Ms. O'Neil founded the firm based on her desire to provide clients with high-quality representation in a personalized atmosphere. The firm, originally known as The May Firm, changed its name in 2009 after Ms. O'Neil married. She has over 18 years of experience representing men, women, and children related to family law matters such as divorce, child custody, and complex property division. Described by one lawyer as "a lethal combination of sweet-and-salty", Ms. O'Neil exudes genuine compassion for her client's difficulties, yet she can be relentless when in pursuit of a client's goals.

Ms. O'Neil became a certified family law specialist by the Texas Board of Legal Specialization in 1997 and has maintained her certification since that time. Representing clients in litigation before the trial court is an important part of her practice. In addition, family law appellate matters are a niche of Ms. O'Neil's practice. Lawyers frequently consult with Ms. O'Neil on their litigation cases about specialized legal issues requiring particularized attention both at the trial court and appellate levels. One judge said of Ms. O'Neil, "She cannot be out-gunned, out-briefed, or out-lawyered!"

A noted author, Ms. O'Neil released her second book *Basics of Texas Divorce Law* in November 2010. Her first book, *All About Texas Law and Kids*, was published in September 2009 by Texas Lawyer Press. The State Bar of Texas and other providers of continuing education for attorneys frequently enlist Ms. O'Neil to provide instruction to attorneys on topics of her expertise in the family law arena. She has been honored by her peers with an "A-V" peer review rating by Martindale-Hubbell Legal Directories for the highest quality legal ability and ethical standards, as well as selected as a Barrister in the Annette Stewart Inns of Court, an organization devoted to the professionalism of the practice of law.

In addition to her service to the legal profession, Ms. O'Neil actively serves the community. She presently serves on the Board of Directors for Services of Hope, a charitable organization dedicated to promoting the needs of at-risk youth in West Dallas.

Ms. O'Neil shares with many of her clients the joys of having a blended family, having married her husband John in 2006, who has a 9-year old son.
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ENFORCEMENT: HOW TO MAKE IT STICK OR GET IT UNSTUCK

I. INTRODUCTION

This paper is intended to cover generally the procedures for enforcement of family law court orders and decrees. This includes a discussion of enforcement of property orders, SAPCR Orders for possession of and access to children, maintenance orders, and child support orders. Admittedly, there are many detailed articles and treatises which address child support enforcement; this paper is not intended to replace those, but merely to be an overview and procedural guideline.

II. GENERAL RULES

A court that renders an order or decree retains the power to enforce the order or decree. However, with SAPCR orders, the suit must be commenced in the court with continuing, exclusive jurisdiction. Tex. Fam. Code §157.001(d). A motion for enforcement is not an election of remedies, but the vehicle in which to allege the possible remedies. An order on the motion for enforcement may include an order for specific performance (i.e., delivery of property), money judgment, contempt, or clarification of the previous order.

Enforcement suits are governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit. Each party is entitled to notice by citation and must be commanded to appear by filing a written answer, although personal service may be waived in writing.

CHECKLIST FOR SUIT TO ENFORCE ORDER:

- Allege date of marriage and divorce
- Attach decree or order
- Allege that Respondent is aware of terms of order
- Quote part of decree to be enforced
- Ask for remedy: specific performance, money judgment, contempt, clarification
- Plead for attorney fees and costs

CHECKLIST FOR OPPOSING SUIT FOR ENFORCEMENT:

- Allege no jurisdiction
- Specially except to allegations
- General denial
- Affirmative defenses (res judicata, estoppel, limitations)
- Request attorneys fees and costs

A. Contempt

1. General requirements

In general, a court may enforce its orders by contempt either on its own motion or on the motion of a party. This includes final orders for possession of and access to a child and child support. Tex. Fam. Code §157.001(b), (c); Tex. R. Civ. P. 380a. Further, a court may enforce by contempt an order requiring delivery of specific property or an award of a right to future property. Tex. Fam. Code §9.012(a). A court may not use contempt to enforce an award of a sum of money payable either in a lump sum or in future installment payments in the nature of a debt except for a sum of money in existence at the time the decree was rendered or a matured right to future payments as in an award of future property. Tex. Fam. Code §9.012(b). Likewise, a court may enforce by contempt an order for post-divorce maintenance (a.k.a. court-ordered alimony or Chapter 8 spousal maintenance). Tex. Fam. Code §8.009.

For a party to be held in contempt for disobeying a court order, it “must spell out the terms of compliance in clear, specific and unambiguous terms so that [the party] will readily know what duties and obligations are imposed on him.”; Ex Parte Slavin, 412 S.W.2d 43, 44 (Tex.1967) (orig. proceeding); see also In re Dupree, 118 S.W.3d 911, 914 (Tex. App. – Dallas 2003, orig. proceeding). To be capable of enforcement, the order must be:

- final
- clear, specific and unambiguous
- an order for the party to do something specific.

Id.

Failure of the order to clearly specify which party has the obligation to act renders the order unenforceable by contempt. In Re Price, 2002 WL 1339895 (Tex. App. – Beaumont 2002, orig. proceeding)(not designated for publication).

To be enforceable by contempt, the order must be in

Regardless of the clarity of the underlying order or decree, the order holding the party in contempt must also be clear and specific in describing the violation of the order. *See In re Nesevitch*, 93 S.W.3d 510 (Tex. App. – Houston [14th Dist.] 2002, orig. proceeding). An order of contempt must be in writing, state the provision of the order sought to be enforced, state the acts or omissions that are the subject of the order, the manner of noncompliance, and relief awarded by the court. If the order imposes incarceration or a fine, a contempt order must contain findings setting out the provisions of the order for which enforcement was sought and the date of each occasion on which the contemnor failed to comply with the order.

Obvious typographical errors do not render a contempt order void, so long as a judgment nunc pro tunc is sought. *Ex Parte Hogan*, 916 S.W.2d 82, 85 (Tex. App. – Houston [1st Dist.] 1996, orig. proceeding).

The contempt order must also be clear and specific about what the contemnor must do to fulfill the terms of the punishment.

In general, a contemnor may not be held in jail pursuant to an oral contempt order. However, a short and reasonable time is allowed for preparation of the judgment of contempt and order of commitment. Usually, entry of the written order on the day of the hearing will always be sufficient. A three-day delay between the oral order and reduction to writing has been held not “short and reasonable”. *Ex Parte Calvillo*, 748 S.W.2d 224, 225 (Tex. 1988).

An alleged contemnor is entitled to at least 10 days notice of the contempt hearing. Tex. Fam. Code §157.062(c)

### Checklist for Contempt Motion:

- **Identify order**
- **Attach order**
- **Quote portion of order violated**
- **Allege Respondent aware of terms of the order**
- **Allege Respondent acted or failed to act in disregard of order**
- **Describe each contemptuous act**

2. Civil Contempt

   It is important to distinguish between civil or criminal contempt. Civil contempt is remedial and coercive in nature. It is said that civil contemnor “carry the keys of prison in their own pockets”. *Shillitani v. U.S.*, 384 U.S. 364, 368, 86 S.Ct. 1531 (1966). In civil contempt, imprisonment is conditioned upon performance of the court order, so confinement may be for an indefinite period of time or until performance of the order has been accomplished to the extent specified by the court.

3. Criminal contempt

   Criminal contempt is meant as punishment for violation of the court order or decree. The sentence is not conditioned upon future compliance, but on punishment for some completed act which offended the honor and integrity of the court. Ordinarily the punishment is fixed and definite.

   Unlike civil contempt, criminal contempt allows the contemnor to receive discretionary good-time credit and thus a shorter sentence. *Ex Parte Acly*, 711 S.W.2d 627, 628 (Tex. 1986); *Ex Parte Suter*, 920 S.W.2d 685, 687 n.1 (Tex. App. – Houston [1st Dist.] 1995, orig. proceeding); *Ex Parte Beaupre*, 915 S.W.2d 228, 232 (Tex. App. – Fort Worth 1996, orig. proceeding). Further, a contemnor may apply to the court for probation or early release from criminal contempt, although the matter is discretionary with the court. *Ex Parte Laymon*, 679 S.W.2d 532, 534 (Tex. App. – Houston [1st Dist.] 1984, orig. proceeding).

4. TRCP 308a

   A party may also sue for contempt of court for violation of a court order for child support or possession of or access to a child under Texas Rule of Civil Procedure 308a. Under this section, the person claiming that an order has been violated makes this known to the court. Tex. R. Civ. P. 308a. The court then may appoint an attorney to investigate the claim. *Id.* If the attorney believes in good faith that the order has been violated, then he shall take the necessary actions under the Family Code to enforce the court order. *Id.*

   The attorney cannot charge the complaining party a fee for representation. If any fee is charged, it will be adjudged against the party who violated the court order and may be taxed as costs of court, awarded as a judgment, or both. *Id.*

5. Due Process Issues

   Unless the judge observes every element of the contemptuous conduct, due process requires that the party accused of contempt be accorded notice and fair hearing. *In Re Oliver*, 333 U.S. 257, 275, 68 S.Ct. 499 (1948). To
meet the notice requirement, the accused must be given full and complete notification of the subject matter. The show cause order or other means of notification must state when, how, and by what means the accused has been guilty of the alleged contempt. It is acceptable to attach the motion containing such allegations to the show cause and incorporate it by reference, but if there is a mistake and the motion is not attached, then due process is violated. *Ex Parte Barlow*, 899 S.W.2d 791, 795-96 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding). Multiple offenses should be pleaded with separate counts, much like a misdemeanor complaint. *Ex Parte McNemee*, 605 S.W.2d 353, 357 (Tex. Civ. App. – El Paso 1980, orig. proceeding).

