# ENFORCING DIVORCE JUDGMENTS AND PROPERTY SETTLEMENT AGREEMENTS IN TEXAS

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## I. PLANNING THE JUDGMENT OR PROPERTY SETTLEMENT AGREEMENT WITH A VIEW TOWARD ENFORCEMENT

Successful enforcement of the divorce judgment is the result of concerted effort and planning throughout the course of litigation. Often the advocate becomes so involved with obtaining an agreement or judgment for division of assets apparently advantageous to his client that he may overlook the application of concepts directed towards enforcement of the judgment. If the attorney delays consideration of the problems of enforcement until entry of judgment, he may find that his client has been denied the fruits of the judgment and that no effective remedies are available to alleviate the situation. Because of the interaction of all phases of divorce litigation, it is incumbent upon the attorney to consider enforcement of the judgment as a concept affecting his pleading, discovery procedures, temporary court orders, and the form of judgment or settlement agreement itself. It is equally important to remember that the degree of enforceability affects the division of assets between the parties.

The following discussion is intended more as a guide for the practitioner than a scholarly critique of the cited authorities. It is specifically directed to enforcement of that portion of the decree resulting from the statutory mandate that "the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage."[1] Although enforcement of orders relating to child support, custody and visitation are excluded from the scope of this article, the subsequent discussion of the court's power to punish and coerce by contempt has universal application.

### *A. Discovery*

A prerequisite of enforceability is adequate knowledge of the assets involved. Although no two estates are alike, assets frequently encoun-

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1. TEX. FAM. CODE ANN. § 3.63 (1973).

tered are insurance policies (many with cash values), employee pension and profit sharing plans, securities, bank accounts, assets with titles registered under certificates of title acts (automobiles, recreational vehicles and boats), real property, accounts and notes receivable, proprietary business interests and some assets which because of statutory law are not subject to division (*e.g.*, railroad retirement benefits).[2] The best description of each asset should be obtained not only to avoid any uncertainty or ambiguity between the parties but also because an inadequate description could result in an inability to assert rights in assets claimed by third parties. A determination of the location of the assets and the identity of the possessor is as important as an adequate description of the assets.

Assuming proper description of assets in the judgment or settlement agreement, title and possession of many assets may be transferred by mere delivery. For other assets, however, stringent requirements are imposed by statute to effectuate a change of ownership which will be recognized by third parties. These requirements must be considered when drafting judgments and settlement agreements rather than waiting until after entry of judgment. For example, the following should be anticipated and provided for: recording requirements for conveyances of real estate or granting of liens upon real estate; certificate of title requirements in connection with transfer of title to vehicles; requirements of the business and commerce code and special requirements of transfer agents and taxing authorities relating to corporate securities; particular printed forms required by insurance companies for change of ownership, beneficiaries, replacement of lost policy or recognition of pledge or assignment of insurance policies; division or transfer of interests in employee pension and retirement plans compatible with benefits offered by the plans; and appropriate requirements of assignment required by statute for commercial paper or other evidence of indebtedness.

### *B. Temporary Orders for Protection of Property*

Once assets available for partition have been discovered, ultimate enforcement may depend upon those procedures invoked to protect the existence and availability of assets for division.

The temporary restraining order or the temporary injunction against the other spouse is the extraordinary relief most frequently sought and granted.[3] It seems to be the practice of some courts that if

2. Allen v. Allen, 363 S.W.2d 312 (Tex. Civ. App.—Houston 1962, no writ).
3. TEX. FAM. CODE ANN. §§ 3.56 and 3.58 (1973).

the spouse sought to be enjoined is self-employed, he will be enjoined only from expending funds or disposing of assets outside of the ordinary course of his business. Furthermore, no guidelines are established by the court to define expenditures in the "ordinary course of business." Because obligations under an order to be punishable by contempt cannot be left to implication or conjecture and the language imposing such burdens should be clear, specific and unequivocal,[4] it seems that better practice would call for a blanket temporary restraining order. The burden should be on the other party to show the court why a temporary restraining order should be modified if an emergency exists before the hearing date.[5] In any event, we will see that the remedy of contempt has its limitations when the asset no longer exists, and the effectiveness of a temporary restraining order and temporary injunction may be negligible.

