

Unedited transcript of

Overview of Motion Practice in the Probate and Family Court

from **Mastering Motions for Temporary or Emergency Orders in the Probate & Family Court**
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Speaker(s)

>>: So I will turn it over to Lola to get us started with bullet point No. 1 - overview of motion practice in probate and family court.

>>: Thanks, Katherine. Hi, everyone. I'm Lola. So we've set this up in a question-and-answer format, and I'll just go through the questions. So what are temporary orders? What are we talking about here today? (Laughter) Why are we here? So temporary orders are the orders that get the case - that get some relief for the litigants as the case moves through its life. As we know - maybe know - these cases can last 2, 3, 4, 5 - heaven forbid 5, 7 years, but the litigants often can be in limbo around certain emergency things, such as child support, custody, parenting time, certain bills that need to be paid. So when we're talking about temporary orders, we're talking about, essentially, the orders that the court can put into place so that the parties can continue to live their lives until the final resolution of the case. And we will talk a lot about how to get those entered, but the thing to take away from this section is that, even though they're called temporary orders, they do tend to set a tone for the case. And once you've got a good temporary order in place, you may be in a stronger position for your client than you would if you had one that you think you might be able to change later. So we'll talk a lot about how to get good temporary orders in place so that your client is in the best position possible for when the case finally goes to judgment. Who can file a motion? Any party in the - any parties to the case - you can file one. Well, you can file one, or opposing counsel can file one, or if an opposing party is unrepresented they can file one. So either party can file any motion - can file a motion for

temporary orders. When can you file a motion? It depends on the motion, but let's say pretty much any time. You can file the motion anytime from the day that you filed the complaint. You can also file the motion along with your complaint; however, if you haven't quite decided what you and your client need to do to really get them in a strong position for the duration of the case, it may be a conversation that you have after you file the complaint if you just want to get the complaint in. There are lots of reasons why you might want to just file the complaint, including certain restraining orders that come along with having filed the complaint. So if there are certain assets you're afraid of having your opposing party or counsel get rid of or spend down or divest, you might just want to run into court and file the complaint and think about the temporary orders a little bit later. But, generally, it's a good idea to just go ahead and file the motion for temporary orders along with your complaint for divorce or parenting time and custody and so forth. So we'll talk about that later, too. Why would you file a motion for temporary orders, and why would you file an opposition? As we've said, the cases do last quite a long time. Family law cases really just can be quite lengthy, and there needs to be some guidance for the parties as they move along. So the reasons you might want to file temporary orders include if there are children involved, if there are decisions that need to be made about medical care, if there are decisions that need to be made about vacations, traveling abroad, things like this - also bills, mortgages, assets that need to be managed in the - during the duration of the case. And why would you file an opposition to a motion for temporary orders? Usually, the reason you would file a motion - an opposition is because the motion that was posed by the opposing party does not meet the goals of your client. So sometimes the person - the opposing party might file a motion that seems perfectly reasonable, and you might just agree at that point, but where you would want to be very mindful is if the client, the opposing party, files a motion to request something that really does not suit the needs of your client at that time, and certain things you want to be mindful of are things that really set your client up for potential disaster when the case goes to judgment. Like we're saying, it sounds like it's a temporary thing and you can always fix it later, but, generally, it does set a pretty strong tone of status quo - as we say in court - for the duration of the case. So if it's even something that you might want to keep open for future, you might just want to file an opposition to at