A factual hearing is required in a constructive contempt proceeding, and the movant has the burden to establish a *prima facie* case. *In Re Oliver*, 333 U.S. at 275; *Ex Parte Stephens*, 734 S.W.2d 761, 763-64 (Tex. App. – Fort Worth 1987, orig. proceeding). The respondent must be given an opportunity to be heard, with the opportunity to present evidence concerning any defenses he or she may have. The burden of proof on affirmative defenses remains on the respondent by preponderance of the evidence.

The respondent must be present at the contempt hearing. A capias for the respondent’s arrest may be issued if the motion for enforcement requests contempt, the respondent was personally served, and the respondent fails to appear. Tex. Fam. Code §157.114. The court may not hold a respondent in contempt if he fails to appear; the remedy is to issue the capias, have him arrested, and compel him to appear for the contempt hearing. However, a contemnor may waive his right to be present at trial and to confront witnesses, provided that the waiver is made knowingly, intelligently, and voluntarily. *Ex Parte Gutierrez*, 661 S.W.2d 763, 764 (Tex. App. – San Antonio 1983, orig. proceeding).

If the court issues a capias, it must also at the same time set an appearance bond or security in a reasonable amount. An appearance bond or security in the amount of $1,000 or a cash bond in the amount of $250 is presumed to be reasonable. But, a higher amount may also be set based upon factors which rebut the presumption. Tex. Fam. Code §157.101. Any bond or security paid will be forfeited in favor of child support arrearages, despite payment of the bond by a person other than the respondent. Tex. Fam. Code §157.106.

If the respondent is taken into custody and released on bond, the bond must be conditioned upon the respondent’s promise to appear in court for the contempt hearing without further service of notice. Tex. Fam. Code §157.104. If the respondent is taken into custody and not released on bond, the respondent must be taken in front of the court that issued the capias on or before the first working day after the arrest. Tex. Fam. Code §157.105(a). If the court is not satisfied that the respondent’s appearance in court at the contempt hearing can be assured by any means other than remaining in custody, the contempt hearing must be held as soon as practicable, but not later than the fifth day after the date the respondent is taken into custody. Tex. Fam. Code §157.105(c). The respondent and his attorney may waive the right to the accelerated hearing.

If incarceration is a possible result of the contempt proceedings, the court must inform a *pro se* respondent of his right to counsel and must inform an indigent respondent of the right to a court-appointed attorney. Tex. Fam. Code §157.163(b).

There is usually no right to a jury trial in contempt proceedings, since the jury trial requirements in the Sixth Amendment to the United States Constitution apply only to instances of criminal contempt where the offense is classified as “serious”. *Muniz v. Hoffman*, 422 U.S. 454, 475-476, 95 S.Ct. 2178 (1975); *Ex Parte Weblund*, 536 S.W.2d 542, 546-47 (Tex. 1976). Further, there is no right to a jury trial in civil contempt proceedings. *Ex Parte Johns*, 807 S.W.2d 768, 772 (Tex. App. – Dallas 1991, orig. proceeding).

In Texas, if the movant requests more than 180 days in jail and/or more than a $500.00 fine, that rises to the level of a “serious sentence” in which the respondent can request a jury trial. *Ex Parte Sproul*, 815 S.W.2d 250 (Tex. 1991); *In Re Baker*, 99 S.W.3d 230 (Tex. App. Eastland—2003, no pet.) If the punishment imposed for criminal contempt may not exceed six months, the charge is not considered “serious”. *Ex Parte Papageorgiou*, 685 S.W.2d 776, 779-780 (Tex. App. – Houston [1st Dist.] 1985, orig. proceeding).

In cases where an individual is charged with multiple counts of criminal contempt, if the punishment is requested to run concurrently, then no jury trial is required. *Id.* However, if the punishment is requested to be consecutive – where the time served will exceed six months in total – then the right to a jury trial is afforded. *Ex Parte Sproul*, 815 S.W.2d 250 (Tex. 1991). It is a violation of the Sixth Amendment for the court to refuse a jury trial and then impose a jail sentence of longer than six months. *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-517, 94 S.Ct. 2687 (1974).

There must be both a written contempt order and a written commitment order to hold a contemnor in jail. There is no specific form for a commitment order. It must be a written order containing a directive to place and detain a person in jail. *Ex Parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980). It should be directed to a sheriff or other officer charged with imprisonment and order them to

6. **Defenses to Contempt**
   
   **Impossibility of Performance.** If it is not within the contemnor’s power to perform the act that will obtain the contemnor’s release, the court may not order civil contempt. *Ex Parte Dustman*, 538 S.W.2d 409, 410 (Tex. 1976). This defense includes impossibility to deliver a child pursuant to a possession order and inability to pay child support.

   **Actual Support of a Child.** It is an affirmative defense to a child support enforcement action that the obligor provided actual support to the child. Tex. Fam. Code §157.008(a). The obligor’s expenses of providing actual support to the child may be asserted as an offset against the child support claim. However, this defense is only available if the managing conservator has voluntarily relinquished actual possession and control of the child for times in excess of any court-ordered possession periods. Tex. Fam. Code §157.008(b).

   **Voluntary Relinquishment of a Child.** The respondent may plead as an affirmative defense to a contempt order for failure to comply with an order for possession and access to a child that the movant voluntarily relinquished actual possession and control of the child. The voluntary relinquishment must have been for the time encompassed by the court-ordered periods during which the respondent is alleged to have interfered. Tex. Fam. Code §157.007.

7. **Attacking a Contempt Order.**

   An order granting a motion for contempt is not appealable through regular appellate procedures. *McCoy v. McCoy*, 908 S.W.2d 42, 43 (Tex. App. – Houston [1st Dist.] 1995, no writ). The only review by an appellate court available to a contemnor is by a petition for writ of habeas corpus. *Smith v. Holder*, 756 S.W.2d 9, 10-11 (Tex. App. – El Paso 1988, no writ). The habeas jurisdiction is limited to situations where a person is restrained in his liberty, and may include probation if the terms of probation include some type of tangible restraint of liberty. *Ex Parte Urbanowicz*, 653 S.W.2d 355, 355-56 (Tex. App. – San Antonio 1983, orig. proceeding); *Ex Parte Hughey*, 932 S.W.2d 308, 310 (Tex. App. – Tyler 1996, orig. proceeding). The usual procedure is to bring the writ of habeas corpus in the court of appeals. However, the Texas Supreme Court and the Court of Criminal Appeals have concurrent jurisdiction with the courts of appeals in habeas matters. As a practical matter, though, the Court of Criminal Appeals will defer habeas to a court of appeals or the Texas Supreme Court in conservatorship matters.

   The only ground for relief in a habeas corpus hearing is that the judgement of contempt is void. Some of the most common reasons for declaring a judgment void include lack of jurisdiction, inadequate notice, impossibility of performance, opportunity to obtain counsel, or failure of the contempt order to comply with statutory or common-law requirements. Failure to admonish an obligor/defendant of his right to counsel, right to a jury trial, or right against self-incrimination constitute violations of the obligor/defendant’s due process rights, requiring granting of writ of habeas corpus. *See In re Baker*, 99 S.W.3d 230 (Tex. App. – Eastland 2003, orig. proceedings); *In re Ohiri*, 95 S.W.3d 413, 2002 WL 31521380 (Tex. App. – Houston [1st Dist.] 2002 orig. proceeding). If the order is erroneous rather than void, the court of appeals may reform the erroneous order instead of releasing the relator. *Ex Parte Balderas*, 804 S.W.2d 261, 263–64 (Tex. App. – Houston [1st Dist.] 1991, orig. proceeding).

**B. Clarification Orders**

A party may bring an action for the clarification of a vague or ambiguous provision in a final judgment. This is not considered a collateral attack on the judgment because a court retains continuing jurisdiction to clarify an ambiguous provision of its decree.

A clarifying order may be issued at the request of a party or on the court’s own motion, and may be made before or simultaneously with a motion for contempt. A court may not alter the substantive order, but may only specify more precisely the manner of effecting the order. So, a clarification order is not effective to correct an inequitable order. A reasonable time must be provided for compliance with a clarified order before it may be enforced by contempt or in any other manner. A clarifying order may not be retroactive.

