

Unedited transcript of

Emergency Motions: When, Why and How to File
from **Mastering Motions for Temporary or Emergency Orders in the**
Probate & Family Court
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Speaker(s)

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>>: We're going to switch gears a little bit and talk about emergency motions - how to request an emergency order from the court. So to begin with, when might you need to file an emergency motion? And what's listed here are kind of variations on a theme, but the idea being that you need to get in front of a judge to have this issue addressed as soon as possible. So below are some examples of situations where that might be necessary. So, you know, the first bullet point here - this is something I also practice in the domestic violence field, so this is something that comes up not infrequently in my cases - is where there is a threat to the immediate safety or well-being of one of the parties or a child. So a pretty common example here might be - well, maybe not common - but a common example of this type of issue would be if there had been an incident where the safety of a child had been compromised - so an allegation of physical or sexual abuse of a child - and the one parent is concerned about the other parent having access to the child as a result of that incident. So that may be a situation where you would want to file an emergency motion, either if it's the beginning of the case where there are no temporary orders in place yet, or where there already is a temporary order for custody or parenting time, but because of this new incident, the parent is now seeking to suspend parenting time, for example, based on the risk to a child. So that would be an example of the first bullet point. Another variation on this theme would be irreparable harm to a party if the relief is not granted as soon as possible. And an example I can think of here is where, you know, the utilities may be being unpaid, and the heat is about to be shut off in the marital home where one party and the children reside, and the court needs

to address the issue of payment of the utilities as soon as possible because of that harm. Another example is if you need ex parte relief without notice to the other party - and I'll get into this a little bit later, but, you know, every court - well, let's add this to the theme - every court has a little bit of a different way of handling emergency motions. In some courts, it is possible to file a motion for ex parte orders, meaning that you go in and you want to request the court - that the court issue a temporary order without notice to the other side, and that would, you know, be a pretty unique circumstance. But an example here might be where one parent is, you know, threatening to board a plane and leave the United States with a child, and there is, you know, no time, like, that the - the facts indicate that this is about to happen imminently, and there's really no time for there to be a hearing scheduled about whether or not that's permissible, so one parent is seeking an ex parte order saying that the other parent cannot remove the child from the Commonwealth. And ex parte orders almost always get scheduled for a quick review hearing because that is an extraordinary form of relief, where the other party hasn't been notified that an order is going to issue. That's almost unheard of in family court for that to happen. Even if a motion hearing can happen pretty quickly, an ex parte order is pretty rare. So, typically, when an ex parte order issues, a hearing is scheduled within a week or two for that order to be reviewed with notice and the opportunity to be heard by the other side. And, finally, the relief cannot wait for a motion hearing in the ordinary course. And this is, again, where - it's a little bit of a fuzzier category, but it might be that the scheduling of motion hearings at the court that you're practicing in is - you know, the hearings don't get scheduled for maybe three months out from when a motion is filed, and there's some event or something that is going to happen prior to that. So let's say, you know, it's July, and a motion hearing isn't available until October, but the parties can't agree where the children should be enrolled in school. And so you may have to file for an emergency hearing because that decision - you know, you need the court's intervention in that decision before September. So that may not be an emergency in the sense that - of the other things we discussed, but you just can't wait until the hearing would normally take place. So when and why to file - so deciding whether to file an emergency motion is - can be a really tricky conversation to have with your client and to make an assessment using your judgment. So, again, know your court and your

judge. So when a case is filed, it gets assigned to a judge, and you can use that knowledge of who your judge is, your own knowledge or knowledge of colleagues, to inform your decision about whether requesting emergency relief is going to be the best course of action. And some judges are, you know, more receptive to issuing emergency orders. Some judges may not be. And, again, it would also depend on whether your case already has a history in front of this judge, and you might be requesting - you know, filing an emergency motion to change an existing temporary order. You know, you really want to be thinking about - what if the judge - what do I think the judge thinks about our case so far, based on my prior appearances? You also want to know your court because the scheduling, as we'll discuss on the next slide, is - varies widely, and you need to know what it's going to actually look like when you file an emergency motion and try to get it scheduled. Of course, you want to consider what is the basis, what is the triggering event, so the scenarios I described in the prior slide. You really want to think about the - you know, is this something that we need to bring to the court's attention? Is there another solution other than filing an emergency motion? And this ties into the next bullet point, which is what evidence is available to support the assertions that I want to make in - as providing the foundation for why I need to file this emergency motion. So again, using the example of an incident where there's been a risk to the safety of a child, if there was a report from a child coming back from parenting time with the other parent saying, you know, that the parent had used physical discipline and hurt them, you know, that's one kind of scenario where a child may make a report of physical harm by a parent. That alone is very different to tell in court from an incident where a third party such as, like, a teacher - where a child discloses physical harm by a parent to a teacher, the teacher files a 51A report with the Department of Children and Families and a police report is also filed and there's lots of third party evidence that would support the allegation - or would substantiate the allegation, not necessarily support. So, you know, you really want to think about, in this short time frame before I see the judge, what can I actually offer to the court to support the assertions we're going to make? And can I - you know, can I prove the allegations? Similarly, is it better to ask permission or ask forgiveness? And what we mean by this is, you know, in the same scenario where a parent doesn't want to send the child on parenting time because of something that happens, you know, you

