 296 (Tex. App.-Houston [14th Dist.] 1990, no writ) (modified division of pension benefits)
7. McDowell v. McDowell, 705 S.W.2d 345 (Tex. App.-Dallas 1986, no writ) (appointment of receiver to sell property declared impermissible modification)

2. Clarification, Not Modification of Property Division

The following cases represent examples where the trial court was held to have clarified the property division, rather than modified it:

1. In re Marriage of Alford, 40 S.W.3rd 187 (Tex.App.-Texarkana 2001, no pet.) (trial court clarified existing decree by adding language requiring husband to execute documents to permit ex-wife to redeem frequent flyer miles awarded to her in original decree of divorce)
2. Pearcy v. Percy, 884 S.W.2d 512 (Tex.App.-San Antonio 1994, no writ) (clarification order proper where original property division is ambiguous or not specific enough to enforce)
3. Whittington v. Whittington, 853 S.W.2d 193 (Tex. App.-Beaumont 1993, no writ) (requiring ex-husband to sign note and impressing lien on real estate determined to be permissible clarification)
4. Cain v. Cain, 746 S.W.2d 861 (Tex.App.-El Paso 1988, writ denied) (turnover order permissible)
5. Able v. Able, 725 S.W.2d 788 (Tex. App.-Houston [14th Dist.] 1987, writ ref'd. n.r.e.) (requiring husband to pay taxes to reimburse wife for taxes permissible)
6. McEntire v. McEntire, 706 S.W.2d 347 (Tex. App.-San Antonio 1986, writ

dism'd.) (requiring former husband to execute note payable to third party)

3. Rules of Construction

Unfortunately, a comparison of cases allowing “clarification” from those prohibiting “modification” suggest differences which are negligible, nebulous, or simply so refined as to be over the head of most lawyers and even an occasional judge. No hard and fast “black letter” or “bright line” rule is available to determine permissible clarification versus impermissible modification. It would appear that the distinction often turns on the degree of articulation in the final decree of divorce and, perhaps, the persuasive abilities of an appellate proponent (or opponent, as applicable).

The case of Reiss v. Reiss, 40 S.W.3rd 605 (Tex.App.-Houston [1st Dist.] February 1, 2001)(No. 01-99-00352-CV)(rehearing overruled, March 2, 2001) (Petition for review filed (March 28, 2001), involves an enforcement action filed by ex-wife, seeking one-half of all of her former husband’s retirement benefits. The trial court ordered that the ex-wife was entitled to one one-half of all of those benefits. Former husband appealed and the court of appeals held that divorced wife had a one-half interest in only the community property portion of the former husband’s retirement benefits and that the value of the interest was to be determined as of the date of the receipt of the benefits. The Reiss case provides an informative discussion of the rules of construction at pages 607 and 608 as follows:

“We construe the divorce decree as a whole with an eye toward harmonizing and giving effect to all provisions. Carlson v. Carlson, 983 S.W.2d 304, 306 (Tex.App. – Houston [1st Dist.] 1998, no pet.). The divorce decree’s interpretation is a legal question, which we review de novo. See In re Marriage of Cannaliato, 28 S.W.3d 96, 97 (Tex.App.- Texarakana 2000, no pet.). If the decree is plain and unambiguous, we must give effect to its language’s literal meaning. Baxter v. Ruddle, 794 S.W.2d 761, 763 (Tex.1990). We presume the trial judge acted as applicable law required. See Patino v. Patino, 687 S.W. 2d 799, 802 (Tex. App. – San Antonio 1985, no writ) (reviewing divorce award of military retirement benefits).”

C. Delivery of Property

To enforce the division of property made in a decree of divorce, the court may make an order to deliver the specific existing property awarded, without regard to whether the property is of special value, including an award of an existing sum of money or its equivalent. Texas Family Code § 9.009.

D. Reduction to Money Judgment

If a party fails to comply with a final decree of divorce and delivery of property in the decree is no longer an adequate remedy, the court may render a money judgment for damages caused by that failure to comply. Texas Family Code § 9.010(a). If the party did not receive payments of money as awarded in the decree of divorce, the court may render judgment against the defaulting party for the amount of unpaid payment to which the party is entitled. Texas Family Code § 9.010(b). The remedy of a reduction to money judgment is in addition to the other remedies provided by law. Texas Family Code § 9.010(c). A money judgment rendered under § 9.010 may be enforced by any means available for enforcement of judgment for debt. Texas Family Code § 9.010(d).