least stop the hemorrhaging down the line. So how do you file a motion? It depends. It depends a lot on what court you're in. And with COVID filings, it really depends a lot on who the judge is, who the clerks are, how they're willing to accept motion filings. It used to be that you would go down to the courthouse and you'll file your motion in hand. Now, certain courts are still accepting e-filing and certain courts are not accepting e-filing. Certain issues you're able to e-file on, and certain issues you're just not able to e-file on yet. Also, it used to be that you could just walk into court and hand it to somebody. Now, certain courts have drop boxes, and you may have to drop your motion into a box and just trust that somebody is going to look inside the box eventually and grab your documents from there. So if new to a court, depending on what county you're in, certainly check the registry. The virtual registry is still alive and well. So if you have any questions about how the court that you're practicing in prefers to receive documents and motions, certainly log in there and ask them those questions because you would hate to do the filings incorrectly and find out that you're waiting for a hearing on a motion that was never properly filed. That would be disastrous for your client. Motions - documents that are required for filing your motion - certainly the motion itself, and sometimes you need to file an affidavit. If you're filing any motions ex parte, you certainly need to attach an affidavit. And usually, if you're trying to file a modification of something that you filed before, you will certainly need an affidavit for that. You may also need to file a proposed order. And sometimes, file the proposed order, but just know that, depending on your judge and what county you're in, it may be helpful and it may not. Some judges are happy to have the proposed order because they get to exactly see where you want to go with your case and what you're asking for, and it gives them a hint about what you're going to be asking for, but sometimes the judges will just write their own orders, and that's OK too. It doesn't - it shouldn't be very different from what you're asking for, but it's certainly helpful to give the judge a heads-up about where you would like the order to go. So those are the documents you typically need to file or that you should probably file. Scheduling a hearing - again, we're going to sound like a broken record - it really depends so much on your court. There are some courts that you - well, in the old days - you could walk into court - the old days being two years ago - you could walk into court and ask for a hearing, and somebody would have a calendar, and they would schedule your hearing in-person so

you could say yes or no if you know you have a vacation planned. Certain courts have never really done it that way, in my experience. You request a hearing, and you get something in the mail maybe three, four weeks from when you requested it, and it might be three months out from when you already had your vacation scheduled and you would need to call and get it rescheduled. So it really just depends. Service of pleadings - be mindful that whatever you filed along with your motions also need to be filed - also need to be served on the opposing party. One common mistake is that, you know, you'll file the motion, and you think they - I'm just going to serve the motion on opposing party, opposing counsel, but you don't attach the affidavit and you don't attach the proposed order. So just be mindful that whatever you filed needs to also be served on the opposing - on the other side. As far as service of pleadings, it just depends on what the motion is and how you're able to do the service. I would just recommend reading the rules of domestic relations to find out how many days - how far in advance and by what mode of service do you need to accomplish proper service. Some motions, you can file seven days if in hand, some you need to serve a full two weeks out and - you know, depending on all that. But the rules are pretty explicit about that, so just have a peek. So why would you need to file temporary orders? Not everything needs a temporary order. Though you would want everything - I mean, I misspoke when I said not everything needs temporary orders. Not everything needs to be a litigious temporary order. I would argue that everything is temporary order. But you want to chat with your client about what is working, what isn't working. So if something that the parties have agreed to is already working, it might not need to be a hearing on a motion for temporary orders. You may be able to just gather yourself with your opposing party or counsel and just see if you all can just file a joint motion so that it can be entered into an order. I do see this also, a common mistake. Something is working and so - and this is why I will clearly want to clear up that I misspoke earlier. Parties feel like they have a pretty good working relationship, the parenting time is working. They're just kind of being drop off as agreed. And then somebody gets sick, somebody can't make it, and all of a sudden, somebody wants to file a contempt. And your client wants you to storm into court and, like, get a modification of this order. They really want to enforce the order that they think they have. If there's no order, there's no action that you can really take. And you just don't want to be in a position where the opposing party

is just kind of walking all over your client, not abiding by the agreement that they had - just the out-of-court agreement where you have no recourse in court because the court never entered an order out of that. So I would say even if something is working, at least try to get it entered as an order by agreement of the parties. Certainly anything that's not working, you would want to get an order on. So if the parties are having difficulty agreeing on where the kids should go to school, if they're having difficulty in making certain medical decisions, if they're just having disagreements up and down the aisle, just go ahead and file a motion, get a judge to enter the order. And when I do this, I do chat with my client that sometimes the order is not the most convenient. So if the parties - it's always better if the parties can sometimes come together and make an agreement among themselves. I know that's not always possible. Certainly, I know that because in domestic violence cases, which is the - all of the cases I take, it's very difficult for parties to come together and come to an agreement about most things. But even if there's one thing that they can agree on, it's usually better than an order from the court. So an order from the court will just try to be equitable, and it might not just be convenient or helpful. It might be that somebody's having to drive really far. It might be that somebody is (inaudible) with the times that are awkward or not useful for birthdays, holidays or things like that. So you just kind of want to be mindful of that even if the parties are at all able to agree on something, that they're able to just file a joint motion or an order. Need for orders pending - I think I spoke about this a little bit. I got ahead of myself. But the reason that we file motions for temporary orders is just so that the clients are not hanging in faith while the case drags on for two or three years. It's not really realistic that nobody's going to spend any of the parties' money for two years. It's not realistic that nobody's going to pay the bills for the marital home, pay the mortgage, keep the water going. Those things are just not realistic. So you just really want to have some solid ground that keeps the parties' lives going while the case is moving till they go to court process. Effective until final judgment - and so you can request that the orders are modified. I can tell you they're very difficult to get modified. So I would say note that they're possible, but don't let that be your first line of defense. Once the temporary order is entered, the standard, first of all, for a temporary orders is best interest. If it's regarding children, it's best interest of the child. If it's financial, you know, the standards is what they

