

MEMORANDUM OF LAW

ISSUE PRESENTED

What are the proper procedures that a party must follow in pursuing an ex parte motion?

BRIEF ANSWER

The Florida Rules of Civil Procedure, the Florida Rules of Juvenile Procedure, and the Florida Supreme Court are in agreement that ex parte orders should not be issued without reliable evidence that an interested party is subject to an immediate threat of irreparable harm. Further, the moving party must certify to the court in writing that it has made a reasonable effort to notify the party to be affected by the order, as well as the reasons that notice should not be required.

DISCUSSION

I. Florida Rules of Civil Procedure

The Florida Rules of Civil Procedure require that “[u]nless the court otherwise orders, every pleading subsequent to the initial pleading and every other paper filed in the action, except applications for witness subpoena, shall be served on each party.”

Fla.R.Civ.P. 1.080(a). The requirements for the issuance of a temporary injunction based on an ex parte motion are outlined in Fla.R.Civ.P. 1.610(a)(1):

A temporary injunction may be granted without written or oral notice to the adverse party only if:

(A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts that have been made to give notice; and the reasons why notice should not be required.

and in Fla.R.Civ.P. 1.610(a)(2):

(2) No evidence other than the affidavit or verified pleading shall be used to support the application for a temporary injunction unless the adverse party appears at the hearing or has received reasonable notice of the hearing. Every temporary injunction granted without notice shall be endorsed with the date and hour of entry and shall be filed forthwith in the clerk's office and shall define the injury, state findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if notice was not given. The temporary injunction shall remain in effect until the further order of the court.

Thus, there are three primary statutory requirements for an ex parte motion in the case of temporary injunctions: (1) evidence of imminent harm, (2) written certification of effort to give notice and (3) written certification of reasons notice should not be required. The Florida appellate courts have shown a strong tendency to enforce these requirements. Languin v. Carneal, 837 So. 2d 525, 527 (Fla. 4th DCA 2003)(holding that a grandparents' motion for an ex parte temporary injunction should have been entered only if their complaint or affidavit established the following criteria: '(1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) considerations of the public interest.' (quoting Yardley v. Albu, 826 So. 2d 467, 470 (Fla. 5th DCA 2002)); Matin v. Hill, 801 So. 2d 1003, 1005 (Fla. 4th DCA 2002)("For a party to obtain a temporary modification of custody, he or she must prove that: (1) a substantial change in the condition of one or both of the parties has occurred, and (2) the best interests of the child will be promoted by the change. Wilson v. Roseberry, 669 So.2d 1152 (Fla. 5th DCA 1996). Generally, both parties must be given an opportunity for a full hearing where the parties and their witnesses are given an opportunity to testify and be heard. Id."); Florida

High Sch. Activities Ass'n v. Benitez, 748 So. 2d 358 (Fla. 5th DCA 1999)(holding that Fla.R.Civ.P. 1.610(a) was not complied with when the trial court granted an ex parte temporary injunction less than one hour after defendant had filed a motion to quash the hearing or to allow defendant to appear telephonically, because there was no effort to provide the defendant with a meaningful opportunity to be heard, and the plaintiff's attorney gave no indication why notice would not have been required); Crooks v. Crooks, 657 So. 2d 918 (Fla. 4th DCA 1995)(holding that an emergency ex parte restraining order changing child custody based on the unsworn evidence of a guardian ad litem could not be entered, regardless if founded on Fla. Stat. ch. 61.13 or ch. 741.30, or Fla.R.Civ.P. 1.1610.)

It may be noteworthy that the Fourth DCA has ruled that ex parte orders granting temporary custody must follow the same procedure as the issuance of a temporary injunction without notice under Fla.R.Civ.P. 1.610. Matin v. Hill, 801 So. 2d 1003, 1005 (Fla. 4th DCA 2002).

