

## **TEMPORARY AND PROTECTIVE ORDER TRAPS**

### **I. INTRODUCTION**

Understanding, presenting or defending any rule of law is best accomplished by reading the law. Simplistic as it may seem, after you read it, then outline it. Then, see if you think you understand it.

The Family Code is broken up into chapters, titles, sub-titles, and there are more hidden traps, changes in what always was, additions of what should never be, and worst of all, they have renumbered everything. All of this has to blend together and work in harmony. Orders too loose or agreements too loose or too tight can be big problems. Keep in mind escape routes and where the key to the lock is.

### **II. TEMPORARY ORDERS**

**Title 1, Chapter 6 Subchapter F of the Family Code provides the rules for temporary restraining orders, temporary injunctions, and other temporary orders in divorce cases. These temporary orders, may, in the appropriate circumstance include relief available under Title 4 and Title 5. The basic forms of Title 1 (divorce) temporary orders come under the following code section numbers.**

#### **TFC Title 1 Chapter 6 Subchapter F**

1. FAM § 6.501 Temporary Restraining Order
2. FAM § 6.502 Temporary Injunction and Other Temporary Orders
3. FAM § 6.503 Affidavit, Verified Pleadings and Bond Not Required
4. FAM § 6.504 Protective Orders: *See Title 4, Subtitle b*
5. FAM § 6.505 Counseling
6. FAM § 6.506 Contempt
7. FAM § 6.507 Interlocutory Appeal  
*Note: An order under Title 1, Chapter 6 is not subject to Interlocutory appeal, except as to the appointment of a receiver*
8. FAM § 6.709 Temporary Orders During Appeal  
*Note: If the existing Temporary Orders go into effect prior to your final trial or if the Court terminated them when the divorce was granted, the trial Court may, not later than the 30<sup>th</sup> day after the date the appeal is perfected, after notice and hearing, render a temporary order necessary for the preservation of the property and protection of the parties during the appeal. Such temporary order pending appeal may include continuation of spousal support; payment of additional interim fees and expenses; appointment of a receiver for the preservation and protection of property; award exclusive use and occupancy of a residence; and retain jurisdiction to enforce a temporary order; unless on proper showing the appellate court supercedes the trial court's order.*

**A. Practice Tips**

Do you encounter loss of logical thinking coupled with anger and possible insanity with your clients? Every divorce case and certainly every child custody case brings out at times the worst in people. They will argue over things that they would never have thought they would argue about before. They will take positions that verge on insanity. They will do things for spite that are 100% out of character for that individual. This is true whether or not the person was previously passive or aggressive. Often times the person who was more passive in the relationship, and perhaps subject to feeling controlled, gains a sense of power when surrounded by a team of lawyers, accountants, and supporters who are willing to wage battle like gladiators. The person who may have been in control of the finances or decision making may feel unduly compressed and restrained in going about those things that are reasonable and necessary to conduct the business affairs of the marital estate.

All too often when the divorce gun is “locked and loaded” a scud missile is fired when something much less would be equally as effective and much less offensive. Discussion of Federal Firearms Statutes in the Emerson case will follow, but both lawyers and Judges in the State of Texas should realize that it is not “bubba” who enjoys the use of recreational usage of firearms. Yet our form book, and the vast majority of both temporary restraining order requests, and the grant of temporary injunctions, contain language that subject the enjoined person to the violation of federal felony statutes. If there is no history of certain types of conduct, consideration should be given to eliminating at least a portion of the laundry list of personal restraints in the form book pleadings. It is recognized that the Form Book tracks in large part §6.501. The problem is §6.501 has been massaged to in essence follow the Form Book, but the U.S. Congress did not read our Form Book before it passed 18 U.S.C. §922.

In this enlightened day of deferred compensation and employment benefits, coupled with the difficulty in obtaining information at the onset of a separation, and at times even with significant efforts exerted, attention should be given to preserving the estate more specifically. Consider not firing the shotgun, nor the scud missile but rather a laser-guided shot for particular targets. Consider whom you should put on notice with regard to the issuance of your injunctions. Consider injunctive relief for such things as:

- (a) Exercising any stock options and warrants except as specifically authorized in advance by written agreement of the parties or as may be authorized in advance by written agreement of the court;
- (b) Exercising any general or limited power of attorney, whether or not recorded, granted to either party by \_\_\_\_\_; or
- (c) Recording any executed but unrecorded power of attorney;
- (d) Paying any indebtedness owed by the parties, or either of them prior to the date the indebtedness is due.