**CHECKLIST FOR CLARIFICATION SUIT:**

- Allege domicile and date of divorce
- Attach decree or previous order
- Allege Respondent is aware of terms of decree
- Quote portion of decree to be clarified
- Set forth how the order needs to be clarified
- Request attorneys fees and costs
III. PROPERTY AWARDS

The methods for enforcing a property award by a divorce or annulment decree are those provided for civil judgments and contracts generally, as well as those set forth in the Texas Family Code for the enforcement of property awards.

A. Suit to Enforce Award

A court that renders a decree of divorce or annulment retains the power to enforce the property division made by the court. Tex. Fam. Code §9.002. A suit to enforce a court order or portion of a decree of divorce or annulment that provides for a division of property may be filed by any party affected by the decree, and must be filed in the court that rendered the decree. Tex. Fam. Code §9.001(a).

This remedy does not apply to property that existed when the decree was rendered but that was not divided. Such property is held by the spouses as tenants-in-common and a suit for partition of such is governed by other procedures.

Orders enforcing the division of property are limited to orders that assist in the implementation of or clarification of the prior order. Tex. Fam. Code §9.006(a). As long as the substantive division of property is not altered, the court may specify more precisely the manner of effecting the property division. Tex. Fam. Code §9.006(b). An order that amends, modifies, or changes the substantive division of property made or approved in a final decree of divorce or annulment is beyond the court’s power and is unenforceable. Tex. Fam. Code §9.007(b).

When the property division in a suit for divorce or annulment includes a specific award of property to one party, the court may order delivery of the specific property awarded, including an award of an existing sum of money or its equivalent. Tex. Fam. Code §9.009. For example, the Dallas Court of Appeals upheld a trial court’s order requiring an ex-husband to deliver gold coins to an ex-wife and provided that if the ex-husband failed to deliver the coins by a certain date, the court would award judgment in favor of ex-wife for value of items not delivered. Reynolds v. Reynolds, 860 S.W.2d 568, 570 (Tex. App. – Dallas, 1993, writ denied).

If a party fails to comply with the orders concerning division in a decree of divorce or annulment, and delivery of the property awarded by the decree is no longer an adequate remedy, the court may enter a money judgment for any damages caused by the party’s failure to comply. Tex. Fam. Code §9.010(a). This remedy is in addition to all other remedies provided by law and may be enforced by any means available for enforcement of a judgment on a debt. Tex. Fam. Code §9.010(c).

1. Contempt

In order to enforce a property award by contempt, the order must be an order to do something specific, not just an award of property. An award of property is not sufficient to sustain an order holding a party in contempt. See In Re Hill, 611 S.W.2d 457, 458 (Tex. Civ. App. – Dallas 1980, orig. proceeding). However, an order for delivery of specific property or an award of a right to future property may be enforced by contempt. Tex. Fam. Code §9.012(a).

If the decree contains an order to pay a sum of money, the decree must state when, to whom, and where the payment must be made. Squires v. Squires, 673 S.W.2d 681, 684 (Tex. App. – Corpus Christi 1984, no writ).

Provided that the court has acquired personal jurisdiction over the former spouse, an order to deliver or transfer tangible or intangible property may be enforced by a contempt proceeding. Ex Parte Limoges, 526 S.W.2d 707, 709 (Tex. Civ. App. – Austin 1975, orig. proceeding). An award of a sum of money in a decree of divorce or annulment, payable in a lump sum or in future installment payments in the nature of a debt, is enforceable by contempt if the fund either (1) was in existence at the time of the decree, or (2) constitutes an award of the right to receive installment payments or a lump sum payment due on the maturation of an existing vested or nonvested right to be paid in the future. Tex. Fam. Code §9.012(b).

This would not be imprisonment for a debt within the meaning of Article One, Section 18 of the Texas Constitution. Ex Parte Sutherland, 526 S.W.2d 536, 539 (Tex. 1975); see Tex. Const. Art. 1 §18.

For example, where a husband refuses to execute a form authorizing the U.S. Air Force to pay benefits to wife, contempt is a proper remedy. Patrick v. Patrick, 728 S.W.2d 864, 866 (Tex. App. – Fort Worth 1987, writ ref’d n.r.e.).

An order to pay a money judgment in installments, when neither the funds nor the right to receive the funds were in existence at the time of the decree, has been held not to be enforceable by contempt proceedings, because enforcement of the type of order by contempt would constitute imprisonment for debt. Ex parte Neff, 542 S.W.2d 268, 269-70 (Tex. Civ. App. – Fort Worth 1976, orig. proceeding).

2. Clarification Order

A property award which is vague or ambiguous may be subject to an order clarifying the award. Although a court, through a clarifying order, may specify more precisely the manner of effecting a property division, the order may not attempt to alter or change the substantive division of property. Tex. Fam. Code §§9.006(b),
For example, a decree dividing military retirement benefits without specifying whether “benefits” meant gross or net benefits was clarified as referring to gross benefits. Dechon v. Dechon, 909 S.W.2d 950, 956-959 (Tex. App. – El Paso 1995, no writ).

According to the El Paso Court of Appeals, clarification requires a finding, express or implied, that the original form of the division of property lacks sufficient specificity to be enforced by contempt. Burke v. Burke, 2004 WL 803764 (Tex. App. – El Paso, 2004).

The Texarkana Court held an order that is impossible to enforce by contempt cannot be clarified. In the Matter of the Marriage of Alford, 40 S.W.3d 187 (Tex. App. – Texarkana 2001, no pet.). This same opinion also determined that no hearing is necessary on a motion for clarification, since a court can order a clarification on its own motion. Id.

3. Statute of Limitations

A suit to enforce a property award regarding division of tangible personal property that existed at the time of the decree must be filed within two years after the decree was signed or becomes final after appeal. Tex. Fam. Code §9.003(a). A suit to enforce a division of future property that was not in existence at the time of the decree must be filed within two years after the right to the property matures or accrues, or within two years after the decree becomes final, whichever is later. Tex. Fam. Code §9.003(b).

It is unclear whether the two-year statute of limitation for suit to enforce applies to all the methods of enforcement under Family Code sections 9.001-9.012, such as orders requiring delivery of specific property awarded, a money judgment for the amount of unpaid payments, including future retirement benefits, to which a party is entitled, and contempt. Some courts of appeals have stated that the two-year statute of limitations applies to all the enforcement remedies. See Dechon, 909 S.W.2d at 960-61; Morales v. Morales, 195 S.W.3d 188, 192 (Tex. App. – San Antonio 2006, pet. denied). However, other courts of appeals have held that it does not apply. See Jenkins v. Jenkins, 991 S.W.2d 440, 446 (Tex. App. – Fort Worth 1999, pet. denied); Bowden v. Knowlton, 734 S.W.2d 206, 207-08 (Tex. App. – Houston [1st dist.] 1987, no writ); Burton v. Burton, 734 S.W.2d 727, 728-29 (Tex. App. – Waco 1987, no writ).

The two-year statute of limitation applies to a court-ordered division of property made under Family Code §§7.001 and 7.002. Tex. Fam. Code §§9.002 and 9.003. It is unclear whether the two-year statute applies to an agreement incident to a divorce. One court has held that the statute applies if the agreement was approved by the court and incorporated by reference in the divorce decree. Dechon, 909 S.W.2d at 961. On the other hand, if the AID contains provisions of the court did not have ordered, such as an award of one spouse’s separate property, then one court of appeals has held that the division may not be construed as a division pursuant to §§7.001 and 7.002 and therefore the ten-year statute of limitations would apply. Pettit v. Pettit, 704 S.W.2d 921, 923-24 (Tex. App. – Houston [14th Dist.] 1986, writ ref’d n.r.e.); Tex. Civ. Prac. & Rem. Code §34.001.

There is no statute of limitations for a clarification procedure since it is a prerequisite to enforcement. However, limitations does apply to enforcement once clarification is obtained. Dechon, 909 S.W.2d at 961-962.

A trial court has continuing jurisdiction to render orders necessary to amend or correct qualified domestic relations orders in order to ensure that they are qualified and enforceable. Tex. Fam. Code §§9.101-9.104.

The Family Code provisions do not specify a time limit within which a suit to enforce a division of real property must be brought.

B. Contract Remedies

A cause of action for breach of contract may arise when one party to an AID fails to discharge the contractual obligations imposed by the agreement. See Delaney v. Davis, 81 S.W.3d 445 (Tex. App. – Houston [14th Dist.] 2002, no pet.). Even though it is incorporated into a divorce decree, a marital property agreement is treated as a contract, and its legal force and meaning are governed by the law of contracts, rather than the law of judgments. Allen v. Allen, 717 S.W.2d 311, 313 (Tex. 1986). A suit for breach of an AID is not a family law proceeding and therefore the amount in controversy must be within the jurisdictional limits of the court in which it is pending. Nix v. Nix, 797 S.W.2d 64, 65 (Tex. App. – Corpus Christi 1990, no writ).

In contrast, an AID that has been approved by the court and made a part of its judgment is no longer merely a contract; it is also the judgment of the court. Thus, it appears that contract defenses are barred as collateral attacks on the final judgment of divorce to the extent that they attack the validity of the agreement at its inception. Connor v. Bean, 630 S.W.2d 697, 699-700 (Tex. App. – Houston [1st Dist.] 1981, writ ref’d n.r.e.).