E. Contempt

An order requiring delivery of specific property, or an award of a right to future property, may be enforced by contempt. Tex. Fam. Code §9.012; Ex Parte Gorena, 595 S.W.2d 841 (Tex. 1979); Ex Parte Preston, 347 S.W.2d 938 (Tex. 1961). Examples of enforcement by contempt include Ex Parte Gorena, supra (payments for spousal support); Ex Parte Sutherland, 515 S.W.2d 137 (Tex. Civ. App.-Texarkana 1974, orig. proceeding); Ex Parte Sutherland, 526 S.W.2d 536 (Tex. 1975) (same case, this time in the Texas Supreme Court); Ex Parte Anderson, 541 S.W.2d 286 (Tex. Civ. App.-San Antonio 1976, orig. proceeding) (compelling payment of arrearage and wife's share of military retirement fund). However, an award of a sum of money in a divorce decree is not enforceable by contempt unless the sum of money is in existence "at the same time the decree was rendered." This section causes great confusion throughout the bench and bar in Texas. Compare an award to spouse "X" of \$20,000, as opposed to an award

of Texas Commerce Bank, Account No. 000-AAA-000, with a balance of \$20,000 at the time of rendition, including injunctions against withdrawal. It may be difficult to enforce a property division against the disenfranchised spouse by contempt in the first instance. This does not mean that it cannot be done; it simply means it places an additional burden on the moving spouse to establish, in the first instance, that even though an award of a sum of money was provided generically, the cash was clearly in existence at the time the trial court rendered a final decree of divorce. Review the difficulties faced by the real party in interest in Ex Parte Neff, 542 S.W. 2d 268 (Tex. Civ. App.-Ft. Worth 1976, orig. proceeding). There, the former Mrs. Neff was awarded "17,500.00 in lieu of property to be paid in equal payments of \$175.00 [bi-monthly]." When Mr. Neff did not pay, he was found in contempt and imprisoned. By habeas corpus, the Fort Worth Court of Appeals discharged Mr. Neff, finding no evidence in the record to sustain a belief that \$17,500.00 was in existence at the time of rendition. Ex Parte Neff is frequently cited by spouses facing contempt charges in similar situations.

The Neff decision raises the question as to why, if cash was in existence at the time of rendition, language such as that used in Neff would be used in this day and time. Chances were in Neff and in most cases, the property on hand at dissolution is such that it cannot or should not be sold or partitioned, and one spouse wants to be "bought out" for his or her interest in the asset. If cash is in existence at the time of the decree, you should ensure the record and decree reflects that it exists, identify the location of the cash, identify the spouse who has control over said cash, and get a written order enjoining the spouse in possession from disposing of the property until it can be turned over to the spouse to whom it has been awarded, or at least into the registry of the Court. Note the Fort Worth Court of Appeals in Neff clearly determined that the burden of proof to establish that funds were in existence at the time of rendition was on Mrs. Neff, who was alleging contempt, and not Mr. Neff, who raised the issue as an affirmative defense. "The burden was on the Respondent, Wilma Neff, to prove that the fund from which the \$17, 500.00 was to be paid to her by Realtor was in existence at the time the decree was

rendered.” Ex Parte Neff, 542 S.W.2d at 270. Notwithstanding Neff, if you were defending an alleged contemtor in this situation, a word to the wise is offered: Do not rely upon the relator to prove anything. If the facts will establish that no cash was in existence at the time the decree was rendered, make sure the record demonstrates the absence of cash. Unless you practice law in the Fort Worth area, there is no guarantee that another court of appeals will accept the designated burden of proof (which, by the way, is correct).

F. Enforcement of Settlement Agreements

Sometimes spouses have agreed to a division of their property in advance of trial. This may have been accomplished by the spouses and counsel in a settlement conference, or as the result of mediation. The degree of difficulty in enforcing a property agreement is measured by the degree of specificity of its terms, and most importantly, where and how the agreement is recorded.