- (e) Creating or contributing to, or reducing the value or withdrawing from or terminating, any trust of any kind or nature except as specifically authorized in advance by written order of the court.
- (f) Making any gift of any kind or nature, except as specifically authorized in advance by written order of the court.
- (g) Creating or contributing to any uniform gifts to minor act accounts or any trust of any kind or nature, except as specifically authorized in advance by written order of the court.
- (h) Filing any extension or form with the Internal Revenue Service with regard to Federal Tax liability for any years of the marriage that limits the other party's choice of filing status.
- (i) Filing any Federal Income Tax Return or amendment to any Federal Income Tax Return for any year of the marriage during the pendency of this suit without first providing a true and correct copy of such proposed return to the attorney of record for the other party at least 14 days in advance of the proposed tender to the Internal Revenue Service. This shall apply whether or not such filing is proposed to be by electronic methods or hard copy filing.
- (j) Changing the locks, key mechanisms, dead bolts, security code, or otherwise restricting access to the party's weekend lake house residence located at \_\_\_\_\_.
- (k) Refusing any child permission to speak telephonically with \_\_\_\_ or interrupting or listening in on any child's telephonic conversations with \_\_\_\_\_.

These are but a few of the types of issues that you may need to specifically target in any particular divorce case. Take some time before you file your petition to find out something about the nature and extent of the estate as well as the party's relationship with their children. Aim at the right target before you fire.

- B. Timing of Filing.** The psychological game plan of a divorce at times is as important a strategy as any other aspect of the case. What tone does this set?

Thirty year marriage. Husband has been out of house seven months. Three adult daughters, their husbands and grandchildren have arrived Wednesday afternoon for Thanksgiving. At 6:00 p.m. Wednesday before Thanksgiving the process server rings the door bell, six year old Lilly, granddaughter, opens the door and has to call grandma to meet the process server, to be served with a full blown TRO as to person and property set for the following Monday.

### **III. TITLE 4 – PROTECTIVE ORDERS AND FAMILY VIOLENCE**

Under the right circumstances protective orders are necessary. Abuse in the family should not be tolerated. However, in some areas of this State it appears that some attorneys are spending a fair amount of time educating their clients on how to abuse the use of a Protective Order to either incite their otherwise calm

spouse to fly off the handle or to simply create a false set of circumstances that are initially impossible to disprove to gain an advantage. Further, once the Protective Order is in place, undoing the harm may be all but impossible.

**If you are not intimately familiar with Protective Orders PLEASE:**

- Read Title 4
- Review the Texas Family Law Practice Manual
- Additional resource guides for a hands-on walk through family violence: “Violence in Family Law Cases”, by Kimberly M. Naylor, Marriage Dissolution—2000; “In the Crossfire—Protective Orders, What Happens When Federal Law Collides with Family Law”, by Lorraine Wilson, Advanced Family Law Course—2001; “Temporary Hearings, Family Violence, Guns and Related Issues,” by Rhonda Hunter, Marriage Dissolution—2002; “A View from the Bench: Temporary Hearings,” by Judge Jeffrey Coen and Judge Beth Maultsby, Advanced Family Law Course—1999.

**FAMILY VIOLENCE – DO WE KNOW IT WHEN WE SEE IT**

Protective Orders are governed by Title 4 of the Texas Family Code. “Family violence” is defined by the code as:

- (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; or
- (2) abuse, as that term is defined by Sections 261.001(1)(c), (E), and (G) by a member of a family or household toward a child of the family or household; or
- (3) dating violence, as that term is defined by Section 71.0021.

“Dating Violence” was added to the definition effective September 1, 2001. Section 71.0021 defines “dating violence” as follows:

“... an act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.”

**A. Offense of Family Violence May Get a Spouse Maintenance**

Texas Family Code §8.051 states:

*In a suit for dissolution of marriage or in a proceeding for maintenance in a court with personal jurisdiction over both former spouses following the dissolution of their marriage by a court that lacked personal jurisdiction over an absent spouse, the court may order maintenance for either spouse only if:*

- (1) *the spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence under Title 4 and the offense occurred:*
  - (A) *within two years before the date on which a suit for dissolution of the marriage is filed; or*
  - (B) *while the suit is pending.*

#### **B. Your Client May be Excluded From Their Residence**

Section 83.006 of the Texas Family Code provides that a person may be excluded from the occupancy of the person's residence by a temporary ex parte order if the applicant:

- (1) files a sworn affidavit that provides a detailed description of the facts and circumstances requiring the exclusion of the person from the residence; and
- (2) appears in person to testify at a temporary ex parte hearing to justify the issuance of the order without notice.

This exclusion may exclude a person from their separate property residence as long as the affidavit and testimony show that:

- (1) the applicant has resided there within 30 days before the date the application was filed;
- (2) the person to be excluded has committed family violence against the member of the household within 30 days before the application was filed; and
- (3) there is clear and present danger that the person to be excluded is likely to commit family violence against a member of the household.