Frequently the use of injunctions against third parties is more effective than temporary injunctive relief against the other spouse. Jurisdiction must be obtained by making that person or firm a party to the suit.[6] Typical examples are an injunction against a bank to prevent withdrawal of funds, an injunction against an employer to impound wages either currently owing or held under deferred payment arrangement and an injunction against insurance companies to prevent withdrawal of cash value from life insurance. This procedure of drying up the source is more effective than relying solely upon the sanction of injunction against the other spouse.

Receivership[7] may be required when a blanket injunction against the other spouse is appropriate if someone must be in a position to collect and pay out assets. Based on the writer's experience, a receivership is generally an unsatisfactory experience and should be used only in extreme cases.

When assets of the marital estate are in possession of a third party (*e.g.*, securities held by a broker either for safekeeping or in the broker's own name), joining the third party to the pending lawsuit is often merited not only for injunctive relief during the pendency of the action, but to facilitate transfer of assets following entry of judgment. Writs of the court used in enforcement of its judgments cannot issue against nonparties.[8]

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4. *Ex parte* Allen, 477 S.W.2d 297 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).
5. TEX. R. CIV. P. 680.
6. *See* Dyer v. Dyer, 87 S.W.2d 489 (Tex. Civ. App.—Dallas 1935, no writ).
7. TEX. REV. CIV. STAT. ANN. art. 2293 *et seq.* (1971).
8. *Ex parte* Harvill, 415 S.W.2d 174 (Tex. 1967); *ex parte* Britton, 127 Tex. 85, 92 S.W.2d 224 (1936).

The filing of a statutory lis pendens[9] prevents alienation or encumbrance of real property located within the State of Texas during the pendency of the action.

A seldom used method of safeguarding cash, securities, jewelry and other assets occupying comparable amounts of space is accomplished by requiring the delivery of such assets into the registry of the court to be delivered by the clerk in accordance with final judgment.

### C. *The Method of Enforcement as It Affects Division of Assets*

In the attorney's negotiation for settlement of the respective rights of the spouses in the marital property estate, the method available for enforcing certain obligations will naturally affect the desirability of entering the contemplated agreement. For example, if the wife relinquished her interest in existing assets for an unsecured promissory note from the husband or for an agreement calling for periodic payments as sanctioned by *Francis v. Francis*,[10] she must consider that in the event of default she will be relegated to an ordinary suit for breach of contract with the usual problems attendant in collecting a judgment. Assuming that the financial circumstances make such an agreement attractive, prudence would dictate that the wife retain a lien against assets set aside to the husband. This lien can effectively be made to encumber any asset retained by the other spouse, including homestead or other assets protected from creditors under exemption statutes. Moreover, it can be made to encumber not only as to the community interest relinquished, but also all the interest formerly owned by both parties.[11]

## II. DRAFTING

The clarity of language and accuracy of description contained in the judgment or property settlement agreement will determine whether the division of assets intended by the parties or ordered by the court has been accomplished, as well as available procedures for enforcement. The judgment must be specific to the extent that the subject matter of the decree can be determined, either from the recitals of the judgment itself or by reference to other portions of the record.[12] Better practice dictates that the subject matter be clearly determinable from the agreement or judgment itself without the necessity of resorting to other portions of

9. TEX. REV. CIV. STAT. ANN. art. 6640 *et seq.* (1969). *See also* Fannin Bank v. Blystone, 417 S.W.2d 502 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

10. 412 S.W.2d 29 (Tex. 1967).