One court of appeals has held that, although contractual defenses are impermissible collateral attacks on a prior judgment when asserted to abrogate the terms and obligations of the judgment itself, contractual defenses that arise from conduct subsequent to the judgment may be raised and considered in determining the measure of damages to which the enforcing party is entitled. Spradley

C. QDROs

The court that rendered a final decree of divorce or annulment or another final order dividing property under this title retains continuing, exclusive jurisdiction to render an enforceable qualified domestic relations order or similar order permitting payment of pension, retirement plan, or other employee benefits divisible by law to an alternate payee. Tex. Fam. Code §9.101(a). This section applies to a previously divided pension, retirement plan, or other employee benefit whether the plan or benefit is private, state or federal.

Any party to the previous decree may petition the court for a QDRO. A petition under this procedure is an original suit under the Texas Rules of Civil Procedure, and each party whose rights may be affected by the petition is entitled to receive notice by citation.

The procedures under this section may be invoked whether the court failed to render a QDRO or rendered a defective QDRO. Tex. Fam. Code §§9.103, 9.104.

IV. MAINTENANCE AWARDS

A. What is Maintenance?

Maintenance is defined as an award in a suit for dissolution of a marriage (including divorce, annulment, or suit to declare marriage void) of periodic payments from the future income of one spouse for the support of the other spouse. Tex. Fam. Code §8.001. The permissible occasions when a court may order periodic maintenance are contained in §8.002 of the Family Code.

B. Withholding Order

With the most recent legislative changes, the collectability of maintenance has improved. Tex. Fam. Code §8.101 et. seq. The procedures for income withholding for maintenance are based largely on the procedures for child support withholding.

Unlike child support withholding, maintenance withholding is discretionary with the court. Tex. Fam. Code §8.101(a). It is not required that the obligor be in arrears prior to the entry of a withholding order if the order is for court-ordered maintenance. Tex. Fam. Code §8.101(a).

The maintenance withholding statutes do not apply to contractual alimony or maintenance unless the agreement specifically permits withholding or the payments are not timely made. Tex. Fam. Code §8.101(b).

Under certain circumstances, a maintenance withholding order may be combined with a child support withholding order, but such order must comply with the laws regarding child support withholding and clearly state the priority of withholding as follows:

1. current child support;
2. current spousal maintenance;
3. child support arrearages; and
4. spousal maintenance arrearages.


Income withholding is also appropriate for maintenance arrearages, even if the current obligation has passed. Tex. Fam. Code §§8.102, 8.103, 8.104.

The maximum amount that may be withheld is 50% disposable earnings.

Section 8.152 sets out the requirements for the withholding order. Tex. Fam. Code §8.152. Either the obligee or obligor may request that such order be issued. Tex. Fam. Code §8.153.

C. Enforcement of Chapter 8 Maintenance

Traditional enforcement remedies are available for the enforcement of maintenance. Enforcement by contempt is available for court-ordered or agreed orders for Chapter 8 maintenance. Tex. Fam. Code §8.059. Also, a judgment can be rendered against the obligor for the past-due amounts, even in a default judgment situation. Id.

The following affirmative defenses apply to an allegation of contempt for non-payment of maintenance:

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

Id. The obligor carries the burden of proof on the affirmative defenses by a preponderance of the evidence. Id.

D. Enforcement of Contractual Alimony

Under Texas law, it has long been held that contractual alimony agreements are enforceable as contracts and governed by contract law. In re Green, 221 S.W.3d 645, 468 (Tex. 2007). Thus, the Family Code
provisions governing enforcement of Chapter 8 maintenance do not apply to contractual alimony provisions in a final decree of divorce that do not comply with Chapter 8 of the Texas Family Code. Such contractual alimony provisions are agreements to pay maintenance falling under §7.006 of the Texas Family Code. See Kee v. Kee, 307 S.W.3d 812, 816 (Tex. App. – Dallas 2010, pet. denied); Tex. Fam. Code §7.006. These agreements are enforceable as contracts or under Chapter 9 of the Texas Family Code, which does not include contempt, or garnishment of wages by income withholding. See Kee, 307 S.W.3d at 816.

1. Contempt

The 2007 Texas Supreme Court Case, In re Green, definitively precludes enforcement of contractual alimony under section 8.059 of the Texas Family Code when the statutory prerequisites for maintenance under Chapter 8 are not met. In re Green, 221 S.W.3d at 468. There, the Texas Supreme Court has held that a court order to pay spousal support is unenforceable by contempt if it merely “restates a private debt rather than a legal duty imposed by Texas law.” Id., at 646. In Green, the wife sought enforcement of the contractual spousal support provisions referenced in the divorce decree. Id. The trial court ordered the husband confined to jail until he paid the spousal support arrearage. Id. at 647.

Thus, in Green, the Supreme Court held that failure to pay a private alimony debt is not contempt punishable by incarceration. Id. “While a legal obligation of support is enforceable by contempt, the promise to pay contractual alimony creates nothing more than a debt.” Id. at 648. Although a person may contract to support his spouse, that obligation, to the extent it exceeds the statutory requirements for spousal maintenance, is a debt for purposes of the state constitutional prohibition of imprisonment for failure to comply with a court order to pay a debt. Id., at 645; see also In re Dupree, 118 S.W.3d 911, 914 (Tex. App. – Dallas, 2003 orig. proceeding).

2. Income Withholding

In 2010, the Dallas Court of Appeals opinion, Kee v. Kee, extended the prohibition against the enforcement of contractual alimony by Chapter 8 enforcement remedies to income withholding. Kee, 307 S.W.3d at 816. While Chapter 8 provides for enforcement of a statutory maintenance obligation by income withholding, the decree at issue in Kee failed to set forth any of the criteria of chapter eight and failed to follow that chapter's guidelines with respect to the amount of support and the duration of the support payments. Id. at 815-16.

Thus, in Kee, the spousal support provision in the divorce decree fell outside of chapter eight and did not create a legal duty under chapter eight on the part of Husband to support Wife. Id. at 816. As in Green, in Dallas Court of Appeals held that the alimony provision in Kee was nothing more than a debt. Husband did not have a legal duty under Chapter Eight of the Family Code to support Wife. Id. The parties’ Agreement did not provide for enforcement by income withholding. Accordingly, such remedy is not available to Wife.

To preserve the availability of Chapter 8 enforcement remedies, the decree must establish satisfaction of all statutory requirements for spousal maintenance under Chapter 8 of the Texas Family Code, including the statutory limitation on amount and duration, and findings related to a party’s disability if applicable. In re Green, 221 S.W.3d at 468; see also Kee, 307 S.W.3d at 814. Like other judgments, courts are to construe divorce decrees as a whole toward the end of harmonizing and giving effect to all that is written. McCollough v. McCollough, 212 S.W.3d 638, 648 (Tex. App.-Austin 2006, no pet.) (Chapter eight does not apply to an alimony provision in a divorce decree that restates a parties’ contractual agreement for alimony) (citing Wilde v. Murchie, 949 S.W.2d 331, 332 (Tex. 1997).

V. POSSESSION AWARDS

An order for possession of or access to a child is enforceable by contempt proceedings as with other court orders. However, the Family Code provides for habeas corpus proceedings where a child is possessed by an unauthorized person. The Family Code in Chapter 42 allows for civil liability for interference with child custody. Traditional criminal remedies for kidnapping are also available.

Typically there are no contractual remedies available when dealing with possession of or access to a child.

A. Contempt

A managing conservator has a duty to refrain from overtly or covertly seeking to impede another conservator from taking possession of a child for court-ordered access. A court may enforce by contempt a final order for possession of and access to a child. Tex. Fam. Code §157.001(b).

There is an unclear distinction between compliance and contempt based upon active versus passive behavior. If a primary conservator encourages a child to resist possession or takes steps to prevent possession from occurring, this would be considered active conduct and is punishable by contempt under any theory. However, consider the situation where a primary conservator fails to insist that the child comply with the possession order. One
court of appeals would consider this not enforceable by contempt. *Ex parte Morgan*, 886 S.W.2d 829, 831 (Tex. App. – Amarillo 1994, orig. proceeding). However, the 14th Court of Appeals disagrees and has held that such passivity would fall into the category of impeding the visitation and punishable by contempt. *Ex parte Rosser*, 899 S.W.2d 382, 386 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding).

A court may enforce a possession order as long as an action is filed within six months after the child becomes an adult or after the date the order providing for possession terminates. Tex. Fam. Code §157.004.

The requirements of contempt proceedings generally likewise applies to contempt proceedings for possession of and access to a child.

### B. Habeas Corpus

A writ of habeas corpus may be brought against any person or entity not entitled to present possession of a child under color of law.

Note that a habeas corpus proceeding is not considered a SAPCR proceeding, but may look to the provisions for SAPCRs for definitions and procedures as appropriate. Tex. Fam. Code §157.371(b). The family code venue provisions do not apply, so look to the civil rules for venue provisions.