#### **C. Your Client May Have Criminal Problems If He Violates The Order**

In a protective order, the Court may prohibit the person found to have committed family violence from possessing a firearm, unless the person is a peace officer, as defined by Section 1.07 of the Texas Penal Code. See Texas Family Code §85.022 (b)(6). This section authorizes the Court to prohibit a person from possessing a firearm for the duration of the protective order.

Texas Penal Code §46.04 makes it illegal to possess a firearm for five years following a conviction for family violence assault punishable as a Class A misdemeanor.

**D. The Protective Order May Be Effective For Two Years**

Unless stated otherwise, a Protective Order is effective for a period of two (2) years after the date the order is entered. If you represent the person against whom the protective order is requested, don't automatically agree to a 2-year period. Perhaps it is more feasible to have the protective order effective for a shorter period of time or a period of time tied to the pendency of the divorce action. See Texas Family Code §85.025.

**E. Violation Of A Protective Order**

Violation of a protective order as provided in §25.07 of the Texas Penal Code is a Class A misdemeanor. It can be a third degree felony if it is shown on the trial of the offense that the defendant has previously violated the protective order by committing an assault or the offense of stalking.

**IV. TITLE 5 §152.304, CHAPTER 153: CONSERVATORSHIP, POSSESSION AND ACCESS**

**A. Public Policy.**

Each of you understands that it is the stated policy of the State of Texas to always put the best interest of children first in determining conservatorship and possession issues. Also the law says to treat both sexes of parents fairly and to appoint them as joint managing conservators. As a practical matter, that is the way it is. The same is true with guidelines of child support. Query: Does this really operate in the best interest of all family law cases? It may result in reducing hearings in some cases and in others cause an increase and a feeling that these people, our clients, and their children are no more special than when you call AT&T to try and change some service that you don't receive anyway.

**B. Labels.**

Consider staying away from using labels such as 'primary' unless the circumstances are appropriate. More often than not this push creates conflict and may result in further litigation.

There are many circumstances however, where a Standard Possession Order is not workable, or for which there should be deviation. In most instances the deviation comes about as a result of a negotiation of the parties as opposed to Court imposition. Therefore, when deviating from the form book SPO be sure that you do not leave in provisions that conflict with one another, that have inherent unworkability, or that leave out some integral period of possession or parental right.

V. **TITLE 5, CHAPTER 105 – TEMPORARY ORDERS BEFORE FINAL ORDERS**

A. **Acronyms.**

In summary, the Court can: determine temporary conservatorship; support; access; grant interim attorney's fees, grant temporary restraining orders and injunction protecting the welfare of the child and other best interest rulings. All of these are couched against the rebuttable presumption in favor of the application of a standard JMC, SPO, CSO, WWO, QMCSO, and the probable involvement of the CSR, and of course the TRO, TI and more.

Temporary Orders under this section are interlocutory and not subject to appeal. Punishment for violation is by contempt.

T.R.C.P. rules requiring a date to be set for a final hearing does not have to be determined at the time the injunction is granted in a SAPCR or divorce. Morse v. Baker-Olsen, 929 S.W.2d 659, (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, no writ).

B. **Ex Parte Limitations.**

A TRO which grants *ex parte* possession or denial of access requires a verified pleading or affidavit stating specific facts showing that immediate and irreparable injury, loss or damage will result before notice can be served and hearing held. Dohrn v. Delgado, 941 S.W.2d 244, (Tex. App. – Corpus Christi, 1996, no writ).

C. **The Record.**

TEX. FAM. CODE §105.003 procedure for contested hearings – an often overlooked, forgotten, ignored, stepchild of this rule is:

“(c) A record shall be made as in civil cases generally unless waived by the parties with the consent of the court.”

We all know what happens when you show up in the AJ court and advise that you want a record. Usually, it is a stern lecture, “if you want a reporter, go get a reporter. The court is going to proceed to hear this matter and if you want to have your record made, it is up to you.”

In a SAPCR, “All oral testimony must be recorded. It is the responsibility of the trial judge to see that the court reporter performs this duty.” Stubbs v. Stubbs, 685. See also Rogers v. Rogers, 561 S.W.2d 172, (Tex. 1978); In re Vega, 10 S.W.3d 720 (Tex. App. – Amarillo 1999, no. pet.); Walker v. Stefanic, 898 S.W.2d 347 (Tex App. – San Antonio 1995, no writ)... “the failure to make a record of proceedings involving custody of a minor child constitutes error on the face of the record.”

