

FIFTY STATES PROGRAM CONSIDERS INJUNCTIVE RELIEF

A Report from the ABA Convention

FAMILY LAW Article by Richard Crouch, Attorney at Law, Crouch & Crouch, Arlington, Virginia; (703) 528-6700;
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At the American Bar Association Convention in San Francisco in August, family law practitioners representing almost all of the 50 states discussed the development of divorce-related law nationwide. One of this year's three featured topics was the use, abuse, and availability of injunctive types of relief. The ABA Family Law Section's Fifty-States Program representatives compared the experience in their respective states and debated the larger policy issues behind the practice problems. Their reports covered injunctive relief against domestic violence and property/income dissipation, no-contact orders, kick-out orders, sequestration, prevention of child removal and the like. Some radical differences and some remarkable similarities emerged. Outrage and concern centered around tactical abuse of such relief, and its unavailability when warranted. A number of subjects that came up more or less at random were the following:

BAD-FAITH TACTICAL ABUSE

Most of the state representatives seemed to agree that while temporary restraining orders and related relief in divorce play an important role, these are often exploited for bad-faith tactical ends by the slicker attorney where ex parte practice is allowed. Experience common to several states was the easy availability of truly ex parte relief, without notice in any form by attorneys who are cozy with the particular judge, while other attorneys are asked why they have not given notice or made a good-faith effort, shown irreparable harm, and generally followed the rules. It was also pointed out that more careful judges, when asked to give injunctive relief without notice, are fond of saying that every lawyer has a telephone.

Of course it was also observed that those who resort to such tactics inevitably defend them by arguing that if given notice the defendant will immediately dissipate property or abduct the children. Hypothetical instances were mooted about, in which it might be malpractice to observe the basic rules of legal ethics and fundamental fairness by giving notice of emergency resort to the friendly judge's chambers. Certain child-snatching and domestic violence situations were hypothesized. One Massachusetts practitioner remembered asking a judge

why he does it and the judge saying that although ultimately no other reason is defensible, he does not want to see his picture on page 1 of the Boston Globe in the morning as the judge who failed to prevent a homicide.

AVAILABILITY, STATUTORY OVERLAP

Unavailability of injunctive relief when needed was discussed. It was agreed that availability and the height of the threshold showing tends to vary widely with locality, counsel and judge. The consensus of reporters seemed to be that in cases of violence it is almost always granted, but the summary put-out order is hardly ever granted anymore. In California the temporary restraining order against any contact with the other spouse was common for a while, but the statutory authority for it was repealed when it was held unconstitutional. From a surprisingly large number of states it was reported that there is a domestic violence statute under which it is much easier to get a tactically useful injunction than it is to get it under the divorce code, with false and exaggerated allegations being common. A great number of states also reported having overlapping jurisdiction to grant such relief among several levels of court systems, with the slickest attorneys knowing how to manipulate the confusing redundancies (e.g., getting a domestic violence injunctive order from juvenile court while the divorce is pending in the court of record).

OVERBREADTH, MUTUALITY, CONSTITUTIONALITY

The breadth of the relief available was of concern to a great many of the reporters. While New York requires a very strong showing before property can be tied up, in South Carolina the fact that the parties are in a divorce case at all is considered to establish extraordinary necessity. Professor Robert Levy of Minnesota commented on the various horror stories about overbreadth of relief by observing that the problem is with "judges who continue to sign without reading them ex parte restraining orders of the most extraordinary scope."

And what of the constitutional question? Some reporters observed that the appellate courts, including the U.S. Supreme Court, have been quick to find pre-judgment sequestration, garnishment, etc., statutes unconstitutional. Professor Levy cited a Minnesota case at 481 N.W.2d 871 which held an ex parte TRO in a divorce case unconstitutional, but noted that the result was simply an immediate change of the statute by the legislature. The question whether post-order relief opportunities are really dispositive of the constitutional question was also raised.

POST-HOC RELIEF FOR REAL?