11. Sayers v. Pyland, 161 S.W.2d 769 (Tex. 1942).

12. Brodhead v. Brodhead, 238 S.W.2d 832 (Tex. Civ. App.—Fort Worth 1951, no writ).

the record. Where there must be resort to matters outside the record for identification of property, the judgment or property settlement agreement is totally ineffectual[13] and may be subject to reversal.[14] Further, properties omitted from the judgment or settlement agreement will continue to be held by the parties as tenants in common.[15] Consequently, there can be no assumption of an award to either party, regardless of intention or present possession, when an asset is not mentioned.[16]

*Dessommes v. Dessommes*[17] illustrates the danger of awarding assets described only as being in possession of one of the parties. This recent decision involves title to the husband's retirement plan. The divorce judgment provided that each party was awarded the property in the possession of such party without specific reference or description of any asset on hand. The court of civil appeals held that possession cannot be interpreted as including intangible contract rights, and the parties were held to be tenants in common in the fund.

If the attorney has followed good practice in discovery and use of temporary orders so that the description and nature of all assets has been brought to light and the status quo maintained, the form of language contained in the settlement agreement or judgment will determine the remedies available for enforcement of the terms of such document. Absent a specific directive in the judgment requiring the spouse in possession to deliver up in proper form assets which may be awarded to the other, the receiving spouse may be relegated exclusively to the remedy of execution, regardless of the value of the assets which that spouse is to receive, and may be denied the benefits of orders requiring specific performance with sanctions of contempt for their breach.[18] Many times, more effective remedies are available, if only included in the judgment terms.

In drawing the settlement agreement, the draftsman should place no faith or reliance on ineffectual directives which probably constitute no more than surplusage or a basis for misplaced hope. How often have we observed such language as "and the parties are ordered to make all payments, deliveries and execute all notes, deeds, assignments and other instruments required to carry this agreement into full force and effect," or "each party is ordered to deliver to the other party the necessary properties, instruments, payments, evidences, etc." It is doubtful that

13. Young v. Young, 23 S.W. 83 (Tex. Civ. App. 1893, no writ).
14. Hudson v. Hudson, 217 S.W.2d 694 (Tex. Civ. App.—Fort Worth 1949, no writ).
15. Cline v. Cline, 323 S.W.2d 276 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).
16. *Ex parte* Williams, 330 S.W.2d 605 (Tex. 1960).
17. 505 S.W.2d 673 (Tex. Civ. App.—Dallas 1973, no writ).
18. *Ex parte* Prickett, 320 S.W.2d 1 (Tex. 1958).

this language creates any rights enforceable by the sanction of contempt, and therefore, it is useless.[19] Assuming that the duty imposed by the wording of the judgment is one intended to be enforced by the remedy of contempt, it is a prerequisite to invocation of the contempt power that the order be so definite, clear and precise that it informs the litigant of the acts he is to do without calling on him for inference or conclusions about which persons might well differ and without leaving anything for further hearing. For example, a provision awarding various household goods is too indefinite for performance when no further description is given and there is no identification by specific location.[20] And to reiterate, there can be no assumption that items of property not specifically mentioned were awarded to either party, thus rendering contempt unavailable for failure to deliver.[21]

If there is to be reliance solely on the judgment or property settlement agreement itself to effectuate all transfers intended, its terms must be comprehensive and take into consideration the nature of assets involved. Typical examples are transfers of title to real estate, transfer of title to chattels registered under certificate of title acts, transfer of securities, and transfer of life insurance policies. In those instances where cooperation in effectuating appropriate transfers can be relied upon, collateral documents such as special warranty deeds, deeds of trust, stock powers with signatures guaranteed, change of beneficiary and change of policy ownership forms will ordinarily be used. Otherwise, the judgment itself must contain specific directives as to such documents which are to be executed. Good practice would dictate the reproduction of the form of such document within the judgment itself or attachment of such document as an exhibit incorporated by reference within the judgment.