In Walker v. Stefanic the court specifically expressed, “we are concerned that this duty to preserve may be repeatedly ignored in those courts utilizing electronic

tape recordings. The record reflects that the family law master, operating under budget constraints, exhausts his tape supply within three months, and therefore permits the court reporter to erase previously recorded proceedings at 3 month intervals in order to replenish the tape supply. The duty to supply the record, however, is not diminished by the use of an alternative form of recordation. Neither can it be eviscerated by budget constraints”.

However, in Henning v. Henning, 889 S.W.2d 611 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1994, writ denied) the Appellant “concedes she waived the presence of a live court reporter, but insists that she did not waive her right to a record”. Here, she did not prevail because the court ruled that one cannot lay behind the log and that she did not show an exercise of due diligence in seeking a record.

A party may waive the making of a record by not requesting a record or not objecting to the lack of the making of a record. Voros v. Turnage, 856 S.W.2d 759, (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, writ denied).

**VI. TEX. FAM. CODE §105.006 – CONTENTS OF FINAL ORDER – THEY REALLY ARE ONLY TEMPORARY ANYWAY**

The specific content of a temporary SAPCR is not set forth in the Code. However, the content of a final order is spelled out in §105.006. Surely the provisions of this statute were well intentioned but thought through about as equally well as many of the others that we are faced with. In this day of computer theft, the ease of obtaining information that is sufficient to assume a new identity, another’s credit, destroy their economic wherewithal, and otherwise torpedo their post-divorce happiness is easily obtainable. What does one need to do some of these things?

- a. Social Security number
- b. Drivers license number
- c. Mother’s maiden name
- d. Home address
- e. Telephone number
- f. Name of employer
- g. Employer’s phone number
- h. Children’s full names
- i. Children’s Social Security numbers
- j. Children’s drivers license numbers

Not only do the parents have to exchange this information with each other, they have to file it with the local clerk, as well as the State Case Registry under Chapter 234 T.F.C., and where else and the hands of who knows who!

*State Registry Comment:*

If any reader of this paper has not been humbled as a result of their efforts to communicate with the State Registry then you should pass on your secrets of success. I know not one person who has no encountered undue frustration, delay, and as a rule – a total lack of success, in resolving an issue with this great agency. Who has even being able to talk to a live person who has authority to resolve the matter?

## **VII. ANOTHER TEMPORARY ORDER TRAP**

### **A. Your Temporary Order May Violate Federal Firearm Laws**

18 U.S.C. §922(g) states:

*“It shall be unlawful for any person ... who is subject to a court order that:*

- (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;*
- (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and*
- (C) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.*

*to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.*

It appears that the standard temporary injunctions, which appear routinely in almost every Texas divorce case at the temporary order stage may fall within the restrictions enumerated in 18 U.S.C. §922(g)(8)(c)(ii).

An individual is prevented from possessing a firearm if the temporary order:

1. is issued after notice;
2. opportunity to appear was given to the Respondent; and
3. the order includes a prohibition of use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily harm.

### **B. Emerson**

U.S. vs. Emerson, 270 F.2d 203 (5<sup>th</sup> Cir. 2001)[United States of America v. Timothy Joe Emerson, 46 F.Supp.2d 958 (N.D.Tex.1999)]

The Emersons were divorcing. On September 4, 1998 the trial court issued a temporary order which granted standard temporary injunctions against the parties. No evidence was adduced at the temporary hearing concerning an act of violence or threatened violence by Mr. Emerson against a family member and no findings regarding family violence were entered. On December 8, 1998 Mr. Emerson was indicted with the federal crime of possession, in and affecting commerce, a firearm on November 18, 1998, which the temporary order was in effect in violation of 18 U.S.C. §922. He moved to dismiss the indictment claiming that the statute violated his second amendment right to bear arms and this fifth amended right to Due Process. The U.S. District Court agreed with Mr. Emerson and held that the statute violated the U.S. Constitution and was unconstitutional. The Government appealed to the Fifth Circuit.

The Fifth Circuit rejected Emerson's argument that the statute required that the predicate order, the family court order, contain an express judicial finding that the defendant posed a credible threat to the physical safety of the wife or child. The Court stated that "if the order 'by its terms explicitly prohibits' the use, attempted use or threatened use of physical force, no such express finding" [of credible threat of violence was necessary.]

Emerson also argued that the statute violated his right to due process because (1) Dr. Emerson did not know that possession of the firearm while be subject to the September 14, 1998 order was crime; (2) the provision is an obscure criminal provision that would be difficult to discover; (3) there is nothing inherently evil about possession of a firearm; and (4) Emerson had no reason to suspect that being subject to the September 14, 1998 order would criminalize otherwise lawful behavior.

The Court noted that the statute required that the party accused must "knowingly" violate Section 922(g), however, the Court reasoned that "knowingly" does not require that the defendant know that his actions are unlawful, but only that he know he is engaging in the activity that the legislature has proscribed. U.S. vs. Emerson, *Id.* at 216.