**CHECKLIST FOR PETITION FOR WRIT OF HABEAS CORPUS:**

- ✓ Name and address of parties
- ✓ Venue facts
- ✓ Allege child is being illegally withheld
- ✓ Allege location of child
- ✓ Reference court order and attach copy
- ✓ Request child be returned

1. Possession pursuant to court order.

Possession of a child may also be enforced through habeas corpus procedures. Where a party is entitled to present possession of a child under a valid court order, a court shall enforce such court order via habeas corpus. Tex. Fam. Code §157.372. This type of proceeding is subject to the requirements of the UCCJEA and the PKPA. Mere proof of a valid court-order should be sufficient to require the writ to issue. *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981).

2. Possession when there is no court order

A parent is entitled to possession of a child and habeas corpus relief against a non-parent, where there has been no court order adjudicating possession and no SAPCR has been filed. Tex. Fam. Code §157.376(a). A court may not use a habeas proceeding to adjudicate possession rights, but merely acts in its ministerial duty to compel the child’s return. Tex. Fam. Code §157.376(b).

3. Evidence

A relator may not use his or her Fifth Amendment right not to give incriminating testimony as a justification for refusing to produce a child when ordered to do so, even though production of the child is evidence that the relator is in contempt of a custody decree. *Baltimore Soc. Serv. V. Bouknight*, 493 U.S. 549, 555, 110 S.Ct. 900 (1990).

A writ of habeas corpus may be based upon either a temporary or final order. *Mergerson v. Daggett*, 644 S.W.2d 451, 452 (Tex. 1982). Further, habeas may be based on either an original adjudication or a modification order. *Elliott v. Bradshaw*, 587 S.W.2d 108 (Tex. 1978).

4. Possessory conservator relief

An order appointing a possessory conservator may be sufficient to entitle him or her to habeas relief if:

- (1) the possessory conservator is a parent;
- (2) the managing conservator is temporarily prevented from having possession (e.g., due to incarceration or death of the managing conservator); and
- (3) under the terms of the order, possession of the child by the possessory conservator is unsupervised.


5. Serious and Immediate Question regarding welfare of child

If there is a serious and immediate question concerning the welfare of a child, the court considering a petition for writ of habeas corpus to recover possession of a child may issue any appropriate temporary order. Tex. Fam. Code §157.374. However, this provision is applied very sparingly and is limited to emergency situations. There are many cases which define what is not an emergency under this section. The possibility that the custodial parent would take the children to another country does not present a serious and immediate danger to the children. *Wise v. Yates*, 639 S.W.2d 460 (Tex. 1982); *Milner v. Kilgore*, 718 S.W.2d 759, 762 (Tex. App. – Beaumont 1986).

The mere fact that the child does not want to return to the custody of the person awarded custody by the court decree does not, in and of itself, present a serious and immediate question concerning the child’s welfare. *Strobel v. Thurman*, 565 S.W.2d 238, 240 (Tex. App. – Austin 1978); *Lundell v. Clawson*, 697 S.W.2d 836, 840 (Tex. App. – Austin 1985, orig. proceeding).

When a judge refuses to grant a habeas application based upon a serious and immediate question, there must be admissible evidence to support such finding. Inadmissible hearsay statements reporting sexual abuse and evidence of conduct occurring prior to the entry of the previous order are not sufficient to support such a finding. *Rosendorf v. Blackmon*, 800 S.W.2d 377, 380 (Tex. App. – Corpus Christi 1990, orig. proceeding). Further, the judge’s finding of a serious and immediate question regarding the child’s welfare must be contained in a written order. *Whatley v. Bacon*, 649 S.W.2d 297, 299 (Tex. 1983); *M.R.J. v. Vick*, 753 S.W.2d 526, 529 (Tex. App. – Fort Worth 1988, orig. proceeding).

6. Contesting right to possession

A habeas writ may not be entered if the court finds that the previous order was granted by a court that did not give the contestants reasonable notice of the proceedings and an opportunity to be heard. Tex. Fam. Code §157.372(b). In addition, the validity of the order that is the subject of the habeas corpus proceeding may be challenged by an attack on the jurisdiction of the court that rendered the order. *Gunter v. Gunther*, 478 S.W.2d 821, 826 (Tex. Civ. App. – Houston [14th Dist.] 1972, writ ref’d n.r.e.).

If the relator has by consent or acquiescence relinquished possession and control of the child for at least six months immediately preceding the filing of the petition for the writ, the court may compel or refuse to compel return of the child. Tex. Fam. Code §157.373(a). The court may disregard brief periods of possession and control by the relator during these six months. Tex. Fam. Code §157.373(b).

7. Procedures

A habeas proceeding should be brought in district court. It may either be brought in the court of continuing, exclusive jurisdiction or a court with jurisdiction to issue a writ in the county where the child is found. Tex. Fam. Code §157.371(a). A relator attempting to enforce a foreign custody order may file a petition in any district court in Texas. Tex. Fam. Code §152.015(a).

When a relator is in Texas for the sole purpose of compelling the return of a child through a habeas corpus proceedings, the relator is not amenable to civil process and is not subject to the jurisdiction of any civil court except the one in which the writ is pending for the purpose of prosecuting the writ. Tex. Fam. Code §157.375(a). A request for attorneys fees, costs, or travel expenses is not a waiver of this immunity from process. Tex. Fam. Code §157.375(b).

Upon presentation of a court order entitling the petitioner to present possession of the child, the party is entitled to an *instanter* order compelling immediate possession. *Grimes v. Flores*, 717 S.W.2d at 957.

8. Review of Grant or Denial of Habeas Corpus

The granting or denial of a petition for writ of habeas corpus is not subject to appeal. *Gray v. Rankin*, 594 S.W.2d 409 (Tex. 1980). Even if it is clearly erroneous, mandamus is the only appropriate remedy. *Zeissig v. Zeissig*, 600 S.W.2d 353, 357 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ). However, an order awarding attorney’s fees and costs in a habeas proceeding may be subject to direct appeal. *Miericke v. Lemoine*, 786 S.W.2d 810, 811 (Tex. App. – Dallas 1990, no writ).

Since the Texas Supreme Court and the courts of appeals have concurrent jurisdiction over writs of mandamus, the petition must be first presented to the appropriate court of appeals. Tex. R. App. P. 52.3(e).

Since a mandamus proceeding is a request for equitable relief, the petitioner must show that it has no adequate remedy at law. *Broyles v. Ashworth*, 782 S.W.2d 31, 34 (Tex. App. – Fort Worth 1989, orig. proceeding). The reviewing court will only grant the mandamus petition if the trial court committed a clear abuse of discretion that was so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *M.R.J. v. Vick*, 753 S.W.2d at 528.

C. Civil Liability

A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a court order may be liable for damages to the person who is denied a possessory interest in the child. Tex. Fam. Code §42.002(a). Each person who aids or assists in such conduct may be held jointly and severally liable for conduct and is not subject to the jurisdiction of any civil court except the one in which the writ is pending for the purpose of prosecuting the writ. Tex. Fam. Code §157.375(a). A request for attorneys fees, costs, or travel expenses is not a waiver of this immunity from process. Tex. Fam. Code §157.375(b).

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reasonable cause to believe the child was the subject of a court order and his or her actions were likely to violate the order. Tex. Fam. Code §42.003(b).

For example, a paternal grandmother could be held liable for aiding and assisting in interference with child custody because she knew the father was in violation of court order but concealed her knowledge of the location of the father and abducted children. *Weirich v. Weirich*, 833 S.W.2d 942, 945-46 (Tex. 1992). Evidence of the grandmother’s presence and participation in court hearings concerning violation of court orders showed that she had actual notice of orders being violated. *Id.*

Previously there were notice requirements that the plaintiff must have followed prior to filing suit, but those were repealed effective September 1, 1999.

This suit for damages may be filed in any county where the plaintiff or defendant resides, in any county where a SAPCR may be brought regarding the child who is the subject of the court order, or in the county with continuing, exclusive jurisdiction over the child. Tex. Fam. Code §42.005.

The defendant may plead as an affirmative defense that the person violated the order with the express consent of the plaintiff. Tex. Fam. Code §42.007. Previously, one could raise an affirmative defense that after receiving notice of an alleged violation, the defendant promptly and fully complied with the order; however, that affirmative defense was eliminated effective September 1, 1999.

A successful plaintiff under this chapter may recover damages as follows:

1. The actual costs and expenses incurred, including attorney’s fees, in locating a child who is the subject of the order, recovering possession of the child if the plaintiff is entitled to possession, and enforcing the order and prosecuting the suit; and
2. Mental suffering and anguish incurred by the plaintiff because of a violation of the order.

Tex. Fam. Code §42.006(a). Exemplary damages may be awarded if the person liable acted with malice or with an intent to cause harm to the plaintiff. Tex. Fam. Code §42.006(b).

On the other hand, a person who brings suit under this chapter frivolously may be liable to the defendant for attorney’s fees and costs. Tex. Fam. Code §42.009.

