



THE ENFORCER

BY DAVID FINDLING

THE FINDLING LAW FIRM

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Anticipating Post-Judgment Bliss

As receiver in family division cases, I am appointed to enforce many judgments of divorce ("JOD") of varying quality. Typically, I am advised by counsel that this case is the most difficult and contentious they have ever experienced. Aside from the non-compliant party, there are certain hallmarks that make some judgments more prone to requiring extensive enforcement action. Problematic judgments seem to fall into the following categories:

- a. specific performance with no alternate remedy in the case of non-performance or frustration of purpose;
- b. collection of unquantified sums;
- c. failure to perfect the lien granted to your client; and
- d. failure to actually award the real and/or personal property of the parties, leaving the determination of title to some condition subsequent or determination by a third party.

If your instinct and experience tell you there may be an issue with compliance, consider penning a tripwire and an alternate remedy into the JOD.

Case Study A

With the downturn in the real estate market, often the relief anticipated in the JOD cannot be obtained due to frustration or impossibility. For instance, consider a judgment that requires Party A to sell the marital home, and pay Party B fifty percent (50%) of the net equity from the sale. Party A does not comply, and several years go by before enforcement proceedings are brought. In the interim, the real estate market has fallen, and the equity that was present at the time of the parties' divorce is now non-existent. The JOD is silent as to a numerical value of Party B's equity and provides no alternate remedy in the case of non-compliance. The home may still have to be sold or refinanced to remove Party B's name from the mortgage,

but what about the ephemeral fifty percent (50%) equity that existed at the time of the parties' divorce? Do they also share in the loss to accomplish a sale? With real estate values reduced by 30% to 60%, this is a very real scenario and may require going back to court to craft an alternate remedy.

Case Study B

Sometimes it is impossible to place a static value on the asset to be divided. If this is the case, consider clearly defining the asset's valuation date, or what happens if specific performance doesn't occur. Examine the JOD that requires Party A to compensate Party B for his/her share of a deferred compensation plan through division of a savings plan account. Not only does Party A not divide the deferred compensation plan as required by the JOD, prior to enforcement proceedings, Party A also liquidates and closes the savings plan account. Hmmm. What does Party B get now? Party A and Party B do not agree about the date of valuation - was it the date that the settlement was put on the record or the date of entry of the JOD? Markets crash and that six weeks makes a difference. Back to court, perhaps requiring an evidentiary hearing, as a determination must be made as to the value of what Party B was supposed to receive. Once an order is entered placing a number on the benefit, it may be satisfied by other assets.

Case Study C

With hundreds of thousands of people out of work, we are encountering many personal bankruptcy filings. You cannot prohibit a party from filing for bankruptcy. However, in terms of debt division, you can help protect your client if the other side does file. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, domestic support obligations are not dischargeable in bankruptcy. See 11 USC §§ 523(a)(5)¹ and 1328(a)(2). Therefore, if Party A is required to pay the debts of Party B, or the joint debts, you may consider clarifying in the JOD whether Party A's payment of those debts on behalf Party B is a domestic support obligation (ie., intended to provide support

for the payee). Even if it is so defined in the JOD, later enforcement proceedings may still be required. These may include requesting the state court or the bankruptcy to determine its intent and if payment of those debts is a domestic support obligation, and therefore, non-dischargeable. For more information pertaining to bankruptcy and domestic relations, you may want to refer to the Enforcer article which appeared in the April, 2008 Michigan Family Law Journal, "Uh Oh, The Other Side Filed for Bankruptcy."

Case Study D

Consider the JOD that obligates Party A to pay Party B non-modifiable support equaling 15% of all of income from Party A's three single-member LLC's until Party B's death.

Party A promptly sells or dissolves the LLC's, opens up new businesses not contemplated in the JOD, and never pays penny. That's blatantly bad, or is it? If the LLC's named in the JOD are gone, what is Party A obligated to pay? Could Party A have been required to make Party B a managing member of the LLC's, or perhaps sign security agreements so that Party B could file UCC-1's indicating a secured interest in the accounts receivable, furniture, fixtures and equipment of the original LLC's (which are now utilized at the new LLC's)? Bad behavior can be difficult to anticipate, but your clients will love, or at least appreciate you for it.

Endnote

1. Other non Domestic Support Obligation claims can also be found to be non-dischargeable under §523(a)(15).