The Court reasoned that Emerson knew that he was in possession of a Barretta pistol and that knowledge was sufficiently applicable for a violation of the statute. In addition, the Court reasoned that when Emerson purchased the gun, a year prior to the family court action, he signed a Form 4473. That Form 4473 gave written notice of the conduct proscribed by the statute [then 922(h)(1)]. *Id.* at 216.

The Court then gave an extensive analysis of the Second Amendment Right to bear arms, including its legislative history, the arguments at its inception, the arguments during the state ratification's and the subsequent passage of the Senate's version of the house's amendment and forwarding to the states of

September 26, 1789. The Court then gave an exhaustive discussion of the judicial history of the right to bear arms as interpreted by subsequent commentary.

The Court concluded that, “A trial court may not issue a temporary injunction except to prevent a threatened injury...The trial court will abuse its discretion if it grants a temporary injunction when the evidence does not clearly establish that the applicant is threatened with an actual, irreparable injury.” *Id.* at 262.

Generally, however, Texas family courts routinely order mutual temporary injunctions in situations where no testimony is given regarding a threatened injury.

The Fifth Circuit has indicated, however, that appellate court review of temporary interlocutory orders, while not available by direct appeal, are available by mandamus under and “abuse of discretion” standard. “A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. *A presently existing actual threat must be shown.*” *Id.* at 263.

Since such an order will not issue unless the issuing court concludes, based on adequate evidence at the hearing, that the party restrained would otherwise pose a realistic threat of imminent physical injury to the protected party, and this is so regardless of whether or not Texas law requires the issuing court to make on the record express or explicit findings to that effect, the Fifth Circuit concludes that the nexus between firearm possession by the enjoined party and the threat of lawless violence is sufficient, though barely so, to support the deprivation of the enjoined party’s Second Amendment right to bear arms.

The Court noted that, “There must be a *likelihood* that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. “A presently existing actual threat must be shown.” *Id.* at 262. The federal court presumes that the temporary injunctions issued by the Texas courts have that showing, otherwise they would not be issued. At present, the federal statute continues to require, notice and a hearing. Further restriction, however, may not be that long in coming.

U.S. v. Emerson, 270 F.3d 203 (5<sup>th</sup> Cir. 2001)

The United States District Court for the Northern District of Texas held that 18 U.S.C. §922(g)(8) is unconstitutional and granted H’s Motion to Dismiss the Indictment. The Government appealed.

The Fifth Circuit reversed and remanded and held that the statute was constitutional. A petition for certiorari was filed on February 28, 2002.

So, what is the lesson? Until the Supreme Court rules on U.S. v. Emerson, don't include the following language in your TRO's, injunctions or Temporary Orders:

- Communicating with the other in person, by telephone, or in writing in vulgar, profane, obscene, or indecent language or in a coarse or offensive manner.
- Threatening one another in person, by telephone, or in writing to take unlawful action against any person;
- Placing one or more telephone calls, anonymously, at any unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication;
- Causing bodily injury to the other; and/or
- Threatening one another with imminent bodily injury.

## VIII. ARE YOU READY?

### A. Your Temporary Orders May Set a Precedent *Getting to the Order*

#### 1. Be Prepared

Whether a property case or a custody case, if you have a temporary hearing, be prepared. Don't just think of it as temporary. It could seem like a life time to get to final. Since most cases are resolved either through settlement discussions or mediation, this may well be the client's only day in Court. Be prepared to argue your case in the time allowed. You may have thirty minutes or you may have a whole day to present your case, so remember your time constrictions when you are preparing.

- Prepare your witnesses
- Get to the point
- Use exhibits
- Use summaries; and
- Use pictures or anything else that will stand out to the Judge.

#### 2. Ask for a Continuance

Even though it is a temporary hearing, the ramifications of the results of such hearing (especially in a custody case) can obviously be extremely important to the rest of your case. If you have just been hired a few days before trial, ask for a continuance in order to adequately prepare to present your client's case.

#### 3. Appeal

If you are having your temporary hearing in front of an associate judge and the results are not favorable to your client, consider an appeal. This may afford you one more bite at the apple. Otherwise, you may be stuck with some orders that are not favorable to your client for a long time. The fact of who has the children from the onset of litigation is an important factor

If your hearing is in front of the district judge, remember that temporary orders are interlocutory and not subject to an appeal except for the appointment of a receiver per §6.507 of the Texas Family Code.

A Court can, however, modify those temporary orders under §105.001 of the Texas Family Code. Although you do not need to prove a “material and substantial change in circumstances”, you do have to show more than a minor adjustment. Crapps v. Crapps, 546 S.W.2d 909 (Tex. App. – Austin 1997, no writ).