1. Rule 11 Agreements

If you want an agreement between lawyers or parties to be enforceable, then one of two things must occur, both of which have two sub-requirements. The agreement must either be (1) (a) reduced to writing, and (b) filed with the court; or (2) (a) made in open court and (b) on the record. Up until a few years ago, there appeared to be much confusion over the applicability of Rule 11 Agreements. This confusion was not so much in the requirements of Rule 11 itself, but whether one party could stand on a Rule 11 Agreement to judgment in the face of repudiation by the other party prior to judgment. In the typical scenario, a Rule 11 Agreement would be entered into in accordance with the Texas Rule of Civil Procedure, but one party would announce his or her repudiation of the agreement prior to rendition of a judgment by the trial court. Thus, on the one hand, the law wanted to favor the enforceability of a Rule 11 Agreement, but on the other hand faced the dilemma that a consent judgment cannot be rendered when consent of one of the parties is lacking at the time of judgment. This confusion was finally resolved by the Texas Supreme Court in Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995), but not before some of this confusion was memorialized. Differing

opinions were issued by the Amarillo Court of Appeals in Ames v. Ames, 860 S.W.2d 590 (Tex. App.-Amarillo 1993, no writ) and the Houston First District Court of Appeals in Cary v. Cary, 894 S.W.2d 111 (Tex. App.- Houston [1st Dist.] 1995, no writ). The Amarillo court in Ames determined that a settlement agreement resulting from court-ordered mediation and signed by all the parties and their attorneys could not be repudiated unilaterally, and further that a trial court had the authority to enter a divorce decree on the basis of a settlement agreement in spite of repudiation pursuant to Chapter 154 of the Texas Civil Practice and Remedies Code. The Houston First Court of Appeals in Cary, disagreed under a similar set of facts. That court pointed out that the Supreme Court had clearly determined that a consent judgment is void if a party has revoked its consent to judgment prior to the time judgment is rendered. Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442, 444 (Tex. 1983). This rationale for consent at the time of judgment was further traced back to a Supreme Court decision in Burnaman v. Heaton, 240 S.W.2d 288 (Tex. 1951). A closer inspection of Burnaman would have provided resolution to the query long before the Supreme Court clarified the issue in Padilla v. LaFrance. The court in Burnaman suggested that enforcement of the agreement could be pursued in the face of repudiation. Nevertheless, the Supreme Court, in Padilla resolved the controversy by reconciling the two otherwise stabilized propositions of law, when it held, “although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.” 907 S.W.2d at 461. In fact, the Supreme Court gave its blessing to a proper procedure in the face of a repudiated Rule 11 agreement, which is to grant a Motion for Summary Judgment in favor of the party standing on the agreement.

2. Enforcement of Mediated Settlement Agreements

Mediation is now a fact of life. Furthermore, there is a desire for universal

acceptance of the proposition that successful mediation is binding on the parties and irrevocable if certain statutory requirements have been met. Section 6.602 of the Texas Family Code outlines the statutory requirements under Title 1, which are mirrored by Section 153.0071 for suits affecting the parent-child relationship under Title 5.

Sections 6.602(a) and 153.0071(c) provide that "on the written agreement of the parties or on the court's own motion, the court may refer [a pending suit] to mediation." Sections 6.602(b) and 153.0071(d) provide that a mediation settlement agreement is binding on the parties if the agreement: (1) provides in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreements is signed. If these specific statutory requirements are met, a party is entitled to judgment on the mediated settlement agreement notwithstanding Texas Rules of Civil Procedure Rule 11, or any other rule of law. Tex. Fam. Code §§6.602(c), 153.0071(e). Thus it is clear that when you have a mediated settlement which meets the statutory requirements, any party is entitled to judgment on the mediated settlement agreement without fear of repudiation by the other party.

G. The "Turnover Statute"

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

The statute ". . . requires a factual showing that the judgment debtor has non-exempt property that is not readily subject to ordinary execution. . . Upon proof of the necessary facts, it authorizes the trial court to order affirmative action by the judgment debtor and others to assist the judgment creditor in subjecting such non-exempt property to satisfaction of the underlying judgment.@ Schultz v. Fifth Judicial District Court of Appeals, 810 S.W.2d 738, 740 (Tex. 1991).