This civil remedy is in addition to any other civil or criminal remedy available, and does not affect the right of any person to represent the child is a suit filed on behalf of the child. Tex. Fam. Code §42.008.

This civil remedy was created by statute effective September 1, 1983. However, cases arising prior to that date would fall under section 700 of the Second Restatement of Torts, which provides that one who knowingly abducts a minor child from a parent legally entitled to its custody is subject to liability to the parent. *Silcott v. Oglesby*, 721 S.W.2d 290, 293 (Tex. 1986).

The two-year statute of limitations for civil suits generally applies, subject to the discovery rule.

D. Criminal Liability

There are several potential criminal penalties for interference with child custody.

1. Interference with Child Custody

A person commits an offense if he takes or retains a child younger than 18 years when he:

1. knows that his taking or retention violates the express terms of a judgment or order of a court disposing of the child’s custody; or
2. has not been awarded custody by court order, but a suit is pending, and takes the child out of the geographic area of the judicial district of the district court where the suit is pending without permission of the court and with the intent to deprive the court of authority over the child.


A noncustodial parent commits an offense if, with the intent to interfere with the lawful custody of a child under 18, he knowingly entices or persuades the child to leave the custody of the custodial parent or person standing in the stead of the custodial parent. Tex. Pen. Code §25.03(b).

The language of this section is broad enough to include temporary custody orders, as well as modification orders. *Davis v. State*, 736 S.W.2d 217, 218 (Tex. App. – Corpus Christi 1987, no writ). Due process requires that the conservatorship order which underlies the charge have given the accused sufficient notice that his or her act would violate the order.

Few cases have dealt with prosecutions under §25.03. Typically it will be easier to pursue contempt rather than a felony charge, since both criminal and civil contempt charges may be brought in addition to the fine.

It is a defense if the person returns the child to the geographic area within three days after the date of the commission of the offense. Tex. Pen. Code §25.03( c).

Prosecution under this section is not subject to a claim based on double jeopardy if there has also been a
civil contempt proceeding regarding the same matter. *Ex Parte Jones*, 36 S.W.3d 139, 142 (Tex. App. — Houston [1st Dist.] 2000, pet. pending). However, the case distinguishes between civil and criminal contempt, implying that if the defendant had been prosecuted for criminal contempt double jeopardy could be implicated. *Id.*

2. Agreement to Abduct from Custody

A person commits an offense if the person agrees, in exchange for compensation or promise of compensation, to abduct a child under 18 by force, threat of force, misrepresentation, stealth, or unlawful entry, knowing that the child is under the care and control of a person with custody or possession per court order or under the care and control of a person with consent of the person having custody or possession under a court order. Tex. Pen. Code §25.031(a).

An offense under this section is a state jail felony.

3. Enticing a Child

A person commits an offense if, with the intent to interfere with the lawful custody of a child under 18, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of a parent or guardian. Tex. Pen. Code §25.04.

An offense under this section is a Class B misdemeanor, unless it is shown that the actor intended to commit a felony against the child, in which even an offense under this section is a felony of the third degree. Tex. Pen. Code §25.04(b).

4. Kidnapping Statutes

A person commits an offense if he intentionally or knowingly abducts another person. Tex. Pen. Code §20.03(a). Abduct means to restrain a person with the intent to prevent his liberation by either:

(1) secreting or holding him in place where he is not likely to be found; or

(2) using or threatening to use deadly force.


It is an affirmative defense to prosecution for kidnapping that:

1. the abduction was not coupled with the intent to use or to threaten to use deadly force;
2. the actor was a relative of the person abducted; and
3. the actor’s sole intent was to assume lawful control of the victim.


An offense under this section is a third degree felony. Tex. Pen. Code §20.03(c).

The defendant commits aggravated kidnapping if the defendant intends to hold the victim for ransom or reward, use him as a shield or hostage, facilitate the commission of a felony or flight after the attempt or commission of a felony, inflict bodily injury or violate or abuse the victim sexually, terrorize the victim or a third person, or interfere with the performance of any governmental or political function. Tex. Pen. Code §20.04(a). Also, a defendant commits aggravated kidnapping if he uses or exhibits a deadly weapon during the commission of the kidnapping. Tex. Pen. Code §20.04(b).

Aggravated kidnapping is a first degree felony. Tex. Pen. Code §20.04(c). However, the defendant may decrease the punishment range to a second degree felony if he proves that he voluntarily released the victim in a safe place. Tex. Pen. Code §20.04(d). The defendant must have performed some overt and affirmative act that brings home to the victim that he or she has been fully released from captivity. *Wiley v. State*, 820 S.W.2d 401 (Tex. App. – Beaumont 1991, no pet.). The release must occur in a place and manner which realistically conveys to victim that he or she is now free from captivity and is now in circumstances and surroundings wherein aid is readily available. *Id.*

5. Unlawful Restraint (a.k.a. False Imprisonment)

A person commits an offense if he intentionally or knowingly restrains another person. Tex. Pen. Code §20.02(a). It is not an offense to detain or move another when it is for the purpose of effecting a lawful arrest or detaining an individual lawfully arrested. Tex. Pen. Code §20.02(d).

It is an affirmative defense to prosecution under this section that the person restrained was a child younger than 14 years of age, the actor was a relative of the child, and the actor’s sole intent was to assume lawful control of the child. Tex. Pen. Code §20.02(b). It is also an affirmative
defense that the person restrained was a child who is at least 14 but younger than 17, the actor does not restrain the child by force, intimidation or deception, and the actor is not more than three years older than the child. Tex. Pen. Code §20.02(d).

An offense under this section is a Class A misdemeanor. Tex. Pen. Code §20.02( c). However, if the person restrained was a child younger than 17, then the offense is a state jail felony. If the actor recklessly exposes the victim to a substantial risk of serious bodily injury, then it is a felony of the third degree.

VI. CHILD SUPPORT AWARDS

Enforcement of child support awards is the subject of many, many lengthy articles unto its own. Therefore, this discussion will be merely an overview.

A. Contempt

An action for contempt for nonpayment of child support, like other contempt proceedings, is initiated by the filing of a motion for enforcement. Tex. Fam. Code §157.001(a). Under a contempt proceeding a court may not reduce or modify the amount of child support arrearages. Tex. Fam. Code §157.262(a). But, the trial court has discretion in setting the conditions under which a child support obligor may purge himself of the contempt.

A court may render a contempt order if a motion is filed within two years after the child becomes an adult or after the child support obligation terminates pursuant to the order of by operation of law. Tex. Fam. Code §157.005(a). There are numerous procedural requirements for contempt proceedings. Requirements for service of notice, procedures to ensure the alleged contemnor’s presence at the hearing, and procedures for the appointment and payment of contemnor’s counsel when incarceration is possible apply to child support contempt actions.

There is no double jeopardy bar based upon a previous conviction of criminal nonsupport and pursuit of contempt remedies. The Fifth Amendment double jeopardy provision allows convictions for the same offense as long as they are by different sovereigns. A contempt proceeding, although criminal in nature, is a private matter, and is not the “same offense” as a crime prosecuted by the state. Ex parte Jackson, 911 S.W.2d 230, 231-33 (Tex. App. – Houston [14th Dist.] 1995, orig. proceeding).

A court may suspend the commitment of an obligor found to be in contempt for failure to pay child support, and instead place the obligor on probation for a period of time not to exceed five years. Tex. Fam. Code §157.211 - 157.217. A motion to revoke probation may be filed by a prosecuting attorney, the Title IV-D agency, or a person affected by the support order, but it must be verified. Tex. Fam. Code §157.214. The court may order the obligor arrested if the motion to revoke alleges a prima facie case that the obligor violated the conditions of probation. But, the obligor must be brought promptly before the court and a hearing held on the first working day after the arrest, unless the court is unavailable, in which the hearing must be held no later than the third working day after the arrest. There is no right to a jury on a motion to revoke. Tex. Fam. Code §157.215 and 157.216.

Inability to pay child support is an affirmative defense to contempt. The elements of this defense are:

1. Lack of ability to provide support in the amount ordered, and
2. Lack of property that could be sold, mortgaged, or otherwise pledged to raise needed funds; unsuccessful attempts to borrow the needed funds; and a lack of knowledge of any source from which the money could have been borrowed or otherwise legally obtained.

Tex. Fam. Code §157.008( c). This defense is available whether the contempt is civil or criminal in nature. Ex parte Dabau, 773, 777 (Tex. App. – Amarillo 1987, orig. proceeding). However, in a civil contempt proceeding, the obligor has the burden of establishing inability to pay the arrearage at the time of the hearing. Ex parte Johns, 807 S.W.2d 768, 772-73 (Tex. App. – Dallas 1991, orig. proceeding). In a proceeding for criminal contempt, the obligor must conclusively demonstrate the inability to pay at the time each payment came due. Ex parte Dabau, 732 S.W.2d at 777.