4. Beware of Agreements Your Client Cannot Live Up To  
Don't let your client agree to something they are not able to do. This sets yourself up for either a modification or an enforcement action later on that would definitely not be in your client's best interest. More about agreement traps below.

## **B. Make Sure Your Temporary Orders Are Enforceable**

1. Make sure your orders are enforceable. After you have worked hard to reach an agreement or try your case, make sure your client can enforce that order if necessary.
2. Use command language even in master's recommendations.
3. Make sure you do formal Temporary Orders and get them signed by the judge.

Section 201.013 of the Texas Family Code provides that:

- a. pending appeal of the associate judge's report, including any proposed order, to the referring court, the decisions and recommendations of the associate judge are in full force and effect and are enforceable as an order of the referring court, except for orders providing for the appointment of a receiver.
- b. If an appeal to the referring court is not filed or the right to an appeal to the referring court is waived, the findings and recommendations of the associate judge become the order of the referring court only on the

referring court's signing an order conforming to the associate judge's report.

4. Prepare the Temporary Orders promptly. Don't rely on the master's recommendation for enforcement purposes. Request that the Court order one party to prepare the orders. Request that the Court order that the orders shall be entered within a certain time period.

## **IX. AGREED TEMPORARY ORDERS AND RULE 11 AGREEMENTS**

The vast majority of Temporary Orders have come about as a result of pre-hearing settlement negotiations, negotiations during the recess of the hearing, or last ditch efforts to salvage something before the Court rules. As a consequence many of these "Orders" contain language that is much more in the form of a contract, agreement, or Rule 11. At times they are intertwined with mandatory and operative words such as shall, may, could, will and the like.

It is important to understand the impact of these agreements. They may be much more than an agreed order. To understand the impact of such agreements, a brief visit to the Rules is appropriate.

### **A. Rule 11 TRCP:**

"Unless otherwise provided in these Rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as a part of the record, or unless it be made in open court and entered of record."

### **B. Title 7 Tex. Civ. Prac. & Rem. Code §154.071 "Effect of Written Settlement Agreement"**

1. "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."
2. "The Court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case."
3. "A SA does not affect an outstanding court order, unless the terms of the agreement are incorporated into a subsequent decree."

### **C. TFC §153.007 "Agreement Concerning Conservatorship Under the Cited Rules"**

1. To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for

conservatorship and possession of the child and for modification of the agreement, including variations from the standard possession order.

- (a) If the court finds that the agreement is in the child's best interest, the court shall render an order in accordance with the agreement.
- (b) Terms of the agreement contained in the order or incorporate by reference regarding conservatorship or support of or access to a child in an order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as a contract.
- (c) If the court finds the agreement is not in the child's best interest, the court may request the parties to submit a revised agreement or the court may render any order for the conservatorship and possession of the child.

**D. TFC §4.102 “Partition or Exchange of Community Property”**

At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a Partition or Exchange Agreement becomes that spouses separate property.

**E. TFC §4.103 “Agreement Between Spouses Concerning Income or Property from Separate Property”**

“At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner.

1. TFC §4.104 “Formalities”

“A Partition or Exchange Agreement must be in writing and signed by both parties.”

2. TFC §4.105 “Enforcement”

“A Partition or Exchange Agreement is not enforceable if the party against whom enforcement is requested proves that:

- (a) The party did not sign the agreement voluntarily; or
- (b) The agreement was unconscionable when it was signed and, before execution of the agreement, that party –
  - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

- (iii) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the party;
- (c) An issue of unconscionability of a Partition or Exchange Agreement shall be decided by the court as a matter of law.
- (d) The remedies and defenses in this Section are exclusive remedies or defenses including common law remedies or defenses.

See ExParte Hall 854 S.W.2d 656 (Tex.1993)

## **X. MARTIAL PROPERTY AGREEMENTS**

Marital Property Agreements are covered in Title 1, Chapter 4 titled “Uniform Pre-Marital Agreement Act”.

- A. Formalities.** §4.002 Pre-Marital Agreement Formality “a Pre-Marital Agreement must be in writing and signed by both parties. The agreement is enforceable without consideration.”

Although the section is framed in the singular, the agreement may consist of one or more documents intended to be part of the agreement and executed as required by the Family Code. [see official legislative comment]

- B. §4.003 Content of Pre-Martial Agreement.** The Code allows the Pre-Marital Agreement to embrace any of the specifics listed in §4.003 and any other matter not in violation of public policy or any statute imposing a criminal penalty. The laundry list set forth in 4.003 is intended to be illustrative, not exclusive. The agreement may provide for such things as:

1. Identification and preservation of separate property including income derived therefrom.
2. The right to buy-sell exchange or mortgage or dispose of property.
3. The disposition of property on separation by divorce or death.
4. The modification or elimination of spousal support.
5. Contractual right to set forth in place rules with regard to Wills and Trusts.
6. The ownership rights in and disposition of the death benefit from a life insurance policy or employment benefit.
7. The parties may not adversely affect the obligations of child support by a Pre-Marital Agreement.

