



In the Matter of the Marriage of Allison Gelbe-Pinkus and Mark Pinkus

2019 TAFLS Trial Institute
San Francisco, California

Motion for Enforcement of Temporary Orders



Enforcement

Examination of Alison Gelbe-Pinkus



The Hearing

At minimum, Movant must establish the following:

1. Jurisdiction of the court

2. Existence order to be enforced

#1 and #2 → prove by asking court to take judicial notice of the order in court's file or offering into evidence certified copy of order

3. Movant's right to bring the motion

4. Specific violations of the order by Respondent

5. Relief requested

#3, #4 and #5 → prove through Movant's testimony, shorthand renditions of testimony

TECHNICAL TIP

- **Movant must prove all required elements in its case in chief.**
 - Movant cannot rely on Respondent to prove up the case. In fact, Respondent need never be sworn.
Ex parte Werblud, 536 S.W.2d 542 (Tex. 1976).
- **Best Practice: Identification of Witness on Record**
 - *See Ex parte Harris*, 581 S.W.2d 545 (Tex. App. – Fort Worth 1979, orig. proceeding).
 - **Later cases declined to follow Harris—most courts will not require identification of respondent as part of the movant's prima facie case.** *Ex parte Snow*, 677 S.W.2d 147 (Tex. App. – Houston [1st Dist.] 1984, orig. proceeding); *Ex parte McManus*, 589 S.W.2d 790 (Tex. App. – Dallas 1979, orig. proceeding).

The Motion

- **Must set forth portion of order sought to be enforced/alleged to have been violated**
- **Manner in which Respondent violated order set forth with specificity**
- **Don't invite the jury - Requested punishment for criminal contempt **LESS THAN 180 DAYS** for all violations (to run concurrently) + Fine **LESS THAN \$500.00****

Ex parte Gunther, 758 S.W.2d 226 (Tex. 1988); *Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984).

The Order to be Enforced

- If Order doesn't clearly and specifically set forth **WHAT** Respondent is ordered to do and **HOW** to do it...can't be sent to jail for violation. *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967).
- Respondent must have actual notice through personal service of contempt hearing—even if it's a **TEMPORARY ORDER**

BUT...

- Rule 4.02(a), TX Disciplinary Rules of Professional Conduct says: no communication directly with a party who is represented by counsel
- But...TFC § 157.062(c) says Respondent to enforcement motion must be personally served.

BEST PRACTICE: DO BOTH

Keep in Mind...

- **No debtor's prison in Texas**
See Tex. Cons. Art. 1 §18.
- **Spousal support is specifically not a debt**
Ex parte Hall, 854 S.W.2d 656 (Tex. 1993).

Best Practice:

- **Characterize payments (i.e., order to pay mortgage) as “temporary spousal support” so they are enforceable by contempt.**

See Whitt v. Whitt, 684, S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1984, no writ).

Enforcement

Examination of Mark Pinkus



Cross Examination Pointers

- STOP trying the other side's case!
 - "You had the ability to make those payments, didn't you?"
 - "And you fully understood what your obligation was, didn't you?"

TECHNICAL TIP

To Use or Not to Use?

- **Special Exceptions**
 - When
 - Alternative? Defend enforcement on defective pleading
- **Assertion of 5th Amendment rights?**
- **Bench Trial → Move for Judgment (v. Directed Verdict)**

Motion for Summary Judgment

Enforceability of Premarital Agreement



The Basics

- MSJ and supporting affidavits shall be filed and served at least 21 days before hearing.
- Adverse party may respond and serve opposing affidavits at least 7 days prior to hearing.
- Permissible exhibits to MSJ:
 - Affidavits
 - Deposition transcripts
 - Interrogatory answers
 - Admissions and other discovery responses
 - Authenticated or certified public records

See TRCP 166a(c)

Objections to Summary Judgment Evidence

- **Objection must be in writing, filed and served no less than 7 days prior to hearing**
- **Objections to non-movant's response must be filed and served no less than 3 days prior to hearing**

Summary Judgment Evidence

Summary Judgment Affidavits

- Should set forth facts that would be admissible in evidence + show that affiant is competent to testify to the matters stated.

TRCP Rule 166a(f)

- Must affirmatively show how affiant became personally familiar with the facts.

Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996)

NOTE: Recitation that witness is personally familiar with the facts *does not satisfy* competency requirement.

Lack of personal knowledge of facts contained in affidavit must be objected to, or it's waived!

Summary Judgment Evidence

- **Unsworn deposition testimony does not constitute summary judgment evidence.**

See Carr v. Hertz Corp., 737 S.W.2d 12, 13 (Tex.App. Corpus Christi 1987, no writ).