It may also be an affirmative defense to contempt for failure to pay child support that the obligor had possession of the child beyond the court-ordered possession periods and directly supported the child during that period. Tex. Fam. Code §157.008(a). If the burden is met, the obligor’s expenses of providing actual support to the child may be asserted as an offset against the claim of the obligee. Tex. Fam. Code §157.008(d). This defense is only available if the managing conservator voluntarily relinquished to the obligor actual possession and control of the child for a time period in excess of any court-ordered periods of possession. Tex. Fam. Code §157.008(b). It is not enough for the managing conservator to merely tolerate or acquiesce in the child’s change of residence – the conservator must affirmatively agree to relinquish the child. Norman v. Norman, 683 S.W.2d 548, 550-51 (Tex. App. – Fort Worth 1985), rev’d on other grounds, 692 S.W.2d 655 (Tex. 1985).
B. Withholding from Earnings

A court must order income withholding in any proceeding where periodic payments of child support are ordered, modified, or enforced. Tex. Fam. Code §158.001. Upon a showing of good cause or agreement of the parties, the court may suspend the issuance of the wage withholding order until the obligor is in arrears at least 30 days, the amount of the arrearage exceeds the amount due for a one-month period, or any other violation of the child support order. Tex. Fam. Code §158.002. For those orders which do not currently order wage withholding, any modification or enforcement action regarding the support obligation will trigger the court to issue a wage withholding order.

In addition to withholding current support, a wage withholding order must provide for withholding of arrearages, including interest due. Tex. Fam. Code §158.003(a). The additional amount to be withheld for the arrearages must be of a sufficient amount to discharge the arrearage in the least amount of time — either two years or an additional 20% added to the support. Tex. Fam. Code §158.003(b).

When current support terminates, then the court must continue to withhold sufficient amount of arrearages to discharge the arrearage within two years.

In Title IV-D cases, there is no discretion and the court must order wage withholding under all circumstances. There can be no suspension of the withholding order. Tex. Fam. Code §158.006. However, if the court finds that the schedule for discharging the arrearage would cause the obligor, obligor’s family, or children to suffer unreasonable hardship, the court may extend the payment period for a reasonable time. Tex. Fam. Code §158.007.

A withholding order may not withhold more than 50% of the obligor’s disposable earnings. Tex. Fam. Code §158.009.

An employer who receives a withholding order must begin to withhold income in accordance with the order not later than the first pay period following receipt by the employer and shall continue as long as the obligor is an employee. Tex. Fam. Code §158.202. The employer may file a motion and request a hearing on the applicability of the order to the employer not less than the 20th day after the date the order is delivered to the employer. Tex. Fam. Code §158.205. Further, an employer who withholds income must remit payment to the appropriate agency within two business days after the withholding. Tex. Fam. Code §158.203(b).

If the employer complies with the withholding order, then he cannot be held liable to the obligor for the income withheld. Tex. Fam. Code §158.206(a). However, if the employer fails to comply with the order, he may be liable to the obligee for the amount not paid in compliance with the order and to the obligor for the amount withheld and not paid plus interest, and to either party for attorneys fees. Tex. Fam. Code §158.206(b). Further, an employer who knowingly violates the law regarding withholding orders may be subject to a fine up to $200 for each occurrence where the employer fails to withhold income as ordered, or remit the withheld income within the time required. Tex. Fam. Code §158.210(a). This fine is paid to the county that remits payments to the obligee. Tex. Fam. Code §158.210(b).

An employer may not discharge or discipline an employee on the basis that he is subject to income withholding. Tex. Fam. Code §158.209(a). If an employer discharges an employee on the basis of the withholding order, the employer continues to be liable to the employee for the wages, benefits, attorneys fees, and court costs incurred in enforcing the employee’s rights. Tex. Fam. Code §158.209(b).

C. Money Judgment

A child support payment not timely made constitutes a final judgment for the amount due and owing, including interest. Tex. Fam. Code §157.261(a). When a motion for enforcement requests a money judgment for arrearages, the court must confirm the amount of arrearages and render one cumulative money judgment. Tex. Fam. Code §157.263(a). The cumulative money judgment includes the unpaid child support not previously confirmed, any balance remaining on previously confirmed arrearages; interest on the arrearages, and a statement that the judgment is cumulative. Tex. Fam. Code §157.263(b).

A money judgment for support arrearages may be enforced by any means available for enforcement of judgments for debts. Tex. Fam. Code §157.264(a). The court shall render an order requiring the obligor to make periodic payments on the judgment including by income withholding under Chapter 158 if the obligor is subject to income withholding. Id., at (b). An order rendered under subsection (b) does not preclude or limit the use of any other means for enforcement of the judgment. Id., at (c).

A court has no authority to reduce or modify the amount of arrearages in rendering an arreage judgment. Tex. Fam. Code §157.262(a).

A cumulative money judgment must include an award of interest on the arrearages. Tex. Fam. Code §157.263(b)(3). Interest begins to accrue on the date the judgment is signed. Tex. Fam. Code §157.261(b). The rate of interest applicable to child support judgments is 6%. Tex. Fam. Code §157.265. This statute applies prospectively. In the Interest of M.C.C., 187 S.W.3d 383, 385 (Tex. 2006). Under the statute, any unpaid child support payments that have not been judicially confirmed
will include 12% interest accrued through December 31, 2001. *Id.* Beginning January 1, 2002, the unpaid child support that is not judicially confirmed, including the 12% interest already accrued in debt, starts accruing any new interest at the new statutory rate of 6%. *Id.* Any unpaid child support that was judicially confirmed before January 1, 2002, will not start to accrue the 6% interest on January 1, 2002, but will accrue at the rate set at the time of the trial court’s order. *Id.*

Accrued interest is part of the child support obligation and may be collected by any means provided for the collection of child support. Tex. Fam. Code §157.267.

The court of continuing jurisdiction retains jurisdiction to confirm the total amount of child support arrearages and render judgment for past-due child support if a motion for enforcement requesting a money judgment is filed within ten years after the child becomes an adult or the date on which the child support obligation terminates under the order or by operation of law. Tex. Fam. Code §157.005(b).


Child support judgments, whether a judgment by operation of law or by court rendition, are not subject to dormancy of judgment provisions. Tex. Civ. Prac. & Rem. Code §34.001; see also *Taylor v. Speck*, 308 S.W.3d 81 (Tex. App. – San Antonio 2010, no pet.). This clarifies the dispute among the courts of appeals that previously existed.

**D. Child Support Lien**

A child support lien may arise against the real and personal property of an obligor for all amounts of overdue support either when a court having continuing jurisdiction or a Title IV-D agency determines an amount of arrearages owed by a child support obligor, or by operation of law, regardless of whether the amounts have been adjudicated or otherwise determined. Tex. Fam. Code §157.312(d).

There is no time limit for requesting a child support lien, levy, or writ of withholding to enforce child support arrearages. An administrative writ of withholding is accepted by the Texas Supreme Court as an appropriate method of securing payment of a prior court-ordered child support liability. *In the Interest of A.D.*, 73 S.W.3d 244 (Tex. 2002).

A judgment for the recovery of money owed by a child support obligor carries with it a lien that may attach to certain property of the judgment debtor. A child support lien generally has a wider reach and is more effective than liens for other money judgments.

Except for liens attaching to motor vehicles, a child support lien is perfected when an abstract of the judgment for past-due child support or a child support lien notice is filed or delivered as provided by Texas Family Code 157.314. Tex. Fam. Code §157.316(a). A lien on a motor vehicle is not perfected until the obligor provides the court with proof that the Texas Department of Motor Vehicles has issues a subsequent title disclosing on its face the fact that the vehicle is subject to a child support lien. Tex. Fam. Code §157.316(b).

A child support lien notice or an abstract of judgment may be filed in any county where the obligor owns personal or real property, county where obligor resides, county with court of continuing jurisdiction over SAPCR, court where a suit by or against the obligor or his estate is pending. Tex. Fam. Code §157.314(a), (b). In addition, the lien notice may be served on any attorney who represents the obligor in a claim that has not been filed with a court, any other individual or organization in possession of obligor’s real or personal property, or any governmental agency that issues or records indicia of property ownership. *Id.*

When perfected, a child support lien attaches to all non-homestead real property and all personal property, including claims for negligence, personal injury, or workers’ compensation. Tex. Fam. Code §157.317(a) and (b). Once perfected, the lien attaches to the title of that property, preventing the debtor from selling, mortgaging, or otherwise transferring the property. If the judgment is rendered after notice and hearing, the lien may be enforced without a foreclosure suit, by levying execution on the property and having it sold at public auction with the proceeds applied to payment of the judgment. Tex. Fam. Code §157.312(f).