Much post-judgment conflict is caused by subjective requirements in settlement agreements or judgment decrees. A typical example of a subjective requirement would be an agreement calling for some future performance but omitting the time for performance.[22] In many instances, the parties may own real property, typically a home, which they agree to sell and to divide the proceeds according to a stated formula. Generally, it is agreed that one of the parties will continue to use the

19. *Ex parte* Myrick, 474 S.W.2d 767 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ). *See also ex parte* Slavin, 412 S.W.2d 43 (Tex. 1967); *Ex parte* Allen, 477 S.W.2d 297 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

20. Shaw v. Shaw, 402 S.W.2d 821 (Tex. Civ. App.—San Antonio 1966, no writ).

21. *Ex parte* Williams, 330 S.W.2d 605 (Tex. 1960).

22. *E.g.*, Dauray v. Gaylord, 402 S.W.2d 948 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); Runcie v. Runcie, 407 S.W.2d 861 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.).

asset until it is sold. In such instances, the party retaining usage may prefer to retain the asset because no definite time for sale has been stated. A similar problem results when disagreement arises over the price at which the asset is to be sold.[23] In such instances, the ability to state objective, rather than subjective, standards of sales time and sales price are dependent upon the nature of the asset and its liquidity within the market. When no time for sale is specified, the standard applied is that of a reasonable time. Subsequent litigation may result in findings that a reasonable time (*within which the sale might occur*) has not yet passed and thus open the door for further litigation. Perhaps an objective test may be written into these clauses by agreement between the parties. For example, the parties might agree to a cutoff date after which a reasonable time is conclusively presumed to have passed. This clause would establish a standard which would justify immediate appointment of a receiver after the cutoff date has passed.

If obligations are imposed upon one spouse to pay the other's tax liability generated by community income, several methods of computation are available. Assuming that the obligee has noncommunity income, is the tax on community income to be computed before taking the other income into consideration, after taking the other into consideration, or by yet some third method? The result can vary substantially and the intensity of the dispute generated is directly proportional to the variance. Therefore, the formula for establishing tax liability should be set out explicitly in the judgment or property settlement agreement.

To make contempt available for failing to deliver existing assets, the judgment should order the party in possession to deliver to the registry of the court the assets awarded to the other spouse with a directive to the district clerk to make ultimate delivery to the spouse entitled to possession.[24] Of course, the asset may not be in possession of the spouse from whom title and right of possession is divested, but may be a contractual right emanating from a third party transferable upon direction of the present holder of such right. In this case the judgment must explicitly order the spouse presently holding the contractual right to request its transfer to the other spouse. In these circumstances, the document of transfer which the surrendering spouse is ordered to sign should be reproduced within the judgment or attached as an exhibit with incorporation by reference to remove any doubt as to what the obligated party must do.[25]

23. Dauray v. Gaylord, 402 S.W.2d 948 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).
24. *Ex parte* Preston, 347 S.W.2d 938 (Tex. 1961).
25. Miguez v. Miguez, 453 S.W.2d 514 (Tex. Civ. App.—Beaumont 1970, no writ).

Finally, in drafting the judgment decree, it is important to avoid language which could keep the judgment from becoming final. An example of language having this effect would be a reservation of some power in the court to change property divisions already made or to make future division of yet unpartitioned assets.[26]

## III. PROCEDURES FOLLOWING ENTRY OF JUDGMENT

All documents of conveyance of real estate or encumbrances thereon or the judgment with partition provisions should be recorded in the deed records. If the judgment contains a money judgment in favor of one spouse, such as for the attorney's fees, that portion of the judgment should be recorded in the abstract of judgment records.[27]