want to assess whether running into court - if you have a - what is your likelihood of success based on the information and evidence you can present to the court and would - if I were successful - or sorry, if I were unsuccessful, what is the risk of harm for my client? So you really want to play out the potential consequences of if you were to rush into court and let's say you cannot substantiate the claims that you're making in your motion. Perhaps it would just reverse the situation and revert to status quo. But perhaps, you know, there may be retaliation by the other side or retaliatory allegations. And it can kind of set off a whole chain reaction of other issues for your client. So you really want to think about - is there a scenario where, you know, perhaps there's more information that needs to be gathered? And maybe opposing counsel will agree to voluntarily suspend parenting time until DCS completes a preliminary investigation? Rather than running into court and asking for that to happen, just kind of everyone taking a step back, assessing the situation, waiting until there's more information? And then, finally, have emergencies been alleged before? And I don't really like this phrase, but there isn't really a better way to say it, but you really want to consider the risk of, you know, crying wolf. And again, that just means, if there is an allegation or a claim that has come up multiple times throughout the course of your litigation and the judge - you know, hasn't - those haven't been successful in terms of getting the relief or meeting your client's goals, then you really want to use that history to make your assessment of whether it's a good idea to raise this issue again. OK. So how do file. So again, the procedure and the types of documents required varies greatly from court to court. Sometimes aspects of these hearings can be handled administratively, and I'll talk about that in terms of the different documents and give examples of courts that I typically practice in. So first, you want to figure out, you know, are we asking for ex parte relief versus just getting a hearing as soon as possible? So considering that first slide about emergency motions, you want to just figure out, what am I asking the court to do? And how quickly do I need it? And can we notify the other side? In terms of documents required, you may file a straight emergency motion for temporary orders, just like a motion for temporary orders but, you know, titling it an emergency and asking for a hearing as soon as possible. That usually goes along with a motion for a short order of notice, meaning that you - so typically a motion has to be served seven days in hand or plus three days if you're mailing it

prior to the hearing. And if you're asking for a hearing as soon as possible, you may need to ask for a short order of notice that would allow you to notify the opposing party your opposing counsel about a hearing taking place sooner than the rules would normally permit you to notify somebody. And so that's what short order of notice is. Sometimes, especially short orders of notice will allow for alternative service, like counsel can email a copy of this - you know, notice of this hearing to the opposing counsel two days before the hearing takes place. So some of the things that may not normally be permissible under the rules of how you serve somebody can be written into a short order of notice. Ex parte motion is the relief you're asking for is something you're asking for an ex parte without notice to the other side. And in some courts - so I practice mostly in Sussex Probate and Family Court. Their process for emergency motions is actually to file a motion for temporary orders plus, on top of that, a motion for speedy hearing on that underlying motion for temporary orders along with an affidavit of emergency. And so this is where - this is an example of where the practice differs from court to court. In Sussex Probate and Family Court, if you file, let's say, a motion for emergency custody, a motion for speedy hearing on that and then an affidavit explaining the emergency, the motion for speedy hearing and affidavit of emergency actually get sent to your judge administratively. And basically, they send the file up to the judge and within, hopefully, a short timeframe the judge reviews the motion for speedy hearing and decides whether or not to give you that speedy hearing. So it's not actually a granting or a denial of the relief in your underlying motion, it's just an administrative decision of, yes, you can have it as soon as possible and here's when that date is or, no, the motion for speedy hearing is denied but you can still schedule your motion for temporary orders in the ordinary course. So you would just - then you have your motion scheduled - your motion for custody would then get scheduled following the normal procedure of a court. So again, talk to colleagues, find out how these things typically get handled in whatever court you're going to be practicing in. So that's a little bit about - so that's a little (unintelligible) on emergency motions.