are. But once the orders that, it does need to be a substantial change in circumstance, which is a pretty hefty burden, which means that if you knew about the challenge that you're having at the time you're seeking the modification, and you agree or, you know, you let that order go through in the first place, it's going to be incumbent upon the moving party - assuming in this case it's you - to prove that there has been a substantial change in circumstance not just that my client no longer works that job, no longer wants to do that, or we don't - you know, things like this. It really needs to be like something drastic changed. I just want to clear up also the passage of time is not a reason to modify an order. Folks will come in and say, oh, this order was entered a year ago, so we just need something different. Well, has anything changed in the year? Maybe it has, or maybe it hasn't. Things can change substantially in three months, but sometimes years pass, and it's kind of the same scenario, so it's difficult to get an order modified on those bases. So we talked about temporary can be deceiving and that it sets the tone for the rest of the case. So I think I've said everything I need to say about that. But just keep that in mind. OK. So common questions - the complaint and motion appear to be asking for the same thing, how are they different? They're different in that the complaint is the umbrella of the case. So the complaint is where you're setting forth what you would like to see ultimately, and it's pretty vague. But the motion should be asking for a very specific thing. For example, you would file a complaint for divorce or custody and parenting times, that just let the court know that generally, you no longer want to be in this marriage, generally, you want some time with the children, generally, you need some child support. But it's not asking for what time to have the time with the children. It's not saying who will live in the house once the divorce goes through. It's not saying who will continue to pay the mortgage for how long and where the children will go to school, who will pay for college if the children are young at the time that you file. That - those things may be not quite on your radar or the radar of the parties at the time of the filing, so the motions are really to put a finer point on some of these issues. When do you need an affidavit and proposed order? Let's say you need an affidavit any time you file an ex parte motion, and you should enter a proposed order all the time. Like I say, you may not really get to see the court use it, but it's helpful to kind of guide the court towards the resolution that you would like to see. Usually I just see courts send the orders hand-written on a piece of paper.

Written is a strong word just kind of hand - and me and 20 of my colleagues are trying to figure out what they say. But you know, I think it's still helpful. I think they read what you type and submit and take it under advisement, and hopefully, that helps your case along. I think we're at what if I want the OP's motion - OP is the opposing party's motion to be denied, but I also need temporary orders? So in that situation, you would file an answer. An answer is always the way to address anything that's been filed in the court, whether it's a complaint or a motion. And you would file - you would ask for a counterclaim. So you would agree to any of the things that seem agreeable to you. But then you would put forth the things that you are asking for in that same answer. So that's really the direction to go.

>>: I just wanted to add in right there - so the answer in counterclaims would be to the complaint filed by the other side. But if they file a motion, it's typically called an opposition.

>>: Opposition, right.

>>: And so the opposition could be - right - directly to the request of the opposing party. But if their motion doesn't address the things that your client wants to see in temporary orders, you may also have to file a separate motion for temporary orders on behalf of your client to make sure that all of the issues are in front of the judge at that motion hearing.

>>: Right. Yeah. And that's - I guess that's the good news about filing your motion once you get the copy served as the opposing party's motion. It's a drag to have to go back to court three different times. And if nobody's filed a motion on the issue, it just does not get heard. And if the clients are pro se - nobody's here if a client's pro se. But if the client is pro se, sometimes when they're in court, if they say, I also would like to address child support, and if they're on a parenting time issue, the court may hear it, but it's difficult to have an attorney who's collecting a fee show up and say, your honor, I neglected to file a motion, but I would also like to be heard on this other thing. The motion hearings are quite quick. You may wait a long time, but they're not long, lots of time the court has set aside to hear your issues. So you just really want to be sure that you filed the motions on anything that you want to be heard. If it's an opposition, it's already before the court.