Where the property settlement agreement involves a transfer of interest in contractual rights, immediate notice should be given to third-party obligors who may be involved. For example, if the agreement calls for the transfer of an insurance policy or some incident of ownership therein, notice should be given to the insurance company; or, if there is to be a transfer of the beneficiary's interest in an employee benefit plan, notice should be given to the trustees of the plan. There is no requirement that the court obtain personal jurisdiction over third parties to divide interests between the spouses, but unquestionably they must be notified of the division of interset for it to bind them. Some question may have existed as to the power of the divorce court to divest one party of his or her interest in employee benefit plans when the document controlling the plan contains a spendthrift provision prohibiting assignment of any interest or right under the plan and prohibiting creditors of the employee from reaching any interest in it. It is now well settled, however, that in the division of such assets neither the employer nor issuer of the contract right, such as an insurance company, is a necessary party because division of interest in the asset between the husband and wife is not an attempt to alter, cancel, or construe legal rights under the contract. Consequently, the two spouses are the only indispensable parties and the spendthrift clause has no application under the circumstances because no debtor-creditor relationship exists between the spouses.[28]

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26. Henderson v. Henderson, 425 S.W.2d 363 (Tex. Civ. App.—San Antonio 1968, writ dism'd).

27. TEX. REV. CIV. STAT. ANN. art. 6635 (1969).

28. Aetna Life Ins. Co. v. Creel, 390 S.W.2d 522 (Tex. Civ. App.—Houston 1965, writ ref'd).

## IV. ENFORCEMENT AND THE CONTEMPT POWER

### *A. Enforcement by Contempt*

Generally, the remedies of punitive and coercive contempt are the most effective methods of enforcement. Their availability depends upon the nature of the right sought to be enforced as well as upon the provisions within the judgment itself. The contempt remedies are available to enforce only those portions of a judgment calling for delivery of assets or transfer of title to assets presently in existence, or for execution of documents effectuating the transfer of property or contract rights presently in existence. The Texas Supreme Court has firmly established the concept that a spouse holding some portion of the marital estate pending final disposition of divorce litigation constructively holds the asset as trustee. Because courts have traditionally possessed the power to require that a trustee deliver the trust corpus in his possession under penalty of contempt, the supreme court in *Ex parte Preston*[29] held that the spouse holding marital property may be specifically compelled to deliver it in accordance with provisions of the judgment under penalty of contempt.[30] In that case, the final judgment ordered the husband to pay into the registry of the court certain sums found by the court to be in his possession. He refused to do so and contended that the court had no power to punish the refusal by contempt. The supreme court struck down that contention. The court held that the trial court has the power to order money and other assets paid into the registry of the court and that an award of existing assets to the wife does not create a debt when the husband is ordered to pay them into the registry of the court. Rather, the husband holds community assets as a constructive trustee, and the trial court has the power to hold a trustee in contempt for failure to comply with an order to pay funds over to the one rightfully entitled to them. Therefore, the trial court has the power to hold the husband in contempt for failure to comply with the order to pay.[31] It would seem that the same result should obtain even if the husband had been ordered to pay the money directly to the wife. But dictum in a later supreme court case, *Ex parte Yates*,[32] indicates that the result in *Preston* is limited to the situation where the husband is ordered to make delivery to the registry of the court rather than directly to the wife.[33]

29. 347 S.W.2d 938 (Tex. 1961).
30. *Id.* at 940-41.
31. *Id.*
32. 387 S.W.2d 377 (Tex. 1965).
33. *Id.* at 379-80.

Even if the asset partitioned is presently in existence, a refusal to deliver it may not be susceptible to enforcement by the remedy of contempt unless a specific directive is contained in the judgment requiring delivery of the asset. In *Ex parte Prickett*,[34] the issue concerned a divorce judgment which awarded marketable securities of undoubted value to the wife. The securities were in the husband's possession and he refused to deliver. Apparently, the judgment contained no specific directive requiring the transfer and delivery of such securities into the registry of the court. The wife sought specific performance under the provisions of procedure rule 308 under which the court may specifically enforce delivery of assets of "especial value" through the penalty of contempt.[35] Although the securities were of great value, the supreme court held that they were readily purchasable upon the stockmarket and, therefore, had no "especial value." Specific performance under the penalty of contempt was denied, and the wife had to resort to the use of ordinary execution.[36]

Though the holding of the case is not squarely in point, dictum in *Ex parte Elmore*[37] enforces the holding in *Ex parte Prickett* that specific enforcement of judgment is not afforded by rule 308 except in limited instances not necessarily controlled by the pecuniary value of the asset in issue. Inferentially, this emphasizes the necessity of placing an order specifically requiring delivery within the judgment itself.

