



USE OF EX PARTE ORDERS IN FAMILY LAW PROCEEDINGS

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Typically, when we think about a legal issue being brought before the court for the purposes of securing an order affecting the parties' rights, we expect the party requesting relief to give notice to the other party of their intention to have a hearing on that request. A date is scheduled for the parties to appear before the Friend of the Court Referee, or Family Court Judge; testimony is taken; evidence introduced; and a decision is made by the court. This method has been used historically to ensure that the party responding to the motion has notice that the other party is requesting a hearing before the court, learns the subject of that hearing, and has an opportunity to appear before the court to argue against the relief being sought by the moving party. Ex Parte Orders are a significant deviation from that established practice.

The Michigan Rules of Court (MRC) provide that an Ex Parte Temporary or Protective Order may be entered by the court, without first notifying the other party and without a hearing, so long as the court is satisfied, "by specific facts set forth in affidavit or verified pleading that *irreparable* injury, loss or damage will result in the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued."

Ex Parte Orders can deal with custody, parenting time, child support, healthcare, and childcare issues. Typically, Ex Parte Orders are issued at the commencement of a proceeding. To obtain one, the MRC requires a Verified Complaint, along with a Verified Statement to the Friend of the Court. Together they must contain specific facts necessary to satisfy a court that irreparable injury, loss or damage will result unless it immediately enters an order prior to the other side having a chance to know what's about to happen, and requesting a formal hearing.

Some counties require additional affidavits or certifications to the court. All will require a copy of the proposed order, as well as the appropriate Friend of the Court forms. The Ex Parte Order becomes effective upon entry, and can be enforced on the other party after service of the order upon them. Once the order has been entered, copies must be served immediately upon the Friend of the Court, as well as the other party. The order will remain in effect until modified or superceded by a temporary or final order, or until it is set aside, based upon the objections made by the other party.

All courts will require language in the order notifying the other party served with the order; that they may file a

written objection to modify or terminate the order; further, that their objections be filed with the court and a copy served on the party who acquired the Ex Parte Order within 14 days after they were served. If they don't timely object, the Ex Parte Order will automatically become a temporary order. It is important to note that if a person is served with an Ex Parte Order, even if they timely file an objection, the Order will remain in effect until a hearing can be held on their objections, and it must be obeyed by the parties, unless a subsequent order requires otherwise. Because of the potentially profound effect on the other party being subjected to an order to which they had no opportunity to contest, a hearing on their timely filed objection or motion will be heard within 21 days after the objection or motion is filed.

While typically, orders for child support are not permitted to be retroactively modified, that prohibition doesn't apply to an Ex Parte Child Support Order if an appropriate objection is filed timely. An Income Withholding Order for child support (which comes into effect by virtue of an Ex Parte Child Support Order), will take effect within 21 days after entry, unless an objection has been timely filed to the Income Withholding Order.

Another type of Ex Parte Order is the Ex Parte Temporary Restraining Order. They are typically acquired by a party seeking to prevent the other party from doing something. A Temporary Restraining Order may be granted without notice to the other party, or their attorney, if it "clearly appears from specific facts shown by affidavit or verified complaint, that immediate and irreparable injury, loss or damage will result to the applicant, from the delay in entry of the order ... or proof that the risk of giving notice of a hearing itself, will precipitate adverse action before an order can be entered." Ex Parte Temporary Restraining Orders require the applicant's attorney to certify to the court in writing what efforts that attorney has made to give notice to the other side, or good and sufficient reasons supporting the moving party's claim that notice should not be required.

When an attorney appears before the court seeking a Temporary Restraining Order, a permanent record or memorandum has to be made of any oral argument or other representation made to the court in support of the application. In order for a Temporary Restraining Order to be granted, the order must specifically state the date and time it is being issued; describe with specificity the injury



sought to be prevented; why it is irreparable; why the order was required to be granted without notice; and, as with the Ex Parte Order, notice regarding their right to file written objections within 14 days of service on them.

If a request for an Ex Parte Injunction is denied, the fact of its denial must be written on the complaint, which is subsequently served on the opposing party. In that fashion, the opposing party is made aware of the fact that an injunction has been requested, and denied.

Although the same Court Rules and law apply to all Circuit/Family Courts in the State of Michigan, as a practical purpose the availability of Ex Parte Orders (including Ex Parte Protective/Restraining Orders) differ from county to county, and sometimes within each county, from judge to judge. Various counties describe the availability of Ex Parte Orders differently. (The emphasis indicated is that of the court, not this author.)

For example, in the Wayne County Circuit Court Friend of the Court Handbook, it indicates:

“Sometimes a judge will immediately enter a child support, parenting time, or custody order, upon the request of one of the parties. This happens if the judge is convinced that a serious need exists, or that serious harm may occur if the order is not entered immediately.”

Macomb County’s description is similar:

“Sometimes a judge will immediately enter custody, parenting time, or child support orders upon request of one of the parties. **This happens if it can be shown to the judge that serious damage will occur if the other party is served with the papers before an order can be entered.**”

In Oakland County, it is described as follows:

“Many divorce actions begin with a temporary court order. If you filed the divorce, your attorney may prepare a court order indicating who will have custody, and perhaps what support should be paid. If you are not the party starting the suit, you will be served with notice that a suit has been filed. You must find out immediately what orders have been entered in your case. You may want to file a motion asking the court to change the orders if you are not in total agreement.”

