

ES PARTE' ORDERS IN THE DOMESTIC DIVISION

Judge J. Michael Gassett and Mark A. Zannotti

Okla. Stat. tit 43 § 110 A.2., provides that:

If the Court finds on the basis of a verified application and testimony of witnesses that irreparable harm will result to the moving party, or a child of a party if no order is issued before the adverse party or attorney for the adverse party can be heard in opposition, the Court may issue a Temporary Restraining Order which shall be immediately effective and enforceable without requiring notice and opportunity to be heard to the other party. If a Temporary Restraining Order issued pursuant to this paragraph, the motion for a temporary order shall be set within ten (10) days.

This little subsection of Title 43, Section 110 is the genesis for some of the most spiteful, vitriolic, aggressive, demeaning and emotionally damaging litigation ever to visit a courthouse. This particular process for obtaining emergency relief seems to fly in the face of the most basic concept of our common and statutory law, that of notice and opportunity to be heard. If a Court issues an order with regard to the custody of a child based on this subsection, the Court is effecting one of the most sacred rights of any parent, the right to the companionship and love and affection of the child. Accordingly, this procedure is an offensive weapon which carries great consequences and should be only used as a last resort.

Applying for an Order

In order to obtain an *ex parte* order there first must have been a Petition for Divorce or Separate Maintenance filed. (Okla. Stat., tit 43 § 110) There is no provision in the paternity statutes for such an *ex parte* order, (i.e. even if a visitation and child support order were entered into after a paternity petition was filed, a non-custodial parent would still not have the remedy of the *ex parte* emergency order.) The party seeking the order needs to file a verified application for the emergency order they seek. Pursuant to the rules of the Fourteenth Judicial District, specifically, Rule DR 3.2 *ex parte* temporary orders are to be heard by the Judge assigned for the day to hear agreed or default judgments as provided in Domestic Rule 4.

Rule DR 4: Agreed or Default Decrees and Judgments

“All requests to grant divorce decrees agreed to by the parties or sought by default shall be heard only by a Judge assigned to the domestic relations division. These hearings shall be from 9:00 a.m. to 9:30 a.m. and 1:00 p.m. to 1:30 p.m.” If a restraining order is issued, a hearing will be set before the assigned Judge within ten (10) days. (See Domestic Rule 1). “All domestic relations cases including Habeas Corpus actions seeking custody of minor child, DHS and paternity cases shall be assigned at the time filing to one of the five domestic relations Judges by random computer function.” In other words the Judge of the day will actually hear the application for the temporary order and within ten (10) days, the Judge that is actually assigned the Divorce or Separate Maintenance case will hear the motion hearing. Strict reading of Section 110 requires witnesses, (i.e. more than one) to obtain the requested relief. Generally, in the domestic division of the Tulsa County Courthouse, practice has indicated that one witness is generally considered sufficient.

Notice to the other side

One of the greatest areas of contention with regard to *ex parte* orders is whether or not notice need be given to the opposing party or counsel. Clear, Section 110.2 provides that an order may be issued without giving notice to the other side. (Okla. Stat. tit. 20 § 23 provides that the Supreme Court is vested with the authority to prescribe rules for district courts, and the presiding judges of the administrative districts may adopt rules that will bring about a better and more efficient administration of justice that are not inconsistent with the rules prescribed by the Supreme Court. The Rules of the Fourteenth Judicial District have been approved by the Supreme Court of Oklahoma.) However, Rule CV 4, of the Rules of the Fourteenth Judicial District, provides that “when presenting an application for an order as described in this rule, (application for temporary restraining order, temporary junction, receivers, and other emergency orders), counsel shall attach the verified statement setting forth: 1) whether the opposition is represented by counsel and, if so, by whom and, 2) that the opposition has been given adequate notice of the presentation of the application at a date and time certain.