- **Relying on excerpted portions of a deposition?**
 - **Attach excerpted portions of deposition as exhibits to MSJ (or response) TOGETHER WITH:**
 - **Copy of the court reporter's certificate, *PLUS***
 - **Attorney's affidavit certifying the truthfulness and correctness of the copied material.**

See Grossman v. Grossman, 799 S.W.2d 511, 513 (Tex. App.-Corpus Christi 1990, no writ); *Kotzur v. Kelly*, 791 S.W.2d 254, 255-57 (Tex.App.—Corpus Christi 1990, no writ); accord *Mendez v. International Playtex, Inc.*, 776 S.W.2d 732, 733 (Tex.App.—Corpus Christi 1989, error denied).

TECHNICAL TIP

- You MAY attach entire deposition transcript as proof.
 - Proffering party must point out to trial court portions of transcript where issues set forth in the motion are raised.
See TRCP 166a(d)

Motion for Summary
Judgment

Argument of Counsel for
Mark Pinkus



MSJ on Premarital Agreement

- Seeking to enforce a premarital agreement?
 - Presumption of enforceability operates without evidence other than *existence and terms of the agreement* to establish no genuine issue as to a material fact regarding enforceability.

The Hearing

- **No testimony at hearing**
TRCP 166a(c)

- **Oral argument does not form basis upon which summary judgment may be rendered**

Rogers v. RJ Reynolds Tobacco Co., 761 S.W.3d 788, 795 (Tex. App.—Beaumont 1988, writ denied).

- **Statements contained in ancillary briefing do not constitute summary judgment proof**

Acevedo v. Droemer, 791 S.W.2d 668, 669 (Tex. App.—San Antonio 1990, no writ).

Motion for Summary
Judgment

Argument of Counsel for
Allison Gelbe-Pinkus



MSJ on Premarital Agreement

Arguing Against Premarital Agreement?

- Spend less time talking about how unfair a prenup is and more time on the burden.
- Your Judge knows PMA may be unfair—if the weren't unfair, we wouldn't need them.

Final Trial on Annulment



TECHNICAL TIP

Bifurcation of Case

- Why do it?
- TRCP 174(b) – the Court, in furtherance of convenience or to avoid prejudice, may order separate trial of any number of claims/issues

The Annulment Trial

Examination of Allison Gelbe-Pinkus



The Annulment Trial

Examination of Mark Pinkus



Impeachment by Prior Inconsistent Statement:

- **COMMIT:** So, it's your testimony that you never limited your wife's ability to use any credit card?
- **CREDIT:**
 - This isn't first time you've testified in this case, correct?
 - You also gave your deposition on January 24, 2019?
 - You were under oath to tell truth that day?
 - Just like you are under oath today in Court?
 - And you did tell the truth during your deposition?
- **CONFRONT:**
 - Page 2, line 2 of deposition on January 24, 2019?
 - Mr. Pinkus, at that deposition, you were asked question and gave following answer:
 - Question: Did you ever take steps to limit your wife's ability to charge on any credit card?
 - Answer: Yes, I called American Express and asked that a limit of \$5,000.00 be placed on the card my wife used.
 - You gave your deposition on January 24, 2019?
 - Mr. Pinkus, did I read that correctly?

TECHNICAL TIP

Admitting Summary of Voluminous Documents

- Contents of voluminous documents, writings, recordings can be presented in chart or summary form (if not convenient to examine all documents)
 - TRE 1006
- Key: Provide opposing side opportunity to examine/copy underlying data on which summary is based.
- Summaries can save Judge countless hours of sorting through records, data or other information necessary to make a decision in a case.

TECHNICAL TIP

Refreshing Witness Recollection

The Starting Point: “I don’t recall”
(when witness previously knew answer)

Foundational Requirement:

- Would looking at prior statement (deposition, email, photograph) help your memory?
- Ask to approach witness with statement
- Direct witness to prior statement (read line ____, page _____)
- Has reviewing this statement helped your memory?
- Return to original question

TECHNICAL TIP

Using Demonstrative Evidence

- Why do it?
 - To simplify complicated subject matter
- When is demonstrative evidence helpful in bench trial?

TECHNICAL TIP

Rule of Optional Completeness vs. Remainder of Writings

Rule of Optional Completeness: Often misstated/misused

- TRE 107: When part of writing/statement is introduced, adverse party may introduce any other writing/statement that is necessary to explain/understand part previously offered.

