

## **FAMILY LAW DEFAULTS -A SLAM DUNK....NOT SO FAST, MY FRIEND.**

When attorneys appear on default judgment in family law cases my heart seizes. *It is our job, attorney and judge, to make certain the non-appearing party has received due process under the constitution.* Yes, we must protect the party that does not answer or does not show up. Think of it as your way on honoring our constitution, without which, we wouldn't have a job...or liberty. It is necessary to make certain the record is clear and supports your judgment, so you don't spend additional funds to defend the judgment on a motion for new trial, appeal or bill of review.

These thoughts come from the article written by Dwayne W. Smith and Susan Flynt Smith and presented at the Advanced Family Law Drafting course in December 2015. These are the highlights. For forms or additional information please see the full article.

**BEST PRACTICE. DEFAULT JUDGMENTS ARE DISFAVORED IN THE LAW:**  
Get it right the first time and your client and this judge will thank you.

### **BASIC**

A default final order or divorce decree may be obtained upon a showing of PROPER SERVICE if the Respondent has failed to file an answer.

Make certain your default judgment has a strong foundation and consider ways the respondent may later attack the judgment.

*The most common attacks on defaults are against the propriety of service or the amount of time provided for an answer.*

### **PREREQUISITES FOR OBTAINING A DEFAULT**

Service of citation  
Citation  
Timing  
Military Service Affidavit  
Certificate of Last Known Address

#### **Service of the Citation**

**DID YOU KNOW?** Texas requires strict compliance with service of process rules; substantial compliance and good faith mistakes, therefore, are not permitted. Due process requires it.

**DID YOU KNOW?** Failure to affirmatively show, ON THE RECORD, strict compliance renders the attempted service of process invalid and of no effect. ITS YOUR JOB to establish strict compliance with service requirements. For

example, the service of process by certified mail is invalid if the person to whom service was addressed failed to sign the green card.

Most mail service is insufficient because:

1. signature on mail receipt is unreadable;
2. signature on mail receipt is not that of the respondent;
3. the clerk or other person fails to properly complete the return of citation.

\*\*\*"Refused" or "Unclaimed" may be sufficient if it is shown that the address was valid and could be located by post office.

**BEST PRACTICE.** Don't do service by mail. See, Service of Process and Default Judgments, Mark Blenden, 15<sup>th</sup> Annual Collections & Creditors' Rights course. Pages and pages of cases overturned on appeal based on insufficient mail service.

**BEST PRACTICE.** Offer into evidence a certified copy of the return of service or the green card. If service was by certified mail **THE GREEN CARD IS A NECESSARY PIECE OF EVIDENCE.**

**DID YOU KNOW?** If you intend to serve an amended petition and the respondent has not yet filed an answer – you must have the respondent personally served with any amended pleadings that will form the basis of your default judgment.

### **Citation**

**BEST PRACTICE.** Make certain the information contained in your citation was proper and included all the info contained in Rule 99(b) Texas Rules of Civil Procedure.

Rule 99(b) of the Texas Rules of Civil Procedure specifies the proper form of the citation to be served upon the respondent:

The citation shall:

- (1) be styled "The State of Texas,";
- (2) be signed by the clerk under seal of court;
- (3) contain name and location of the court;
- (4) show date of filing of the petition;
- (5) show date of issuance of citation;
- (6) show file number;
- (7) show names of parties;
- (8) be directed to the respondent;
- (9) show the name and address of attorney for petitioner, otherwise the address of petitioner;

10) contain the time within which these rules require the respondent to file a written answer with the clerk who issued citation;  
(11) contain address of the clerk; and  
(12) shall notify the respondent that in case of failure of respondent to file and answer, judgment by default may be rendered for the relief demanded in the petition.

The citation shall direct the respondent to file a written answer to the petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.

**DID YOU KNOW?** If the return on the citation states, "...was served on John Jones". NOPE doesn't work. Must state "was DELIVERED TO".