Rule DR 3.2, there is not specific language that must be included in the application for emergency relief as it is set in CV 4. However, DR 11, Application of civil rules, states that “the civil rules contained in the previous section are applicable to domestic relations cases unless otherwise provided for in this section.” This would seem to indicate that CV 4 is applicable also in domestic *ex parte* temporary order applications. Again, if this is so, it seems to contradict

section 110.A.2. To muddy the waters eve further if counsel refers to Okla. Stat. 43 Subsection 112A.3, counsel will discover that “...if there are minor children of the marriage, the Court: ...3. May modify or change any order whenever circumstances render such change proper, either before or after judgment in the action.” This statute, read literally, seems to indicate that any time the Court feels its circumstances render such change proper, the Court may change custody.

Burden of Proof

The burden of proof at the show cause hearing (within ten (10) days according to statute), is unclear. There is no guidance with regard to what the burden of proof is at this hearing, is it clear and convincing or a preponderance of the evidence? There is no case law guidance in this regard. Can the Court keep this emergency order in effect if there is no a continuing showing of irreparable harm? Need the respondent even produce any evidence if the applicant fails to show that an emergency still exists?

What is irreparable harm?

By strict definition, irreparable harm is some harm that cannot be repaired. (i.e. some damage that cannot be fixed.) There is no case law in Oklahoma with regard to irreparable harm when it comes to a minor child. However, there is some case law in both the Oklahoma Federal District Courts and Oklahoma State Courts which define harm. In *Manuel v. Oklahoma City University*, 833 P.2d 288 (Okla. Ct. App. 1992) The Court of Appeals defined irreparable harm as “injury is irreparable when it is incapable of being fully compensated by money damages, or where the measure of damages is so speculative that arriving in an amount of damages would be difficult or impossible.” See *Hines v. Independence School District No. 50, Grant County* 380 P.2d 948 (Okla. 1963) Given this standard, is a child that is about to suffer a broken arm or non permanent scarring or non permanent contusions going to suffer irreparable harm? I do not think anyone on the third floor would argue that. However in the strictest sense of the word, those circumstances might not be considered irreparable harm.

Rules of Professional Conduct

The first rule of professional conduct that should be considered when an attorney is filing an emergency application for relief is Rule 3.1 *Claims and Contentions*. “A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension,

modification, or reversal of an existing law.” This rule arguably imposes upon an attorney the duty to investigate sources other than the party seeking the emergency order. In any event, any competent attorney would certainly investigate and question other witnesses (other than the complaining party) if they are available.

The next rule and attorney that is seeking an emergency order should look toward is Rule 3.3 which is *Candor Toward the Tribunal*. Rule 3.3.A states that “a lawyer shall not knowingly: 1) make a false statement of fact or of law to a tribunal; 2) fail to disclose a fact to tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Subsection four states the offer evidence that the lawyer knows to be false. If a lawyer is offered material evidence and comes to know of its falsity, the lawyer shall make the following remedial measures: (a) when a client is offered false evidence, the lawyer shall promptly call upon the Court to rectify same; b) if the client refuses or is unable to do so, the lawyer shall promptly reveal its false character to the tribunal” In other words, if your client has told you one thing in your office and then gets on the stand and makes up a story this is much more grievous, the prosecuting lawyer has a duty to bring this to the Court’s attention. Further Subsection D.3.3. of Rule 3.3 holds that in an *ex parte* proceeding, the lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Certainly, this means that the lawyer has a duty to disclose to the Court everything the lawyer knows about the case when seeking an emergency order. The lawyer should inform the Court if he or she truly believes his client’s request for emergency relief is truly an emergency and if there is truly irreparable harm, or if there is just a great concern.

Conclusion

Because of the great rights effected by an emergency order, the family law practitioner must be very careful when seeking relief under this procedure. This practitioner believes that Section 110 of this statute controls and that notice need not be given to the other side prior to an emergency order. However, the local rules seem to disagree with me in that regard. In any event, the use of emergency orders will continue as long as there are divorce cases with children and valuable assets involved. It is advisable to investigate the facts fully before filing a pleading asking for emergency relief. It is also advisable and required that the above procedures are followed.