Rule of Remainder of Writings: Used to immediately correct to provide context right away, without waiting for “their turn”

- TRE 106: When writing/statement (or part thereof) is introduced, adverse party may AT THAT TIME introduce any other part or any other writing/statement which ought *in fairness* to be considered contemporaneously with it... ”

Final Trial on Divorce



The Divorce Trial

Examination of Allison Gelbe-Pinkus



The Divorce Trial

Examination of Mark Pinkus



TECHNICAL TIP

- **Direct examination** → focuses on the witness.
- **Cross examination** → focuses on the examiner.

TECHNICAL TIP

Direct – Open-ended

Q: When did you and your wife separate?

A: In May of 2018.

Q: How did you acquire the stock in Facebook?

A: I had a connected within the company and was allowed to invest in an early private offering.

Cross - Lead

Q: You separated from your wife in May, 2018?

A: Yes.

Q: You were able to invest in Facebook stock through a private offering because of a connection within the company?

A: Yes.

TECHNICAL TIP

Maintaining Control on Cross

Control techniques

- Use witness’s own words in cross examination
 - Details can make difference in witness response
- “Ma’am, thank you, but that’s not the question that I asked you” – Then, re-ask the question
- Put your hand up (i.e., “stop”) – Then, re-ask the question

TECHNICAL TIP

Maintaining Control on Cross

Control techniques

- Always use **LEADING QUESTIONS**
- Avoid tag lines (e.g., “isn’t it true...” & “wouldn’t you agree...”)
- Ask cleaner questions:
 - Q: You woke up this morning?
 - Q: You got dressed in black suit?
 - Q: You went to Starbucks and ordered 2 lattes?

OBJECTIONS - HEARSAY

- **ANY** out of court statement which is relevant and **NOT** offered to prove the truth of the matter stated is NOT hearsay.
- **Operative Facts** → When the mere making of an out-of-court statement – regardless of its truthfulness – has legal significance, then it is a statement of “operative fact” and is NOT hearsay.

OBJECTIONS

Speculation vs. Personal Knowledge

Q: Why did your wife file the Amended pleading?

OBJECTION: Calls for Speculation

REPHRASE THE QUESTION:

Q: Did you speak with your wife on the day she filed the amended pleading?

A: Yes

Q: What did she say about this new pleading, if anything?

A: She told me that she would get to my money, one way or another.

OBJECTIONS

Misstating Prior Testimony

Misstating Prior Testimony

Q: Had you done business with Facebook before?

A: Yes, on many occasions

Q: Over the many years you have worked with Facebook, did your wife come to any meetings?

OBJECTION: Question misstates testimony

OBJECTIONS

Overcoming “Facts Not in Evidence”

Q: What was your net worth at the time of your marriage?

A: Approximately \$10 million dollars.

Q: And how did your pre-marriage intellectual property cause your net worth increase during marriage?

Objection, assumes facts not in evidence (and leading)

Problems:

- (1) No prior testimony to existence of pre-marriage intellectual property;
- (2) No prior testimony to status/increase in net worth during marriage.

Solution: Go back and ask additional questions to bring those facts into evidence first before asking the question

TECHNICAL TIP

- **When a narrative objection interrupts your client (and your flow)?**
 - **Signpost to regain court’s attention + question:**
 - Q: You previously stated you were on the way to San Francisco on December 24, 2018. What happened after you arrived there?**

JUDICIAL ADMISSIONS

- **Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.**

Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001).

- **A judicially admitted fact is established as a matter of law, and the admitting party may not dispute it or introduce evidence contrary to it.**

Bowen v. Robinson, 227 S.W.3 86, 92 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

- **Examples: Sworn Inventory; Factual statements in live pleadings**

TECHNICAL TIP

Flaw in Pleading Discovered at Trial

- Ask for Trial Amendment

Address unfair surprise

Was it within discovery/disclosures?

- Ask for a Motion for Continuance (in writing)

TECHNICAL TIP

Testimony Regarding Relief Requested

- If facing a sustained leading objection when leading client through the relief they are requesting:
 - Use “Requested Relief” document”
 - Q: If I were to ask you to state the relief you are requesting, would this document accurately summarize your testimony?
 - A: Yes
 - Move to admit as a summary of witness’s testimony

Taking Witness on Voir Dire

- Why: to question a witness in advance for the purpose of determining whether the witness will be permitted to give testimony on a particular matter
- How:
 - Ask Judge permission to “take the witness on voir dire.”
 - Attorney asks preliminary questions aimed at ascertaining the quality, admissibility or competency of the evidence that the witness will offer.
 - Usually followed by objection to the proposed evidence OR statement that the attorney has no objection.

TECHNICAL TIP

- **TRE 612 – If witness uses writing to refresh memory before testifying, adverse party entitled to have writing produced at hearing for inspection and for use in cross examining witness thereon. May introduce into evidence those portions that relate to witness testimony**



The End!

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