It appeared from the discussion that some states have a true opportunity of prompt resort to court after one is served with such an ex parte temporary order, and some do not. In Rhode Island it appears that there is a great problem with abuse, because a husband can be thrown out of his house ex parte under the domestic violence statute and there is no hearing opportunity until 21 days later. Similar abuses were suggested from Oklahoma and Minnesota. In Texas, it was noted, this kind of abuse is very easy to effect. Virtually all the reporters seemed to agree that the propriety of the sneak attack almost never gets tested

because the order issues, the order is honored, and by the time the defendant's counsel could have geared up for a hearing, the oppressive effect of the injunction has motivated attorney and client to contact the other side and accept the magnanimous compromise of a mutual injunction.

DUBIOUS MUTUALITY

Some reporters, including one from Chicago, explained that orders improperly granted are usually set aside upon resort to the court by post-hoc motion, but by then the damage is done, and by then the attorneys have probably made the injunction mutual. Harvey Golden of South Carolina, a past chairman of the Section, said that he does not usually end up striking without warning, but he usually finds himself talking to opposing counsel about whether there will be injunctive relief by agreement, or he will have to go to court for it. All too often he hears defendant's counsel agree to the injunctive relief saying "Sure, let's make it mutual." Golden's reaction to that is usually a polite no, because mutual restraining orders, in a case where they are only warranted against the abuses of one party – as is so often the case with domestic violence or dissipation of assets – place the case from the very beginning in a false light. He would rather have the court know the true history of the case, and mutual injunctive orders would grossly distort and mislead an impartial observer as to the respective roles of the parties concerned.

AND WHAT OF BOND?

A number of lawyers, particularly those from Connecticut, felt that requirement of bond was at least a partial safeguard against abusive exploitation of preliminary injunctive relief, and they wondered at the reports from other states where bond is not required from the enjoining party. However, they were assured that in many states divorce cases are considered immune from bond requirements. Bond would, after all, be unfair in many family law cases, it was said, since often the most threatened party has no assets at all.

OVERBREADTH

Temporary and ex parte injunctive relief against dissipation of assets often takes absurdly overbroad forms, the representative agreed. When judicial authorities tie up a business person's ability to move property and money around, there is nearly always an exception for transfers in the ordinary course of business, and for ordinary and necessary living expenses and attorney's fees. However, the problem encountered in more than one state is the attitude of banks, lenders, stockbrokers, etc., who will nevertheless regard a husband's funds as unconditionally embargoed because they can easily say "We won't take the risk of making the determination of what is ordinary and necessary."

COURT RULE, COMMON LAW, OR STATUTE?

To many of those who raised abuses, the answer was placement of the entire injunction process under a detailed and comprehensive statute. Several states' representatives said that they had such statutes governing domestic relations injunctive relief. The Wisconsin representative, Greg Herman, said that that

state has no statute on the subject, but the Family Law Section is recommending one. Alabama has no statute, reporter Judith Crittenden noted, although there is a rule of civil procedure allowing injunctive relief. Marilyn Sellers from Washington State suggested that a state could simply adopt Federal Rule of Civil Procedure 65, thereby making applicable all of the case law under that Federal Rule, which has proved to be a fairly good safeguard against abuse.

The discussion evolved into a consideration of whether a state is better off having a statute, and what such a comprehensive statute might look like. It was emphasized several times that Delaware has a full, comprehensive, automatic and mutual temporary restraining order effective (against the complainant) upon filing, and (against the respondent) upon service of process. Kansas, California, Colorado and Illinois, along with Ohio, appeared to have similar statutory schemes. Colorado seems to have one of the most comprehensive and detailed statutes on the subject, CRS 1410-127 (1989). If a state such as Virginia had such a statute, both parties would know that immediately upon the filing of divorce, there are few games to be played in this area, since both parties are mutually restrained anyway from seeking those first-strike advantages that have so distorted and embittered divorce litigation in the past. The party who is told he cannot contact his spouse, or cannot withdraw money from the bank to take advantage of an attractive investment deal, will at least have the comfort of knowing that the other party is similarly restrained.

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