

MINUTES

AD HOC COMMITTEE ON AUTOMATIC TEMP. ORDERS

AUGUST 26, 2009 * Telephonic Meeting

1. WELCOME AND CALL TO ORDER:

The meeting was called to order by Co-Chair, G.M. Robert Jones, at 12:03 p.m. and welcomed members.

2. ATTENDANCE:

Robert Jones
David Manz
Maria Gonzalez
Douglas Greenbaum
JJ Dahl
Barbara Beilly
Evan Marks
Carin Porras
Tom Sasser
Elisha Roy

TOM moved to approve the minutes of June 24, 2009 and EVAN seconded. Minutes were unanimously approved.

TOM gave his report as Chair of the Constitutionality Subcommittee. The Eighteenth Circuit is the only Circuit which is using an Automatic Temporary Order under the Administrative Orders versus all other Circuits are using "standing orders." TOM researched what is the jurisdictional basis for standing orders. It is doubtful that this will pass constitutional muster if done by automatic order.

TOM did an analysis of various states and reported that one state declared the concept unconstitutional, one state has a challenge pending and four states have some functional form of these automatic orders.

The polestar opinion continues to be the Supreme Court opinion out of Illinois. It implied that it cannot be done and pass constitutional muster. TOM asked whether we are looking at this as a need for a statute. What authority exists for these Automatic Orders? Do we need a rule or statute? TOM cannot find any authority for a rule or

order. Are we then limited to the concept of the statute?

ROB advised that the Eleventh Circuit is currently looking at the concept of the Automatic Order.

DAVID advised that the only way we can accomplish this is by Statute which passes constitutional muster. There is a problem. The Standing Orders used in Monroe County are probably deemed violative of constitutional rights. What is the remedy? JJ asked TOM to clarify what his local counsel in Palm Beach Counsel advised him of regarding Rule 2.120. TOM advised that pursuant to Judicial Rule of Administration 2.120, it expressly provides that Automatic Orders are only available to address administrative court affairs (i.e., rotation of Judges, and setting of calendars), not anything substantive in nature. The local Rule has to be procedural not substantive in nature.

ROB advised that it is clear that you must look at a Statute and understand that we will also need Supreme Court approved Rules.

CARIN clarified that all Standing Orders are violative of the Rules of Judicial Administration. TOM agreed.

ROB stated that the constitutional issue is the key.

EVAN advised and suggested that TOM look at the Ne Exeat Statute. TOM pointed out that Ne Exeat is not automatic and you need affirmative requirements. TOM also looked at prejudgment attachment statutes.

MARIA gave her report as Chair of the Children's Issues Subcommittee. First, the subcommittee reviewed a total of 10 children issues clauses (9 of which currently appear in Rob's 2nd draft ("kitchen sink") version of a temporary automatic order. The discussion was limited to which children issues this subcommittee would recommend be included in an automatic order. Attached is a Table which summaries the subcommittee's recommendations as to each children issue and whether it should be included (yes) or excluded (no). In general, if the issue appeared to lean more towards protection of property or money issues, (ie, life insurance beneficiary or liquidating cash value), then it was excluded as a children's issue. Second, the subcommittee began a preliminary discussion of proposed language to be included in the automatic order as relates to the six points which were determined to be children issues.

The subcommittee analyzed the automatic orders used in seven current circuits as well as the proposed order in the 11th circuit and prepared a Summary of whether their orders address children issues or property issues. Attached is that Summary Table which reflects that the majority of the issues contained in the automatic orders pertain to property/money issues and not children issues. The subcommittee also

analyzed the various existing automatic orders used in eight states and did the same comparison. Attached is that Summary Table which reflects that five states only incorporate one children issue in their orders, two states incorporate no children issues and only one state reflects five children issues in their orders. MARIA advised that this subcommittee is not prepared to present any motions to this body at this time. The subcommittee will continue to meet and discuss these issues and be prepared to provide a report and any motions at the next live meeting in February 2010.

DAVID gave his report as Chair of the Property/Money Subcommittee. The subcommittee discussed a significant problems with numbers 1-9 under section (3)(b) of the "kitchen sink" order. They concluded there is a denial of right of property, due process, and hearing notice problems. Potential remedies are automatic right to a return hearing similar to Rule 1.610 within five days. However, BARBARA noted that this would be catastrophic on the Court docket. BARBARA therefore proposed a Statute that these are not automatic orders, but can be issued by appropriate evidentiary hearing or by verified motion under Rule 1.610 or by stipulation of the parties. Therefore, either by stipulation, by expedited hearing or by Rule 1.610 requirements, but not by Automatic Orders.

They researched the issue and the Illinois case is a serious road block.

They concluded that items 1-9 of the "kitchen sink" all address deprivation of property rights without notice of hearing and is therefore unconstitutional.

DAVID was going to make a motion on behalf of the subcommittee , however, ROB suggested that the subcommittee avoid making a motion unless it is a recommendation regarding an Automatic Temporary Order as opposed to some non-automatic process in light of the scope of the Ad Hoc Committee's charge.

ROB asked DAVID where should his subcommittee go. We have identified three types of elements: property, children and miscellaneous issues. We can still have a product that goes to rules and forms with provisions, but you can stipulate to other things that touch on property and how do you do it?

ELISHA raised a concern of how can you have children's issues in an Automatic Order and not deprive parties of their parental rights. DAVID stated that you need the children's issues as a prophylactic measure.

TOM believes the Court cannot order the ban on disparaging remarks absent stipulation of the parties because it is a breach of freedom of speech. Also, it is vague and ambiguous. It is difficult to get contempt for such things as reasonable telephone contact.

CARIN noted whether we have gone full circle? and are we doing or considering advisory guidelines versus mandatory orders.

ROB still wants the children's issues subcommittee to continue its work and to make its recommendations to the full committee irrespective of the Constitutional Subcommittee's current position on the constitutional issues.

DAVID's subcommittee cannot recommend any Automatic Order for property issues because of constitutional issues. There is only one small area that could be included which is (3)(a) regarding opening the other party's mail. His subcommittee did the research and DAVID moved that we reject the property related provisions in the "kitchen sink" because they cannot be included in an Automatic Order as the provisions would violate due process and state and federal constitutional rights. BARBARA seconded.

Discussion: EVAN stated that under Chapter 61, an automatic order is not excluding one party's property because it is held jointly. DAVID responded that since it is jointly held property, it still deprives one party of the use of it. And deprivation of property rights would still apply, at a minimum it is still a joint interest.

MARIA took the vote and the Motion passed unanimously.

ROB stated that the committee will not be meeting in September in Tampa the next live meeting will be in February in Orlando in conjunction with the Certification Seminar. ROB also stated the Co-Chair David Manz will give the report for our Ad Hoc Committee at the EC meeting being held in September.

Meeting adjourned at 1:17 p.m.

Submitted by,
MARIA C. Gonzalez,
Secretary