

**The Automatic Dissolution Stay: May it Rest in Peace**

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Although hailed by divorce lawyers and judges alike, the Automatic Dissolution Stay, Section 501.1(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/501.1), providing for the automatic restraint against transferring, encumbering or disposing of any property without bond, was declared unconstitutional by a lower court in a decision which was affirmed by the Supreme Court of Illinois without dissent. **Messenger v. Edgar**, 157 Ill.2d 162, 623 N.E.2d 310 (Ill.1993). I presented the constitutional challenge.

I first argued that our client had standing to maintain the declaratory judgment action by virtue of her status as a divorce litigant. The Court held that the injury alleged, a deprivation of her property, was a direct injury to a legally cognizable interest.

The State of Illinois, as well as the Illinois State Bar Association, and the American Academy of Matrimonial Lawyers as "friends of the court," argued that the "stay" was not actually an injunction and therefore that our due process analysis was not appropriate. They argued that this case was similar to **Bank of Aspen v. Fox Cartage, Inc.**, 126 Ill.2d 307 (1989), which held that the restraining provision of a citation to discover assets issued to a third party was not an injunction. The Court held the case in point to be "markedly different" from the provisions at issue in **Bank of Aspen**, in that Section 501.1(a)(1), deals with the transfer, not of another person's property, but one's own.

The Illinois Supreme Court decided the case on substantive due process grounds, holding that the restraining provision was overbroad because it automatically restrained a party's non-marital property as well as marital property. The opinion said that, "by virtue of the excessively broad sweep of this section to include a restraint affecting property that cannot be considered in any way a marital asset, the means adopted by the legislature is not a rational means of accomplishing its purpose." In addition, there are at least five respects in which the statute violated procedural due process:

- the failure to provide for notice prior to the deprivation of one's property;
- the failure to provide for a hearing prior to the deprivation of one's property;
- the failure to require the filing of a factual affidavit;
- the failure to require that a judge order the restraint; and
- the failure to require a bond or specific finding as why bond is not required.

Although many had referred to this statute as an important expression of public policy, the public policy of Illinois is to be found in its constitution. **Hyatte v. Quinn**, 607 N.E.2d 321 (2d Dist.1993). No matter what the purported public policy, there is no excuse for violating due process rights. See e.g., **People ex rel. Brazen v. Finley**, 146 Ill.App.3d 750 (1st Dist.1986)(rule requiring plaintiff's lawyer to submit affidavit, purpose of which was to shield the public from unethical solicitation by over-reaching attorneys, although well intentioned, was violative of constitution).

In my view, the dissolution action stay cannot be redrafted to avoid substantial constitutional infirmities.

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*A frequent speaker and author on various matrimonial law topics, Paul Feinstein has over 25 years of experience in family and appellate law. In 1993 he was successful in overturning Illinois' automatic domestic relations asset freeze law in the Supreme Court of Illinois. Mr. Feinstein receives daily inquiries from other matrimonial law practitioners requesting legal opinions. He can be reached by phone at (312) 346-6392 or by e-mail at [pfeinlaw@aol.com](mailto:pfeinlaw@aol.com). View his [Divorce Magazine profile here](#).*