The use of the turnover statute will not preclude the creditor from utilizing other remedies to collect the judgment. Matrix, Inc. v. Provident America Ins. Co., 658 S.W.2d 665, 668 (Tex. App.-Dallas 1983, no writ). This relief is available to the judgment creditor to reach property to obtain satisfaction on his judgment where three prerequisites are met: (1) the judgment debtor owns property, including present or future right to property; (2) that cannot be attached or levied on by ordinary legal process; and, (3) the property is not exempt from attachment execution, or seizure for the satisfaction of liabilities. Texas Civ. Prac. & Rem. Code ' 31.002(a)(2).

The enforcement of a turnover order does not violate the Constitutional prohibition against incarceration for a debt, and failure to obey a turnover order is enforceable by contempt. Ex Parte Buller, 834 S.W.2d 622 (Tex.App.-Beaumont 1992, no writ). However, in order to obtain a turnover order, you must have a hearing to determine which non-exempt assets exist, and then draft the order as a mandatory injunction which is definite, clear, and concise. Bergman v. Bergman, 828 S.W.2d 555 (Tex. App.-El Paso 1992, no writ). (When applying this statute to the enforcement of a property division, only non-exempt property can be reached.) Texas Civ. Prac. & Rem. Code ' 31.002(f). See also Tex. Prop. Code ' ' 42.0021, 42.001, 42.002.

H. Attorney's Fees and Costs

In any proceeding to enforce a property division, the court may award costs as in other civil cases. Texas Family Code ' 9.013.

Prior to April 17, 1997, a petitioner could not recover attorney's fees in an enforcement action. Now 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. Texas Family Code ' 9.014. Mullins v. Mullins, 785 S.W.2d 5 (Tex. App.-Fort Worth, 1990, no writ); McEntire v. McEntire, 706 S.W.2d 347 (Tex. App.-San Antonio 1986 writ dismissed w.o.j.)

In McMann v. McMann, 942 S.W.2d 94 (Tex. App.-Houston [1st Dist.] 1997, no writ), a clause in an agreement incident to divorce stated that the attorney's fees of the successful party

either prosecuting or defending a suit under the agreement would be recovered. When ex-husband sought increased visitation in a post-divorce modification, ex-wife counter-petitioned for partition of undisclosed assets. Ex-husband and ex-wife were both successful, with him getting more visitation and her getting more child support. *Id.* The court, however, denied the partition finding no undisclosed property. The trial court awarded ex-wife \$11,400 in attorney's fees. When ex-husband appealed, the Houston court reversed and rendered granting wife no fees but awarding husband \$12,000 for having successfully defended the partition/motion for enforcement.

VIII. CONCLUSION - CLOSING THE FILE

As recommended previously in this article, the attorney should strive to conclude all transfers of property, to make the payment due dates for equalizing payments and attorney's fees concurrent with the date the divorce decree is signed, to secure the parties' signatures on all documents ancillary to the property division, and to make certain all such documents are in the attorney's possession and recorded, as applicable. 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 the former spouse.

If you cannot tie things up quite so neatly, 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. You must check and double-check to see that all real estate documents are properly recorded, that the security instruments related to compensation for a party's interest in a closely-held corporation are executed properly and that the collateral is protected, 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.

The client may not understand why so much work is required after he or she is officially "divorced." Therefore, you should

explain to your client all the work that must be done after the judge renders the divorce and prepare the client for the time that it will take and the money that it will cost. Occasionally, the client who is tired of paying attorney's fees simply will refuse to authorize any additional work and will not pay additional fees. If you find yourself in this position and the client specifically has 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. You should also get your client to sign a CYA letter in order to provide some measure of protection in the event of a grievance or a malpractice suit.

Detailed checklists, such as the one borrowed from Jim Loveless and attached to this article as Appendix AA,⁶ are helpful guidelines for the attorney and staff to follow to close a file and avoid "dropped balls." Never close a file and send it to storage until you have either checked off each duty, marked it as "not applicable" to the particular case, or (in the event a client has dismissed you or you have withdrawn as attorney of record) sent a letter to the client, informing the client of these remaining things to be done.

Such 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 associates. Your malpractice carrier will also be happy.