Inasmuch as contempt is reserved for enforcement of an order to deliver presently existing assets, it is clearly unavailable to enforce the breach of an obligation by one spouse to pay funds or deliver assets not presently existing. In *Ex parte Yates*, the wife was awarded a promissory note which had been made by a third party and was in possession of the husband. The husband, however, was granted an option to redeem the note by making specified periodic payments. In fact, the husband pledged the note in violation of a temporary injunction. Rather than seeking to hold the husband in contempt for failing to make delivery of the note as required by the judgment, the wife sought to hold him in contempt for failure to make the periodic payments. The court held that the husband could not be in contempt for failing to make payments of money not specifically awarded to the wife, nor in existence at the time of the divorce, because they simply constituted sums to be earned in the future. The court implied that contempt would have been available for

34. 320 S.W.2d 1 (Tex. 1958).
35. TEX. R. CIV. P. 308.
36. 320 S.W.2d at 3.
37. 342 S.W.2d 558 (Tex. 1961).

the failure to deliver if the judgment had required the husband to deliver the promissory note to the district clerk.[38]

Frequently, a party, either by terms of the judgment or by joint agreement is obligated for payment of outstanding debts, taxes, attorneys' fees and the like, but with no provision for payment out of any fund presently in existence. Such obligations are not enforceable by contempt, and any provision of a judgment purporting to give the remedy of contempt for enforcement is void.[39] Presumably, if the other spouse suffered some loss as a result of the failure by the spouse upon whom such burdens were imposed the only available remedy would be a suit for damages. Because enforcement of such obligations might be cumbersome and ineffectual, a spouse who might be affected by the failure of the other party to perform would be well advised to retain some lien upon assets awarded to the other party to secure performance of the obligation.

In these times, many individuals are receiving or may become entitled to receive military retirement pay, and a portion of it may be awarded to the other spouse. Unfortunately, there is no effective way to require governmental disbursing agencies to divide payments, and regardless of division by the divorce court, all payments will be made to the person in whose name such benefits were earned. Consequently, the attorney is faced with creating an effective method of channeling these funds in accordance with the judgment. In *Hamborsky v. Hamborsky*,[40] the trial court ordered the husband to pay to the wife $100 out of each of his military retirement checks not later than five days following receipt. The husband failed to comply and the wife sought to invoke contempt. The trial court found no contempt, (a nonappealable order), and so the wife's appeal was dismissed. The court of civil appeals reserved judgment on whether a husband could be held in contempt under these circumstances. A method which might possibly insure a contempt remedy in these cases would be to draft a judgment providing findings and conclusions purporting to make the recipient of such funds a trustee of that portion of the payment which should be delivered. If the recipient is considered a trustee, he may then be subject to the contempt power under the holding in *Ex Parte Preston*.[41]

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38. 387 S.W.2d at 379-80.

39. *Ex parte* Jones, 358 S.W.2d 730 (Tex. 1962); *Ex parte* Duncan, 462 S.W.2d 336 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); McCauley v. McCauley, 374 S.W.2d 719 (Tex. Civ. App.—Waco 1963, writ dism'd).

40. 497 S.W.2d 405 (Tex. Civ. App.—San Antonio 1973, no writ).