### **Timing Must Be Proper**

Answer period has expired.

Return has been on file for TEN DAYS. T.R.C.P. 107

60 days has passed since the date of filing for a divorce.

**DID YOU KNOW?**...If the answer is sent to the proper clerk by first-class mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing, the answer, if received by the clerk not more than ten days tardily, shall be filed by the clerk and shall be deemed filed in time. Tex. R. Civ. P. 5; *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267, 268 (Tex. 1996).

You know that defaults cannot be granted in a divorce until past the answer date AND 60 days has past....unless....domestic violence.

**DID YOU KNOW?** Though you may be entitled to a default judgment, you also may have ethical obligations that prevent you from taking that judgment. The Texas Lawyer's Creed says that "I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intentions to proceed.

### **MILITARY AFFIDAVIT**

The military affidavit MUST BE FILED. Court cannot render a default judgment without affidavit! Trust but verify. It takes only a few minutes to confirm what your client tells you about military service. Search the Defense Manpower Data Center as close to the hearing date as possible so the official status report shows the date of your search.

[https://www.dmdc.osd.mil/appj/scra/single\\_record.xhtml](https://www.dmdc.osd.mil/appj/scra/single_record.xhtml).

**BEST PRACTICE.** File Servicemember affidavit and last known mailing address affidavit as soon as possible.

## WHAT IS AN ANSWER?

Default judgments are disfavored. Anything on a piece of paper and filed is an answer.

## DOCUMENTS NECESSARY TO OBTAIN DEFAULT

Certificate of last known address

Military service affidavit

Statement of Evidence form (if service was by posting or publication).

Order

**BEST PRACTICE.** File and bring. File the documents in the clerks file and bring a copy with you to the hearing.

## SCHEDULING THE HEARING

Don't have to give notice to a non-answering respondent. If the respondent filed an answer, you must provide PROOF that you sent notice of the hearing in accordance with Rule 21a and TRCP 45.

**BEST PRACTICE.** If the party opposing you is pro se and has entered an appearance of any shape or form, then serve all documents and correspondence via certified mail, return receipt requested, or through the e-file service. Print out the documents from the e-file service indicating the documents have been served or bring the green card to prove actual notice. \*\*This is the best thing about the e-filing business....

**Remember the 60-day waiting period if a divorce.**

## DRAFTING THE DEFAULT ORDER

Three things must be included in your default judgment:

- 1) A statement that the respondent was cited to appear in accordance with the TRCP;
- 2) A statement that the respondent, although properly cited, wholly failed to answer and appear; and
- 3) A statement that the respondent has defaulted.

**REMEMBER.** Mere recitations within the order regarding proper service and notice will not suffice. The RECORD must demonstrate that the respondent was properly served, and that proof of service has been on file for at least 10 days.

## PREPARE FOR THE HEARING!!!

Sounds easy. But don't slough off the preparation. Make sure you have your evidence. No excuses.

Unlike in other civil matters, a default in family law cases does not necessarily mean you win on all potentially-contested points. In a suit for divorce, the petition is not taken as confessed if no answer is filed.

**BEST PRACTICE.** Treat the hearing as if it were a final trial in a contested case. Your client deserves this treatment. In the future, your default judgment may be challenged. Marshal your evidence and plan your attack as if you had an opponent. It's easy if you do it at this stage. Don't cut corners. Have the record and evidence support the relief requested.

*Roberts v. Roberts*, 621 S.W. 2d, 825 (Tex. App. –Waco 1981, no writ), Waco Court of Appeals overturned a default judgment's property division due to the petitioner's failure to introduce evidence that specifically traced separate property sold to purchase community property. (How easy would that have been to do without the respondent present? Oopsie.) There was no evidence as to the amount or value of the separate property, the amount or value of the community property at issue, or the circumstances of the parties. In short, no evidence as to why the division of property constituted a just and right division.