II. Florida Rules of Juvenile Procedure

The service of pleadings and papers in dependency and termination of parental rights proceedings is addressed in Fla.R.Juv.P. 8.240(b)(1):

When Required. Unless the court orders otherwise, every pleading subsequent to the initial petition, every order, every written motion, unless it is one as to which hearing ex parte is authorized, and every written notice filed in the case shall be served on each party; however, nothing herein shall be construed to require that a plea be in writing or that an application for witness subpoena be served.

This same paragraph also appears in the Rules regarding delinquency and CINS/FINS proceedings.

III. Florida Family Law Rules of Procedure

A. Procedure

The Florida Family Law Rules of Procedure address ex parte motions in two instances. First, Rule 12.610(b)(3) states that

[u]pon the filing of a petition, the court shall set a hearing to be held at the earliest possible time. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. **When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time.** Nothing herein affects a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with these rules. Fla.Fam.LawR.Proc. 12.610(b)(3) (emphasis added).

Second, Rule 12.610(c)(1)(A) and (B) establishes the requirements of an ex parte order:

(A) Temporary Injunction. **For the injunction for protection to be issued ex parte, it must appear to the court that an immediate and present danger of domestic or repeat violence exists.** In an ex parte hearing for the purpose of obtaining an ex parte temporary injunction, the court may limit the evidence to the verified pleadings or affidavits for a determination of whether there is an imminent danger that the petitioner will become a victim of domestic or repeat violence. If the respondent appears at the hearing or has received reasonable notice of the hearing, the court may hold a hearing on the petition. If a verified petition and affidavit are amended, the court shall consider the amendments as if originally filed. Fla.Fam.Law R.Proc. 12.610(b)(3) (emphasis added)

(B) Permanent Injunction. A full evidentiary hearing shall be conducted.

Rule 12.610(c)(1)(A) and (B). Accordingly, the Fourth DCA has ruled that, absent evidence sufficient to show a threat of immediate harm, ex parte injunctions are inappropriate. Sanchez v. State, 785 So.2d 672, 677 (Fla. 4th DCA 2001)(holding that when a petition for an injunction is denied as insufficient only because it does not present an appearance of an immediate and present danger of domestic violence, the court must set a full hearing on the petition, with notice, at the earliest possible time); Semple v. Semple, 763 So. 2d 484 (Fla. 4th DCA 2000)(holding that where a husband was not

permitted to cross-examine his wife and present witnesses at a hearing following issuance of an ex parte protection-from-abuse injunction under Fla. Stat. ch. 741.30(5)(a), he was denied the basic rights of a full evidentiary hearing assured under ch. 741.30(5) and required by Fla. R. Fam. Law P. 12.610(c)(1)(B), and issuance of a permanent injunction and award of temporary child custody on such basis was error).

B. Definition of “Ex Parte”, Florida Family Law Rules of Procedure

Although the term “ex parte” is not defined within the Florida Statutes or the Florida Rules of Civil Procedure, the Florida Family Law Rules Forms include the following definition:

Ex parte -- communication with the judge by only one party. In order for a judge to speak with either party, the other party must have been properly notified and have an opportunity to be heard. If you have something you wish to tell the judge, you should ask for a hearing or file information in the clerk of court's office, with certification that a copy was sent to the other party.

IV. Florida Statutes: Domestic Violence Cases

The Florida Statutes indicate that ex parte proceedings, while rare, should be available in some instances. Chapter 26, which describes the Circuit Courts, states that “there must be at least one judge available on Saturdays, Sundays, holidays, and after hours on weekdays to hear motions for a temporary injunction ex parte in domestic violence cases.” Fla.Stat. § 26.20.

The proper procedure for obtaining temporary injunctions in domestic violence cases is addressed at length in Title 43, Domestic Relations, § 741.30(5)(a)(b)(c):

(5) (a) When it appears to the court that an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing, and may grant such relief as the court deems proper, including an injunction:

1. Restraining the respondent from committing any acts of domestic violence.
2. Awarding to the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner.
3. On the same basis as provided in s. 61.13(2), (3), (4), and (5), granting to the petitioner temporary custody of a minor child or children.