41. See text accompanying notes 29 & 30 *supra*.

### B. *Provisions Not Enforceable by Contempt*

Provisions calling for payments in the future from nonexistent or unspecified funds, delivery of assets not presently in existence, payment of debts from nonexistent or unspecified funds and comparable obligations are said to be contractual in nature. Presumably, enforcement is by subsequent suit between the parties for breach of contract. Absent special circumstances, anticipated relief would be a money judgment, the enforcement of which is ordinarily relegated to writs of execution or garnishment. Examples of provisions basically contractual in nature, and unenforceable by contempt are: judgments or settlement agreements requiring the husband to discharge the unpaid balance of indebtedness secured by lien against real property awarded to the wife; obligations imposed upon the husband requiring him to pay the wife's attorney fee;[42] or an obligation imposed upon the husband to discharge debts secured by lien against an automobile awarded to the wife.[43] Likewise,

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Although the case does not deal specifically with divorce, Castilleja v. Camero, 414 S.W.2d 431 (Tex. 1967), presents possibilities for specific performance of judgments in those instances where this has not been provided for by terms of the judgment itself. In *Castilleja* both parties were co-winners of a Mexican lottery and both were involved in prior litigation involving title to the lottery proceeds. Plaintiff in the cited case was also plaintiff in the earlier suit, where he had recovered judgment against the defendant. Judgment in the earlier suit had declared the plaintiff the owner of one-half of the lottery proceeds which were deposited in the defendant's account in a Mexican bank. This judgment enjoined the defendant from disposing of any of the funds except for the purpose of assigning them to the court clerk as *supersedeas*. The defendant perfected an appeal but did not make the assignment or otherwise supersede. In the cited case, the plaintiff again sued the defendant, seeking a writ of mandamus specifically requiring him to transfer plaintiff's interest in the Mexican bank balance to the court clerk to be held until final judgment. The mandamus was granted and the defendant appealed, contending that the posting of *supersedeas* bond was a voluntary act and that the writ of mandamus erroneously required him to make a *supersedeas* bond in a separate and distinct cause. The supreme court affirmed the order of mandamus on the precedent of *Ex parte* Preston, 347 S.W.2d 938 (Tex. 1961), and held that the defendant was a constructive trustee of the funds in question. It declared that the evidence justified findings that the lottery proceeds were in danger of being lost or depleted because the prior judgment declaring ownership as between the parties was ineffective to protect the funds because they were out of reach of both the plaintiff and the court. The supreme court further held that orders which are not inconsistent with the original judgment between the parties may be made to conserve the property which is the subject of appeal, even though done in a separate cause.

Though the writ of mandamus in *Castilleja* was invoked to protect assets pending appeal, it may be available to protect assets which are the subject of property division orders. In the situation where an asset which is in the control of one spouse is awarded to the other spouse and there is no provision in the judgment requiring delivery of that asset to the court clerk, perhaps the *Castilleja* approach could be used to obtain a writ of mandamus ordering specific delivery of the asset. Regardless of the availability of mandamus, however, it is preferable for the right of specific performance to emanate from the divorce judgment itself so that there may be no span of time in which the party in possession can dispose of the asset awarded to the other without subjecting himself to the penalty of contempt.

42. McCauley v. McCauley, 374 S.W.2d 719 (Tex. Civ. App.—Waco 1963, writ dism'd).

43. *Ex parte* Duncan, 462 S.W.2d 336 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).

provisions requiring one of the parties to make future purchases for the benefit of the other or to render personal services are contractual in nature and enforceable only by suit for breach of contract.[44]

### C. *Disposition of Out-of-State Realty*

No district or domestic relations court of Texas has jurisdiction over real estate situated in other states. Consequently, any attempt to adjudicate title to such land or to transfer title by terms of a judgment is ineffectual. However, a Texas divorce court has personal jurisdiction over the spouse owning real property in another jurisdiction and conveyance of an interest in that land may be effected by a judgment requiring specific performance; *i.e.*, a directive to the spouse holding title to make conveyance with sanctions of contempt for his failure to do so.[45] In such circumstances, the judgment requiring specific performance should be free of any ambiguity as to what action is expected of the party ordered to convey. This is best accomplished by setting forth in full within the body of the judgment, or through an exhibit incorporated by reference, the exact form of conveyance required.