APPENDIX A

CHECKLIST FOR FINALIZING A DIVORCE
(Long Form)

Action Needed	Date Completed
A. Documents to be submitted to the Court:	
_____ 1. Final Decree of Divorce/Agreement Incident to Divorce	
_____ (a) Copy provided to opposing party’s attorney	_____
_____ (b) Certified copy ordered for client	_____
_____ (c) Certified copy mailed to client	_____
_____ (d) Copy served on defaulting party	_____
_____ (e) Copy filed with child support office	_____
_____ (f) Certified copy recorded w/County Clerk’s office	_____
_____ (g) Other: _____	
_____ 2. Notice/Order Withholding from Earnings for Child Support	
_____ (a) Copy provided to opposing party’s attorney	_____
_____ (b) Copy provided to client	_____
_____ (c) Copy served on defaulting party	_____
_____ (d) Request filed with District Clerk for service of Order on obligor’s employer	_____
_____ (e) Copy served on obligor’s employer	_____
_____ (f) Other: _____	_____
_____ 3. Qualified Domestic Relations Order	
_____ (a) QDRO pre-approval letters mailed to each Plan Administrator	_____
_____ (b) Certified copy of QDRO served on each Plan Administrator	_____
_____ (c) Confirmation of qualification of QDRO received from each Plan Administrator	_____
_____ (d) If QDRO rejected by Plan Administrator, file Motion to clarify and/or amend QDRO	_____

_____ (e) Other: _____

_____ 4. Parent-child Relationship Information Sheet

_____ (a) Completed by both parties _____

_____ (b) Filed with Court _____

_____ (c) Blank form sent to client for future changes of information _____

_____ (d) Other: _____

B. Miscellaneous Real Estate Documents:

_____ 1. Special Warranty Deed

_____ (a) Original executed by proper party (and properly notarized) _____

_____ (b) Original filed with County Clerk’s office and receipt obtained _____

_____ (c) Recorded original/copy mailed to client _____

_____ (d) Other: _____

_____ 2. Quitclaim Deed

_____ (a) Original executed by proper party and properly notarized _____

_____ (b) Original filed with County Clerk’s office and receipt obtained _____

_____ (c) Recorded original/copy mailed to client _____

_____ (d) Other: _____

_____ 3. Real Estate Lien Note

_____ (a) Original executed by proper party _____

_____ (b) Original mailed to client _____

_____ (c) Copy provided to opposing party’s attorney _____

_____ (d) Other: _____

_____ 4. Deed of Trust

_____ (a) Original executed by proper party and properly notarized _____

_____ (b) Original filed with County Clerk’s office and receipt obtained _____

_____ (c) Recorded original/copy mailed to client _____

- _____ (d) Other: _____
- _____ 5. Deed of Trust to Secure Assumption _____
- _____ (a) Original executed by proper party and properly notarized _____
- _____ (b) Original filed with County Clerk’s office and receipt obtained _____
- _____ (c) Recorded original/copy mailed to client _____
- _____ (d) Other: _____
- _____ 6. Transfer of Lien _____
- _____ (a) Original executed by proper party and properly notarized _____
- _____ (b) Original filed with County Clerk’s office and receipt obtained _____
- _____ (c) Recorded original/copy mailed to client _____
- _____ (d) Other: _____
- _____ 7. Assignment of Escrow Funds Letter _____
- _____ (a) Original executed by proper party and properly notarized _____
- _____ (b) Original mailed to mortgage company w/copy of Special Warranty Deed _____
- _____ (c) Copy mailed to client _____
- _____ (d) Other: _____
- _____ 8. Notice of Assignment of Homeowner’s Policy with cover letter to insurance carrier _____
- _____ 9. Assignment of utility deposits _____
- _____ (a) Original executed by proper party and properly notarized _____
- _____ (b) Copy mailed to gas, water, electric, and phone companies with cover letter _____
- _____ (c) Original mailed to client _____
- _____ (d) Other: _____
- C. Sale of Real Estate
- _____ 1. Facilitate and monitor the sale of real estate _____
- _____ (a) Establish reminder system _____