- C. §4.005 Amendment or Revocation.** After marriage, a Pre-Marital Agreement may be amended or revoked only by written agreement signed by the parties. The amended agreement or revocation is enforceable without consideration.

- D. Marital Property Agreements.** This section contemplates folks that are married.

1. §4.102 Partition or Exchange of Community Property: the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as a spouses may desire.
2. §4.103 At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner.
3. §4.104 Formalities: A partition or exchange agreement must be in writing and signed by both parties.

Does a Rule 11 Agreement have more requirements for validity than a Marital Property Agreement does? There is no requirement that the Marital Property Agreement be filed with the Court. But, at the time of a temporary hearing, when one enters into a Rule 11 Agreement, have they entered into a Marital Property Agreement? Have they by their very conduct modified the terms of a Pre-Marital or Post Marital Agreement presently in existence?

Consider the circumstances where a Marital Property Agreement in existence at the time of the filing of a divorce provides that neither spouse shall receive or be obligated to pay spousal support to the other during the pendency of a divorce. The divorce is then filed, the parties are attempting to move forward amicably, to avoid a temporary hearing and a contested issue, one spouse agrees, in writing, via a Rule 11 Agreement to pay spousal support for some specific or non specific period of time during the pendency of the suit to in essence delay a hearing that might cost more than the amount agreed to be paid as support. It is a business decision. Is that sufficient to be an amendment to the Pre-Marital Agreement and to modify the waive of spousal support provision?

Consider the same basic circumstances, but that there is a provision that one spouse shall not reside in the marital residence, or in the separate property residence of the other in the event of a filing of divorce. The divorce is filed an a Rule 11 Agreement is entered providing to the contrary.

Consider the circumstances where there is a provision that notwithstanding a Marital Property Agreement if any spousal support or temporary support is ordered that there is a right of reimbursement to the paying spouse from the separate estate of the receiving spouse. Assume a Rule 11 Agreement for Temporary Orders is entered, and there is no reference to the inclusion of the reimbursement right. Has it now been waived or modified?

Consider the circumstance where a party agrees to advance interim fees, under court duress, utilizing funds that would be separate under a marital property agreement. Is that, if done with a Rule 11 Agreement a waiver or a modification of the existing Marital Property Agreement?

If any agreements of this type are made, consideration should be had as to the inclusion of the reference to the Marital Property Agreement and a savings clause that this agreement is not intended to modify or alter the terms or conditions of the Marital Property Agreement previously in existence. There is no waiver of a right of reimbursement. There is no waiver as to right of characterization of income. Is the party better off declining to enter into the Rule 11 Agreement, even knowing that the court will impose some sort of an order that may be oppressive to preserve the right to argue that the court's orders violated the terms of the marital property agreement? Don't let the client sign the Rule 11.

Certain of these mines float in uncharted waters. To be on the safe side, be careful about your Rule 11's. Provide that they are subject to modification by the court. There are at least trial level rulings where the court found, after the entry of a Rule 11 Agreement that it was without power to modify the temporary agreement to pay support which was in contravention of the terms of the Pre-Marital Agreement. The Court went on to find that the Rule 11 Agreement modified the terms of the Pre-Marital Agreement. In once such case the issue was settled pending appeal. It might be nice if we had the answer but we do not as to certain of these mines.

## **XI. DRAFTING TEMPORARY ORDERS**

### **A. Who is going to draft the order?**

Generally, the district or associate judge designates an attorney for one party to draft the temporary order. If for some reason this does not occur. And the attorneys have not previously agreed, request a clarification from the court. Failure to do so can cause delays in getting an enforceable order.

If your client is receiving benefits from the temporary order, be it child support or specific possession of the children whom your client has not seen in weeks, volunteer to draft the order.

### **B. Preparing the temporary order.**

The single biggest problem in completing the temporary order process is the drafting delays, not what happens after the order is presented to the court.

The TEXAS LAWYERS'S CREED §III.12 states as follows:

"I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with the submission to the court [sic]. I will promptly approve the form of orders which accurately reflect the substance of the ruling of the Court."

Further, TRCP Rule 305 allows a party to submit a proposed judgment to the court for signature and requires that if a proposed order is sent to the court, a copy must be sent to all counsel in accordance with TRCP Rule 21(a).