**BEST PRACTICE.** Consider outlining and including Findings of Fact and Conclusions of Law, especially in those dicey cases involving separate property issues or other issues requiring testimony. Include them in your order. This practice will help you focus on what evidence will be required to support your judgment, which will in turn help defend your default judgment from a Motion for New Trial, Restricted Appeal, or Bill of Review.

If your client is seeking a disproportionate division because they spent 10 years as a stay-at-home parent and their spouse ran off to Aruba, make sure your proof includes those facts, their personal and professional background, their household duties, their future opportunities, and their current circumstances. Give serious thought to the types of proof you would need if the case were contested. If your client has reimbursement, attorney's fees, breach of fiduciary duty, fraud, waste, or other related claims, you may need to bring a CPA or other expert witness to testify as to tracing issues, fees, and/or the value of the reconstituted estate if the money trail cannot easily be explained by your client.

**BEST PRACTICE.** Create an exhibit for your hearing that summarizes your client's testimony regarding the just and right division of the community estate. Drafting the summary in a manner that corresponds with your client's inventory will make it easy for the judge (and the court of appeals, if necessary) to evaluate the property division.

Consider the types of property at issues. If the property is not easily partitioned, and your client wants it awarded to him/her in whole, you must demonstrate on the record why such an award is justified.

**DID YOU KNOW?** The burden of proof does not change just because the respondent has not appeared. Whether a preponderance of the evidence or clear and convincing standard applies, make sure your evidence meets and surpasses the applicable standard.

In custody cases, if the respondent is an unsuitable parent, make sure you enter evidence into the record demonstrating why the respondent should be a possessory conservator or should have limited access to the child.

**BEST PRACTICE.** Your witness's testimony cannot be conclusory. Cannot. Cannot. It must be specific and fact-based. Conclusory testimony can be overturned easily if the default judgment is ever attacked.

**BEST PRACTICE.** Compare your pleading with your final order before you schedule your hearing. The judge only can grant relief that has been requested, that includes confirmation of separate property, not appointing JMC's, and spousal maintenance awards.

## RECORD

It is your responsibility. A record is REQUIRED for a default judgment.

**DID YOU KNOW?** The requirement of a record in cases involving the parent child relationship is mandatory and is not subject to harmless error review. The parties can waive the record...but must be BOTH parties and with the consent of the court.

**BEST PRACTICE.** Make a record. The record is your friend.

## SPECIAL CONSIDERATIONS FOR DEFAULTS IN FAMILY CASES

Defaults in family cases are generally the same as civil cases, EXCEPT....

1. Cannot grant a default judgment in a divorce until after expiration of 60 days. (Civil case it's Monday after the expiration of 20 days.)
2. A respondent in a divorce case does not admit the material allegations in the petition by failing to file an answer. Petitioner must present evidence in support of the allegations in the petition. Petitioner must present evidence to support the property division, characterization of property, attorney's fees, the amount of child support, and the amount of spousal maintenance.

**BEST PRACTICE. Bring an inventory to admit into evidence.**

### **UNIQUE ISSUES IN SAPCR'S**

In the context of default judgments these are unique. The parentage of a child may be established by the entering of a default decree. However, the adjudication of such an issue does not necessarily bar future litigation of the same issue. For example, the mere failure to deny paternity does not bar litigation of paternity in the future. Courts appear more willing to overturn default judgments in SAPCRs than default judgments in other types of cases.

### **MOTION FOR NEW TRIAL**

Denied if and only if, you can show that the respondent knew he was sued and did not care.

### **WORDS OF WISDOM.**

Remember. Your opponent is really the court of appeals, or the trial judge if you want to survive a motion for new trial. The court of appeals will put your work under a magnifying glass if your judgment is ever challenged. Be proud of your work. Pay attention to detail. Be known as the lawyer that crosses all the t's and dots the i's.

How often does an opponent challenge a default judgment? Not very. But do the work up front. Be known as the lawyer with airtight judgments.