- (1) Client monitor for remarriage, death, cohabitation, etc. which would trigger the sale requirement _____
- (2) Create a reminder for required listing or sale date _____
- _____ (b) Check official records (e.g., to determine whether there has been marriage) _____
- _____ 2. Review and obtain old execution of real estate listing agreement _____
- (a) Ensure that the property is kept in saleable condition _____
- (b) Verify compliance with all other applicable terms of the decree (such as showing the property to prospective buyers or periodic inspections to make certain that the property is being kept saleable) _____
- (c) Assist or arrange appraisals _____
- (d) Notify lenders concerning real estate payment provisions and request notification in the event of a default in payment _____
- _____ 3. If a disposition of real estate results in a taxable event: _____
- (a) Ensure that copies of all relevant documents will be provided to client or to you _____
- (b) Aid in the determination of client’s tax basis _____
- (c) Recommend that client seek advice from tax attorney/accountant _____
- _____ 4. Satisfaction and discharge of liens _____
- (a) Refer specifically to paragraph and document number in decree and document number of other instrument creating the lien _____
- (b) Promptly file or record Quitclaim Deed or other instrument satisfying the lien _____
- (c) Especially for registered property, include a copy of the instrument for return to you with information marked _____

D. Miscellaneous Transfer Documents

- _____ 1. Certificate of Titles – Vehicles _____
- (a) Obtain original(s) from opposing party’s attorney _____
- (b) Original(s) given to client _____
- (c) Other: _____
- _____ 2. Seller, Donor, or Trader’s Affidavit/Application for Certificate of Title – Vehicle _____

- | | | |
|-------|--|-------|
| _____ | (a) Original(s) given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 3. Power of Attorney to Transfer Motor Vehicle | |
| _____ | (a) Original(s) given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 4. Letter to automobile insurance carrier | _____ |
| _____ | 5. Irrevocable stock or bond power | |
| _____ | (a) Original given to client with instructions | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 6. Assignment of Interest – for business | |
| _____ | (a) Original given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 7. Assignment of Interest – for Financial Accounts | |
| _____ | (a) Original given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 8. Assignment of Interest – for Partnership / Joint Ventures | |
| _____ | (a) Original given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 9. Assignment of Interest – Miscellaneous | |
| _____ | (a) _____ | _____ |
| _____ | 10. Special power of Attorney | |
| _____ | (a) Original given to client | _____ |
| _____ | (b) Other: _____ | _____ |
| _____ | 11. Operating Trust Agreement for Jointly Owned Property After Divorce | |
| _____ | (a) Copy provided to opposing party’s attorney | _____ |
| _____ | (b) Copy provided to client | _____ |
| _____ | (c) Other: _____ | _____ |

- _____ 12. Collateral Pledge Agreement
 - _____ (a) Original filed with County Clerk’s Office _____
 - _____ (b) Copy provided to client _____
 - _____ (c) Other: _____ _____
- _____ 13. Transfer of Nonrealty Assets
 - _____ (a) Assist Client in preparing and filing necessary instruments and docs. _____
 - _____ (1) Assist client in executing and filing vehicle certificate of title _____
 - _____ (2) prepare and have executed stock powers, change of beneficiaries, or other indices of ownership _____
 - _____ (b) Assist in the physical transfer of property _____
 - _____ (c) Prepare and send appropriate correspondence concerning nonrealty property transfers _____

E. Insurance

- _____ 1. Ensure that required medical, hospitalization, and dental insurance coverage is retained or obtained
 - _____ (a) Review all policies _____
 - _____ (b) Write to insurance carrier requesting notification of change in coverage, beneficiary, etc. _____
 - _____ (c) Communicate with insurance carrier concerning provisions of decree _____
 - _____ (d) Set up necessary monitoring systems _____
 - _____ (e) COBRA notice letter for continued coverage mailed to ins. carrier _____
 - _____ (f) Health insurance letter for direct payment of benefits to sole managing conservator mailed to insurance carrier _____
- _____ 2. Ensure that required life insurance is retained or obtained
 - _____ (a) Review all policies _____
 - _____ (b) Obtain change of beneficiary forms; complete and send to ins. carrier _____
 - _____ (c) Write insurance company requesting notification of noncompliance with decree _____

F. Custody and Payment of Support

- _____ 1. Implement shared custody arrangement _____
- _____ (a) Prepare and send appropriate letters to schools, doctors, day care _____
centers, and other necessary parties
- _____ (b) Ensure equal access to confidential information _____
- _____ (c) Inform childcare providers of joint parenting _____
- _____ 2. Provide names of persons to mediate or arbitrate conflicts _____
- _____ (a) with the client’s permission, contact the mediator _____
- _____ (1) Provide the mediator with a copy of relevant portions of _____
the decree
- _____ (2) Put mediator in contact with client _____
- _____ 3. Instruct client concerning payment of alimony or support _____
- _____ (a) Instruct client regarding due dates and proper notification on checks _____
- _____ (b) Establish reminder system regarding any future lump sum payments _____