Because of the growing problem with having orders drafted and submitted in a timely fashion, many courts have adopted local rules that require orders to be submitted within a specified time and notice provided to all counsel with a specific time to object. Such a rule was included in the local rules drafted by the Dallas County Family Courts and approved by the Supreme Court on May 11, 1999. Under §8.02 of said rules, the attorney submitting the order shall send a copy of the proposed order to all opposing counsel with notice that the judge will be asked to sign the order unless written objections are filed within ten days.

It is suggested that if you are drafting the order you do so while the terms are still fresh in your mind. When completed, send it to opposing counsel for review and signature. If counsel fails to approve it within a specific period (subject to the time restrictions of the case) send a courtesy letter, fax, e-mail or phone call reminding him to review and sign or convey their objections. If you still can't obtain the signed order or their objections, then submit the proposed order to the court with a letter asking the court to sign it by a date certain if no written objections are received. Include a description of what steps you have previously taken and a statement that you are sending a copy of this letter to opposing counsel.

If you have a court that will not accept this procedure your only other alternative is to file a motion for entry of the temporary order. Also include a request for attorney fees/costs. Set the motion for hearing as soon as possible.

Of course, as stated earlier one way to avoid this entire procedure is to bring a proposed temporary order to the hearing in the hope that you can interlineate sufficiently to satisfy the judge. If the order ends up with many interlineations to conform copies, it may be easier to ask the court if you can copy it at the law library after it is signed before returning to the clerk for filing.

As of September 1, 1999, associate judges can issue their report in the form of a "proposed order." At the end of the hearing the associate judge can be asked to simply adopt the proposed temporary order as the report. The advantage of this method allows you to obtain the referring judge's signature immediately. Since this is a temporary order there need be no concern regarding the entry of a final order pending appeal. Just insert the sentence "These temporary orders are signed and entered subject to an appeal, if any, taken by any party to this matter."

Because the report by the associate judge becomes the order of the court pending the outcome of an appeal (TEX. FAM. CODE §201.013(a)), you now have an enforceable order instead of a vague summary report, docket entry or reported record with no command language.

*Practice Note: Judges --* the next time you do not grant fees on a righteous Motion to Enter – you might have cost that lawyer to work for free – only you can prevent a “forest fire”—!

### C. **Ancillary Orders**

There are always several ancillary orders that need to be drafted contemporaneously with the temporary order. Even more than temporary orders, these seem to languish on the attorney’s desk or in a brief case. Often valuable time and advantage is lost if they are shelved or worse, ignored.

1. Wage Withholding Order. The most important accompanying order is the wage withholding order to be served upon the employer. Despite any agreement to the contrary, a wage withholding order must be entered in all matters in which any type of child support is paid, without exceptions. TEX. FAM. CODE §158.001.

Despite the fact that this requirement has been in effect for two years it is amazing how many cases are finalized without the entry of an order. The fact that a payor is self-employed or unemployed is not an exception. The payor may be employed at sometime in the future.

Beginning September 1, 1999, an employer may not send payments directly to the obligee. TEX. FAM. CODE §153.208(a). Payments may only be sent to a IV-D Agency, local child support registry (county child support office) or the Attorney General. The collecting agency, its address and account number must be stated in the order. Because of the many changes in the manner of withholding earnings for child support, it is recommended that you read all the changes to TEX. FAM. CODE 158.101-.211 and not rely on the older form orders.

## XII. **CONCLUSION**

Be lawyers. Think like lawyers. Every time you entered into an Agreed Order whether it be truly in the form of an Order or Rule 11 Agreement or some hybrid think about the problems. How can I be or not be screwed by this?

Most of the time at the onset of the case you do not have all the information. In many instances you may not even have a copy of the Marital Property Agreement if one exists. It may be in a lock box or it may be decades old and your client is unable to locate it. In some instances the client may actually forget that such an agreement existed. Be careful. There is within this writer’s knowledge at least one unreported malpractice case where the husband had significant protections under both a Pre-Marital and Post Marital Property Agreement. At the onset of the divorce case husband’s counsel suggested avoiding the courthouse and entering into a 90 day agreement. That agreement provided that husband would provide support to the wife, allow her the use and possession of certain of his separate property and cause him to pay certain obligations that would be her separate debt under the Marital Property Agreement.

The 3 months support was much less than the “quote” to do the hearing, and Husband was already at the lake house. Sounds fair, reasonable and business like doesn't it?

The court enforced those agreements as amendments to the earlier Marital Property Agreements. It was in writing and signed by the parties. In a separate action Husband sought from his former lawyer recompense for all that it costs him including the attorneys fees that he expended through the process. With the complete denial of liability on Husband's original counsel's behalf, the issue was ultimately settled with a significant payment from husband's liability carrier on the eve of trial.