But if it's not, it's very difficult to just show up that day and say I also would like to be heard on this. So thanks, Katherine. All right, we've talked a little bit about some of these. So the relief that folks are typically seeking for as part of their motions for temporary orders include custody, both physical and legal, parenting time, child support, health insurance coverage for medical expenses, spousal support, occupancy of the marital home, payment of bills and other expenses, tax issues. Some of these things will certainly come up at the end of the case, things like paying bills and other expenses that can also come up later, especially those like mortgage and things like that. But, you know, things that are more run of the mill - like utilities, we talked about water bill, gas bill and things like that - those certainly can come up at a temporary orders hearing. Tax issues - let's say taxes, who's paying more taxes? Especially who is getting to claim that children on taxes? That's a big one that'll tend to come up on temporary court, especially if the case - I mean, they're usually put on a 14-month track, so certainly, folks are going to have to file at least a one tax year during the pendency of the case if not more. Return of personal asset - property and items, communication guidelines with parties and kids. So - all right, we've got some statutes here that you want to keep in mind when you file motions for temporary orders. You want to look at 208 section 31 and 31A when you're requesting any issues with parenting time and custody, 209C certainly dealing with paternity, all things related. So just take a look at these. If you're filing for support issues, health insurance for kids and things like that, you just want to check out the Mass child support guidelines. They have been updated pretty recently. So if you had cases that have just been going along, you may not have had to file a new child support guideline. But they have been updated, so next time you're in court, you probably will need to modify the guidelines. I think what folks - what mentors were advising people do was if you had a case that was a little bit newer, even before the guidelines went into place to request the court consider the fact that the guidelines were going into effect - when did they go, Katherine, maybe December or late November?

>>: I believe it was October.

>>: October - right - so pretty recently. So whatever guidelines you've submitted, if you've got cases that are currently open in the court, just be

mindful that you're using the most current and most up-to-date guidelines next time you go back to court. And you should be filing new financial statements any time you are dealing with the issue of custody or parenting time and child support. So just be mindful that you're constantly updating - you're updating that. Spousal support - you can find guidelines - you can find the guidance for that under MGL 208, section 34. Also they can share the marital home, same 208 section 34B. Just be mindful of the legal authorities that you're fighting when you're asking for certain things. You can't just ask for whatever you want. I mean, you can, but you want to have solid, legal ground for being able to ask for those things. I can't say enough that scheduling these orders vary so much by county. This was true before the pandemic, and the pandemic has not made it easier. So you just really want to be mindful about where you're practicing. You just want to check with the virtual registry, check with the clerk support that you're practicing in. Just ask how are you scheduling these temporary order hearing. It's helpful to try to get them scheduled, coordinate with your opposing counsel as a professional courtesy and to just make sure that everybody can be present. It would be a real bummer to request a hearing and - first of all, request the hearing and find out that the opposing side does not really have an issue with what you're asking for and that it might not even have had to go to a hearing, but also that opposing counsel cannot attend the hearing, and then you're - they're requesting a new hearing date. And now your case is delayed by months if we're honest; it's really taking months. So just reach out to opposing counsel and make sure that you all can't get on the same page before you charge into court and just demand a hearing or sign an agreement for temporary orders. Again, if you can work something out, that's always the better solution. I understand that it's not always possible and in my cases, seldom possible, but we try because we find that the parties are a little more amenable to complying with something that they agreed with, that they proposed than something that was ordered by a court. So that's - that side may also just keep you out of court for unnecessary time. Even if you're in a county that's still doing Zoom hearings, those Zoom hearings are taking a long time, and some of us are waiting for a long time in those Zoom rooms to get in. So if you can sort something out with yourself and just send a proposed - send an agreed motion, a judgement - an agreed motion, that'll really save you some time and your client some time.

>>: Flipping over to me now.

>>: OK, then let me have a quick look at the questions. Here we are. Is it OK to just do a few questions? We've got one that says, hi, I'm not sure if you're going to address this in this training but was hoping you could speak to motions for emergency - yeah - emergency temporary orders on modification for custody. Yeah. We are going to - Katherine is going to address that in pretty good detail. So do we have sample motions and complaints available? I believe MCLE has several guides that have many, many, many examples. We didn't prepare any for this presentation because I think there are many, many available online. I would refer to the MCLE resource guide for a sample.