(b) In a hearing ex parte for the purpose of obtaining such ex parte temporary injunction, no evidence other than verified pleadings or affidavits shall be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. When the only ground for denial is no appearance of an immediate and present danger of domestic violence, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. Nothing herein affects a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with the Florida Rules of Civil Procedure.

(c) Any such ex parte temporary injunction shall be effective for a fixed period not to exceed 15 days. A full hearing, as provided by this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party, which shall include a continuance to obtain service of process. Any injunction shall be extended if necessary to remain in full force and effect during any period of continuance. Fla.Stat. § 741.30.

The case law concerning Fla.Stat. § 741.30 indicates that the Florida appellate courts wish to insure that, prior to the issuance of any ex parte order, the requirements of due process have been comported with to the fullest extent possible. Semple v. Semple, 763 So. 2d 484 (Fla. 4th DCA 2000)(holding that where a husband was not permitted to cross-examine his wife and present witnesses at a hearing following issuance under Fla. Stat. ch. 741.30(5)(a) of an ex parte protection-from-abuse injunction, he was denied basic rights of a full evidentiary hearing assured under ch. 741.30(5) and required by Fla. R. Fam. Law P. 12.610(c)(1)(B)); Rollins v. Baker, 683 So. 2d 1138 (Fla. 5th DCA 1996)(holding that a trial judge erred in participating in an ex parte meeting with the

wife's attorney because, while Fla. Stat. ch. 741.30(5) allowed for the issuance of an ex parte temporary injunction pending a full hearing, the trial court was limited to ruling upon verified pleadings or affidavits; the ex parte communications together with the judge's biased comments were sufficient to create a well-grounded fear of lack of impartiality).

The appellate courts will be equally scrupulous in determining whether the trial court was too hasty in denying an ex parte motion. Sanchez v. State, 785 So.2d 672, 677 (Fla. 4th DCA 2001)(holding that petitioners who were beaten and threatened by a person were granted certiorari after trial court summarily denied ex parte injunctions against domestic violence because trial court failed to give petitioners the opportunity to argue their cases after denying their petitions and did not sufficiently set forth the legal grounds for dismissal.)

V. Florida Statutes: Ex parte Motions and Children

Under the Uniform Interstate Family Support Act, “[u]pon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this act.” Fla. Stat. § 88.3121. Nevertheless, this section’s subtitle is “Nondisclosure of information in **exceptional circumstances**,” (emphasis added), and only concerns the disclosure of a child’s information, not the requirements of notice and opportunity to be heard.

Under the Uniform Child Custody Jurisdiction and Enforcement Act, Fla.Stat. § 61, an emergency motion for an ex parte injunction must be accompanied by allegations of mistreatment and abuse occurring in Florida at the time of filing. Simmons v. Simmons, 698 So. 2d 947 (Fla. 4th DCA 1997); Fla.Stat. § 61.514. Also, ex parte decrees obtained from foreign jurisdictions are not recognized in Florida, where it is not shown that the foreign jurisdiction would not accord minimum due process when ruling on the issue of permanent child custody. Suarez Ortega v. Pujals De Suarez, 465 So. 2d 607 (Fla. 3rd DCA 1985); Fla.Stat. § 61.506.

VI. Florida Statutes: Other Ex parte Motions

There are several other instances in which the issuance of an ex parte order may be allowed. Under the Florida Mental Health Act, a person can be subject to an involuntary examination “if there is reason to believe that he or she is mentally ill” and that person poses a danger of some kind. Fla.Stat. § 394.463(1). The rules for entering this type of ex parte order are rather specific: “A court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination, giving the findings on which that conclusion is based. The ex parte order for involuntary examination must be based on sworn testimony, written or oral....” Fla.Stat. § 394.463(2)(a)(1).