### D. *Limitations on the Contempt Power to Enforce Delivery of Assets*

Two distinct concepts are involved in the application of contempt. The first is that of punishment provided in order to preserve decorum and the dignity of the orders of the court. The second is said to be coercive or remedial and designed to enforce a particular duty. Obviously, there is some overlap between the two purposes. Assuming the breach of an order which is punishable by contempt, the movant must show that the contemnor had knowledge of the order and has or has had the ability to comply with it. Punishment may be by confinement in the county jail for not more than six months.[46] In addition, the court may order the contemnor imprisoned until he has complied with the order. But ability to perform is a prerequisite to imposition of coercion,[47] and the contemnor must possess the means to purge himself of contempt before he may be imprisoned for an indefinite time.[48] The contemnor

44. *Ex parte* Jones, 358 S.W.2d 370 (Tex. 1962).

45. McElreath v. McElreath, 345 S.W.2d 722 (Tex. 1961).

46. TEX. REV. CIV. STAT. ANN. art. 1911a (1971).

47. *Ex parte* DeWees, 210 S.W.2d 145 (Tex. 1948); *Ex parte* Klugsberg, 87 S.W.2d 465 (Tex. 1935).

48. *Ex parte* Ramzy, 424 S.W.2d 220 (Tex. 1968); *Ex parte* Rohleder, 424 S.W.2d 891 (Tex. 1967); *Ex parte* Savelle, 398 S.W.2d 918 (Tex. 1966); *Ex parte* Townsley, 297 S.W.2d 111 (Tex. 1956); *Ex parte* Kellenborn, 276 S.W.2d 251 (Tex. 1955). See *Ex parte* Ramzy, *supra*, for a form containing judgment of contempt and commitment order.

may be punished notwithstanding his inability to perform where he brought on the contempt by his own conduct, but the sanction in these circumstances is limited to the statutory punishment.[49] There may be separate punishments for each act of contempt even though all charges are considered at one hearing, provided the motion for contempt specifically and distinctly alleges each violation.[50]

Because of these limitations on the contempt power the value of "drying up the source" is made apparent. If, for example, a spouse disposes of marital assets in violation of a restraining order or injunction, a specified punishment not exceeding six months in jail may be invoked, but this does not restore the asset. Further, since the contemnor has disposed of the means by which he could purge himself, coercive contempt is unavailable. It is almost as if the contemnor has the ability to defeat a court order by voluntarily disposing of the means of compliance. True, a sentence of up to six months should have a deterring effect, but it does not restore the asset once expended. An even more significant consideration, based on the writer's experience, is the aversion of judges to impose more than token punishment regardless of the number and gravity of violations in those circumstances where performance is not possible, even though such impossibility results from the contemnor's voluntary conduct. As a consequence, "drying up the source" by impleading institutions in possession of the assets, and by placing them under injunction merits should be considered in any case in which the integrity of the spouse having control over the assets is in doubt.

## V. CONCLUSION

The techniques discussed in this article may not all be needed in those situations where both sides to the divorce litigation maintain an atmosphere of integrity and fair dealing. Inevitably, however, cases will arise in which it is deemed necessary to provide for maximum protection. The steps suggested in this article are designed for such cases.

Although techniques have not as yet crystalized for effective enforcement of certain aspects of divorce judgments, fairly adequate enforcement provisions are available. They require, however, careful planning in the drafting of the judgment to be effective. The judgment which carefully charts the way is in itself conducive to strict compliance because it clearly informs all parties as to their duty. In most instances, it obviates the need for resort to enforcement.

49. *Ex parte* Gonzales, 414 S.W.2d 656 (Tex. 1967).

50. *Ex parte* Loreant, 464 S.W.2d 223 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).