A child support lien is effective until all current support and child support arrearages, including interest, have been paid or the lien is otherwise released. Tex. Fam. Code §157.318(a).
CHECKLIST FOR LIEN NOTICE
Tex. Fam. Code §157.313(a)

✓ The name and address of the person to whom the notice is being sent.
✓ The style, docket number, and identity of the court having continuing jurisdiction of the child support action.
✓ The name, address, birth date, driver’s license number, and social security number of the obligor.
✓ The name and social security number of the obligee and child.
✓ The amount of child support arrearage owed by obligor and date of rendition of court order, and date and manner arrearages determined.
✓ The rate of interest specified in the court order or the rate provided by law.
✓ The name and address of the person or agency asserting the lien.
✓ If the property is a motor vehicle, the VIN number as shown on title.
✓ Statement that the lien attaches to all nonexempt real and personal property of the obligor that is located or recorded in the state.
✓ Statement that any ordered child support not timely paid in the future constitutes a final judgment for the amount due and owing, including interest and accrues up to an amount that may not exceed the lien amount.
✓ Statement that obligor is being provided with a copy of the lien notice and that the obligor may dispute the amount by filing suit under Section 157.323.
✓ Verification.

Upon full payment of the child support due, the claimant must execute and deliver a release of lien, which is effected when filed in a county where an abstract is filed. Tex. Fam. Code §157.322(a).

The Texas Property Code exempts certain items of personal property from debt collection or attachment. Tex. Prop. Code §§42.001 & 42.002. However, that statute specifically excludes child support liens from its provisions. Tex. Prop. Code §42.005. Because child support is not a debt, but a natural and legal duty, the exclusion of child support liens from the exemptions has been determined to be constitutional. Dryden v. Dryden, 97 S.W.3d 863, 866 (Tex. App. – Corpus Christi 2003, pet. denied).

E. Federal Tax Procedures for Collecting Child Support

There are two methods available to enforce child support payments from delinquent child support obligors through federal tax collection. The first procedure allows collection of past-due child support by offsetting the support arrearages amount against a federal tax refund due to the delinquent payor. See I.R.C. §6402( c). The second method is an assessment and collection procedure where the U. S. Treasury Department is authorized to collect the certified amount of unpaid child support by levying against essentially any property of the delinquent child support obligor that would be subject to levy when collecting federal taxes. See I.R.C. §6334( c). The regulations for these two procedures may be found in the Treasury Regulations. See Treas. Reg. §301.6402-5(a)(1).

F. Obligor’s Eligibility for State Loans, Grants and Contracts

An obligor who is more than 30 days delinquent in his child support payments is not eligible to receive payments from state funds under a contract to provide property, materials, or services; or to receive a state-funded grant or loan. Tex. Fam. Code §231.006(a). This also applies to a business entity in which the obligor is a sole proprietor, partner, shareholder, or owner with an ownership interest of at least 25%. Id. The obligor remains ineligible until either all arrearages have been paid or the obligor is in compliance with a written repayment agreement or court order as to an existing delinquency. Tex. Fam. Code §231.006(b).

G. License Suspension

An order suspending a license of an obligor may be issued if the obligor meets the following criteria:

(1) Has an arrearage equal to or greater than the total support due for 90 days under a support order;
(2) Has been provided an opportunity to make payments toward the child support arrearage under a court order or agreed repayment schedule; and
(3) Has failed to comply with the repayment schedule.

Tex. Fam. Code §232.003(a)
A license is any license, certificate, registration, permit, or other authorization that: (1) is issued by a licensing authority; (2) is subject before expiration to suspension, revocation, forfeiture, or termination by the issuing licensing authority; and (3) a person must obtain to practice or engage in a particular business, occupation or profession, operate a motor vehicle, or engage in any other regulated activity where license or permit is required (hunting, fishing, or other recreational activity). Tex. Fam. Code §232.001. The Family Code contains a list of 59 licensing authorities. Tex. Fam. Code §232.002.

An obligee or child support agency may file a petition to suspend a license of an obligor who has an arrearage equal to or greater than the total support due for 90 days under a support order. Tex. Fam. Code §232.004(a). The petition shall be filed in the court of continuing jurisdiction or the Title IV-D court. Tex. Fam. Code §232.004(c).

H. Contract Remedies

To promote the amicable settlement of disputes between parties to a suit, the Texas Family Code provides for agreements concerning child support. See Tex. Fam. Code §154.124. Where an agreement regarding child support is in the child’s best interest and a court approves the agreement, the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt. Tex. Fam. Code §154.124(c). This provision does not apply if the parties’ written agreement is not set forth in the decree. Fullerton v. Holliman, 730 S.W.2d 168, 170-71, (Tex. App.– Eastland 1987, writ ref’d n.r.e.)

If the agreement specifically provides, a contractual agreement for child support is also enforceable under the law of contracts. This is true even if the agreement is incorporated into a decree or order. Contractual remedies are in addition to the other remedies provided for enforcement of judgments and court orders. When a child support agreement provides for enforcement through contractual remedies, the suit is a common law action and therefore is not subject to jurisdiction provided by the Family Code. A breach of contract suit may be brought in a court of general civil jurisdiction depending upon the amount in controversy. Adwan v. Adwan, 538 S.W.2d 192, 193-95 (Tex. Civ. App.– Dallas, 1976, no writ).

As a matter of public policy, the terms of a child support agreement may not modify the court’s power to modify the agreement as necessary to protect the child’s best interest. In re Marriage of Edwards, 804 S.W.2d 653, 655 (Tex. App.– Amarillo 1991, no writ.)

I. Criminal Sanctions

An individual commits an offense if he or she intentionally or knowingly fails to provide support for his or her child younger than 18 years of age, or for his or her child who is the subject of a court order requiring the individual to support the children. Tex. Pen. Code §25.05(a). A child includes a child born out of wedlock whose paternity has either been established in a civil suit or acknowledged by the actor. Tex. Pen. Code §25.05(b).

An offense under this section is a state jail felony. Tex. Pen. Code §25.05(f). Prosecution under this section is in addition to other civil remedies provided by law. Tex. Pen Code §25.05(e).

A conviction for criminal nonsupport may be had based upon the uncorroborated testimony of a party to the offense. Tex. Pen. Code §25.05(c).

It is an affirmative defense to prosecution under this section that the actor could not provide support for the child. Tex. Pen. Code §25.05(d). Thus, inability to pay is not an element of criminal nonsupport, but an affirmative defense upon which the defendant carries the burden of proof. Lyons v. State, 835 S.W.2d 715 (Tex. App. – Texarkana 1992, no writ).

VII. MEDICAL EXPENSE REIMBURSEMENT

Most family law decrees and orders contain standard language regarding reimbursement for medical expenses. These provisions typically lack the specificity required to be enforceable by contempt. See Slavin, 412 S.W.2d at 44. Yet, these provisions are still enforceable nonetheless and are commonly the subject of family law enforcement actions.

Commonly, the provisions of a decree governing medical reimbursement requires the party incurring the expense to submit the invoice for reimbursement within 10 days of payment, or within another time period specified in the decree. Submission of an invoice within the requisite time frame triggers the other party to reimburse the expense, usually within 10 days. Typically, failure to strictly abide by the submission requirements set forth in the decree wholly waives the right of reimbursement. In re L.L., --- S.W.3d ----, 2010 WL 5385376, at *3 (Tex. App.–San Antonio, Dec. 29, 2010, no pet. h.); In re T.J.L., 97 S.W.3d 257, 267 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (trial court did not abuse its discretion in ruling that party's failure to provide timely notice of medical bills as required by divorce decree relieved other party of obligation to pay one-half of medical expenses); see also Downer, 701 S.W.2d 238, 241-42 (Tex. 1985).

The Amarillo Court of Appeals, however, affirmed a trial court’s decision awarding mother reimbursement for uninsured medical expenses even though she failed to provide notice of the expenses to the father within ten days.
of receipt of the medical bills as required by the decree. In re A.C.B., 302 S.W.3d 560, 565 (Tex. App. – Amarillo 2009, no pet.). While the father argued that the mother's failure to provide notice as required was fatal to her request for reimbursement, the Amarillo Court of Appeals disagreed, stating: “Even if [the mother] failed to provide copies of medical bills within the 10 day deadline established by the modification order, each parent is obligated to support his or her child during the child's minority and is liable to any other person, including the other parent, who provides necessities for the child.” Id. at 565, 565 (citing Creavin v. Moloney, 773 S.W.2d 698, 702-03 (Tex. App. – Corpus Christi 1989, writ denied)). In essence, the Amarillo Court found the trial court did not abuse its discretion in ordering reimbursement because there was a legal basis for its decision, independent of the requirements in the decree.

While a party may be able to recover medical expenses as necessaries (depending on the trial court), the better practice is clear compliance with the conditions precedent to enforcement. The San Antonio Court of Appeals specifically distinguished A.C.B., providing: “Here, the parties are in a different posture on appeal because the issue is whether the trial court abused its discretion by denying the requested reimbursement rather than by allowing a reimbursement. Because the trial court chose to enforce the notice requirement contained in the decree, we cannot conclude it failed to follow guiding principles or acted in an arbitrary manner.” See e.g. L.L., 2010 WL 5385376 at *3; T.J.L., 97 S.W.3d at 267.

VIII. CONCLUSION

In conclusion, this paper was intended to be an overview and practical guide to enforcement of all types of family law orders and decrees. Enforcement proceedings are very detailed and require specific adherence to the procedural rules. In some ways, it is almost “form over substance”. Be sure to review the statutory requirements for any particular proceeding which you are pursuing.