Washtenaw County’s Family Court Bench Book states:

“An Ex Parte Order may be entered upon filing an affidavit or verified pleading with the facts showing irreparable harm, loss or damage will result from the delay required to give notice, or that notice will precipitate adverse action.”

Kent County’s Friend of the Court Handbook gives some insight into the rationale for granting an Ex Parte Order, indicating:

“A judge will enter an Ex Parte Order without the other party present when the judge believes that serious harm will occur if the judge defers issuing any orders, until the opposing party has the opportunity to speak with the judge. Ex Parte Orders usually are intended to keep the situation stable until the judge can hear from both parties.”

Needless to say, you will need to consult with your attorney not only on whether or not your presenting facts may require an Ex Parte Order, but also the degree to which Ex Parte Orders are available in your particular circuit.

The majority of times an attorney is retained to represent someone in a Family Court matter, although the marriage or relationship between the parties may be dissolving, there is at least a modicum of civility, respect and sense of responsibility. In such a case, the other side is simply served with a complaint which commences the action for divorce, separate maintenance, paternity or the like. The opposing party files their response to that complaint. A Scheduling Order is entered which dictates the length of time the parties have to share information with each other in a procedure called discovery. Motions may be filed prior to the actual final trial or hearing in the matter, to keep the case on track, and if the case has still not been resolved through alternative dispute resolution, or otherwise by mutual agreement of the parties, a hearing is held. There are a number of reasons why your attorney may seek an Ex Parte Order:

Issues Regarding Rights And Responsibilities Of The Parties With Regard To The Children

Children need stability. Even if the parties are still living together, one party may be preventing the other from access to their children, or they may have threatened to move their children to an address other than where they are presently living. An Ex Parte Order may be needed to maintain equal access to the children or to declare the address at which the children must reside. Where there is a credible threat to remove the children from the state or the country, an Ex Parte Restraining Order may be required. (Addressing threats to remove the children out of the country may require additional protective measures. Your attorney should consult with the U.S. Department of State, Office of Children’s Issues at 202-736-9156, or go to <http://travel.state.gov> for more information.)

Where the parties are no longer cohabitating, your attorney may want to seek an Ex Parte Order For Child Support. The law requires that child support be set based upon the



Child Support Formula, as described in the Michigan Child Support Formula Manual. This temporary child support will be based upon the income figures in the Verified Statement to the Friend of the Court, as well as other factors.

Concerns Regarding The Payment Of Debts

If the parties are cohabitating, and have an existing arrangement for the payment of debts, and one of the parties has threatened to refuse contribution to the payment of bills and customary expenses such as mortgage, electric, water, gas, phone, car payments or car insurance, an Ex Parte Order may provide for the continuation of the existing debt payment arrangements. One party's unilateral actions to cease an existing pattern and practice for the payment of debts may cause damage to one or both of the parties' credit, default on mortgage or lease obligations, and unnecessary stress and financial insecurity to the children and parties.

Preservation Of Assets

Where a party has recently engaged in excessive expenditures beyond that reasonably necessary, or has threatened to sell or transfer an interest in property outside of the marital estate, or incur liens or debts not reasonably necessary, an Ex Parte Temporary Restraining Order Regarding Property may be granted to prohibit such actions. The courts typically require such restrictions on the use of assets and/or incursion of debts, to be mutual.

Health And Life Insurance Coverage And Preservation Of Employment Benefits

Until some other arrangements are made, the parties and the children need to be able to rely on a continuation of health insurance coverage and, to some degree, a continuation of employment benefits provided to the family. This includes

remaining as beneficiary on the other party's pension, 401k, or child related benefit provisions. If the facts show that those rights have been threatened, an attorney may wish to protect those rights with a Temporary Restraining Order preventing insurance and other employment benefits coverage from being modified or eliminated.

Even if you and your attorney have crossed all of your t's, and dotted all of your i's, there is no guarantee that your request for an Ex Parte Order will be granted. If so, you may be required to file a motion with the court, give the other party notice of a hearing, and wait until a hearing can be held before a Referee or Judge to decide whether or not the relief you are seeking should be granted. The Michigan Rules of Court and Local Court Rules may allow the court to set the hearing on an expedited basis.

There are occasions when sanctions or attorney's fees may arise from the issuance of an Ex Parte Order. For example, a party who procures an Ex Parte Order without a factual basis, or who grossly distorts the facts to procure an Ex Parte Order, may be sanctioned with costs and attorney's fees. So too, a party who objects to a particular term in an Ex Parte Order, without reasonable grounds, may be sanctioned, and the other party awarded attorney's fees and costs. Whether an objection to an Ex Parte Order is filed or not, until the Ex Parte Order has been either modified, or terminated, a party may be sanctioned with costs and attorney's fees if they violate the terms of an Ex Parte Order.

The mere act of filing for divorce, custody or paternity, can often cause nerves to be frayed, and individuals to act in an unreasonable and inappropriate fashion. They may threaten to retaliate against the other party if they file such an action. Where necessary, an Ex Parte Order can send a clear message to the other party that the judge is looking for stability for the parties and the children, and is asking the parties to act in a reasonable fashion from the very beginning.