Other instances in which ex parte proceedings may be allowed include petitions for probable cause determinations for sexually violent predators (Fla.Stat. § 394.913), the appointment of receivers in assisted living facilities disputes (Fla.Stat. §§ 400.422(2), 400.966), communications between a worker’s compensation claimant and authorized health care providers (Fla.Stat. § 440.13) and between a defendant hospital and its physician employees (Fla.Stat. § 456.057), the seizure of counterfeit goods (Fla.Stat. §

506.09), and certain types of wiretapping (Fla.Stat. § 934.09(3)). Some agencies may also issue ex parte orders (Fla. Stat. §§ 120.66 (Administrative Procedure Act) and 517.161(securities transactions)).

VII. The Florida Constitution

The due process requirement of Fla.Cons. Art. I, § 9 has caused Florida courts to hold ex parte orders and communications to be invalid in a variety of cases. Hanson v. Hanson, 678 So. 2d 522 (Fla. 5th DCA 1996)(holding that an hour-long ex parte communication with the attorney for the former husband regarding the attorney's drafting of the final judgment violated former wife's due process rights to fair notice, reasonable opportunity to be heard, and fundamental fairness); Brake v. Murphy, 693 So. 2d 663 (Fla. 3rd DCA 1997), appeal denied, review denied, 700 So. 2d 686 (Fla. 1997)(holding that a trial court's order requiring a personal representative of an estate to post a bond to be applied to fees and costs related to future contempt proceedings violated the access to courts and due process clauses of the Florida Constitution where the judge had denied a personal representative's motion for disqualification based on ex parte contacts with lawyers for other beneficiaries concerning motions for surcharges against the personal representative); Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991)(holding that due process under Fla. Const. art. I, § 9 permits the State to seek an ex parte preliminary hearing in those situations where the State has not yet taken possession of the personal property that it wishes to be forfeited pursuant to the Florida Contraband Forfeiture Act, Fla. Stat. ch. 932.701; at that hearing, the court shall authorize seizure of the personal property if it finds probable cause to maintain the forfeiture action); State v. Smith, 547 So. 2d 131 (Fla. 1989)(holding that where the state's attorney obtained an ex

parte court order compelling defendant's appearance at a lineup, after defendant, already in custody and unrepresented, refused to stand in a lineup, the procedure was unconstitutional).

VIII. The Florida Supreme Court

In 1970, the Florida Supreme Court ruled in Lieberman v. Marshall, 236 So.2d 120, that, “[s]ince orders are sustained by proofs, and proofs result from adversarial presentations, **a court should never issue an ex parte order without notice to defendants and without a hearing, unless an immediate threat of irreparable injury exists**, which forecloses opportunity to give reasonable notice and in which a subsequent remedy for damages or other relief would be inadequate.” Id. ad 125 (emphasis added). Further, “[t]o justify issuance of a restraining order without notice, it must appear that the time required to give notice of a hearing would actually permit the threatened injury to occur. Thursby v. Stewart, 103 Fla. 990, 138 So. 742 (1931); Godwin v. Phifer, 51 Fla. 441, 41 So. 597 (1906).” Id. at 125. Lieberman has never been overruled or questioned and has been cited favorably on this point by the Fourth DCA in City of Boca Raton v. Boca Raton Airport Auth., 768 So. 2d 1191 (Fla. 4th DCA 2000), Smith v. Knight, 679 So. 2d 359 (Fla. 4th DCA 1996), Malzahn v. Malzahn, 541 So. 2d 1359 (Fla. 4th DCA 1989), South Florida Limousines, Inc. v. Broward County Aviation Dep't, 512 So. 2d 1059 (Fla. 4th DCA 1987), Ingaglio v. Ennis, 443 So. 2d 459 (Fla. 4th DCA 1984), Devoe & Reynolds Co. v. KDS Paint Co., 382 So. 2d 126 (Fla. 4th DCA 1980), and Dansig v. Roman, 358 So. 2d 860 (Fla. 4th DCA 1978).

CONCLUSION

Ex parte orders are to be issued only in particular circumstances, which are outlined in the Florida Rules of Court and the Florida Statutes. Unless there is an immediate threat of injury, all parties should be served with notice and given an opportunity to be heard.