G. Tax Matters

- _____ 1. Obtain all relevant documentation, or copies thereof, for preparation of _____
returns and tax planning
- _____ (a) Provide copies of past-filed returns to client or accountant _____
- _____ (b) Supply all documents concerning tax basis, deductible items, etc., _____
to client or accountant
- _____ 2. Communicate directly with accountant concerning decree _____
- _____ 3. Advise client regarding dependency exemptions _____
- _____ (a) Explain multiple support declaration form, federal form 2120 _____
and any comparable state form
- _____ (b) Instruct client to maintain records regarding child support _____
- _____ 4. Communicate with client concerning tax effect of decree _____
- _____ (a) Advise client of the necessity to reinvest proceeds from certain _____
sales of the homestead to avoid tax
- _____ (b) Work with an accountant or advise client to obtain tax advisor _____
- _____ 5. Assist client concerning federal W-4 form and any comparable state form _____

- _____ 6. Obtain and divide tax refunds _____
- _____ (a) Assist in preparing tax returns _____
- _____ (b) Review returns before execution by client _____
- _____ 7. Determine deductibility or adjustment to basis relating to attorney’s fees and costs _____
- _____ (a) Review all time records and related documentation _____
- _____ (b) Provide written communication dealing with tax deductibility and adjustment of tax basis _____
- _____ 8. Provide tax deductibility or adjustment to tax basis allocation on periodic billings _____
- _____ (a) Prepare separate letters concerning tax deductibility and basis adjustment _____
- _____ (b) Provide any other written material to aid client (i.e., billing records) _____
- _____ 9. Tax exemption for child(ren) – IRS Form 8332 _____
- _____ (a) Original signed by opposing party _____
- _____ (b) Original given to client _____
- _____ (c) Other: _____

H. Payment of Indebtedness

- _____ 1. Provide payor with payment books, payment details, etc. _____
- _____ 2. Communicate with creditors, requesting notification of default _____
- _____ (a) Prevent initiation of suit if there is default with appropriate communication _____
- _____ (b) In case of default, prevent assets from being lost by taking appropriate action _____

I. Change of Name

- _____ 1. Assist client in changing public records, driver’s license, social security number, etc. _____
- _____ 2. Obtain multiple certified copies of decree as needed by client _____

J. Military Retirement / Survivor’s Benefit Plan

- _____ 1. Documents to be executed by opposing party: _____

- _____ (a) Agreement to name former spouse beneficiary under the Armed Services survivor benefit plan _____
- _____ (b) Survivor benefit plan election statement for former spouse coverage – Form 20-237 _____
- _____ (c) Survivor benefit plan election change – Form 20-238 _____
- _____ 2. Documents to be executed by client: _____
- _____ (a) Request for former spouse payment from retired pay _____
- _____ (b) Letter requesting survivor benefit plan election _____
- _____ 3. Documents to be executed by attorney: _____
- _____ (a) Certification of finality of court order under the provisions of Title 10, U.S. Code, Section 1408 _____
- _____ (b) Letter requesting survivor benefit plan election _____

K. Civil Service Retirement

- _____ 1. Documents to be executed by client: _____
- _____ (a) Application for apportionment of retirement benefits under Public Law 95-366 _____
- _____ 2. Documents to be executed by attorney: _____
- _____ (a) Notice letter to Office of Personnel Management requesting direct payments _____

L. Follow-up Communications

- _____ 1. Review of file to determine items to be returned to client _____
- _____ 2. Prepare appropriate letter explaining provision of decree and detailing items returned and/or explain same in conference with client _____
- _____ 3. Letter to client advising that other legal services may be needed - wills, etc. _____
- _____ 4. Prepare necessary finalization of communications relative to final bill _____
- _____ (a) Write letter to client with billing _____
- _____ (b) Send billing to opposing party through counsel (if opposing party is to pay) _____
- _____ (c) Create a reminder system regarding payment _____