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Temporary Restraining Orders and Injunctions On Ex Parte Applications Without Notice to Defendant

BY GEORGE F. DUNKLEE*

An application in case No. A-34116, *Mulvihill v. Mulvihill*, came on for hearing before me as presiding judge May 25th, 1942, based on a verified petition in the usual form, which was granted and duly served, and the defendant ejected from his home at 222 Gaylord Street by the sheriff, as ordered by the court. The defendant then being so ejected committed suicide.

This unfortunate result caused the court to make an investigation of the facts and a study of the law that might be of value to the profession as a precedent in such *ex parte* applications without notice to a defendant in divorce cases, and thereby avoid in the future an injustice therein.

THE LAW

1st. Rule 65 is as follows:

"(a) *Preliminary notice.* No preliminary injunction shall be issued without notice to the adverse party."

2nd. "C (h) *When inapplicable.* This rule shall not apply to suits for divorce, alimony, separate maintenance or custody of infants. In such suits, the court may make prohibitive or mandatory orders, without notice or bond, as may be just." (Effective April 6, 1941, p. 1 of rules.)

3rd. This provision "C (h) When inapplicable," is a new harsh provision without previous precedent in this jurisdiction.

A. There was no similar provision in the Code of Civil Procedure.

B. There is no such provision in the federal rules.

C. In the case of *Sedgwick v. Sedgwick*,[1] at page 168 of opinion, the court said:

> "Whether the district court possesses inherent common-law power to issue restraining orders in proper cases, in divorce actions, without notice and without bond, we express no opinion."

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*Formerly presiding judge of the Denver district courts. This opinion has been sent in pamphlet form by Judge Dunklee to all the district judges of the state. We reprint it, at Judge Dunklee's suggestion, so that the attorneys of the state may have ready access to the same opinion.

[1]50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C 653 (1911).

4th. These applications for restraining orders and injunctions without notice to the defendant are generally made as soon as the cases have been filed in the clerk's office and before they have been regularly assigned to any division, and therefore regularly come before the presiding judge for his action.

5th. The Honorable Stanley H. Johnson was presiding judge from April 6th, 1941, to January 12th, 1942. During that time I find, from the records of the clerk's office, there were seventy-six such restraining orders and injunctions granted without notice to the defendant as per said rule.

6th. That from said 12th day of January, 1942, to May 25th, 1942, I was the presiding judge, and granted twenty-two (22) such injunctions and restraining orders without notice on similar applications as per said rule.

7th. That on said May 25th, 1942, the said *Mulvihill* case, No. A-34116, came before me *ex parte* for a similar restraining order, which was granted as per the files and records of said cause.

8th. The defendant was duly served at his family hame, 222 Gaylord Street, by the undersheriff, as shown by the record. Mr. Mulvihill 'phoned his attorney, who arrived at the home about 7:30 P. M. After a consultation he was advised to obey the order of the court, and that they would take up the legal matters later. Mr. Mulvihill then said several times, quoting from his attorney's report to the court, " 'It is the most humiliating thing that has ever happened to me.' He then packed up; bade goodbye to his family, consisting of wife and three boys. He then left through a side door with his bags, got into his car, backed out into the street." The defendant, then being so ejected, went out into the country and committed suicide.

9th. After this unfortunate event I requested a report (contained in full in the record, Exhibit A) from the defendant's attorney. Also a report (Exhibit A1) from the undersheriff, who served it upon the defendant, in order to make a record of the facts as they saw them in the defendant's home. The object of this investigation by the court and these reports was to get the facts as to how this *ex parte* restraining order worked out in this case.

The attorney closed his report with these words:

> "He was quite manly about the whole affair, spoke well of his wife, refused to go into the details of his troubles and of course showed the deepest affection for his children, as did both of the older boys in their talks with me."

The undersheriff in his report uses the following language:

"I do feel, however, that the issuing of restraining orders and forcing parties to leave their house without being heard is generally a bad practice. In the seven years that I have been in this office, I have handled nearly all matters of this kind personally and I know full well that in not a single case so far has there been any immediate danger, and if both parties had been heard I am certain that any serious consequences could have been avoided.

"The same thing is true of *ne exeats*. I haven't found a single case of that kind in my experience where a hearing with both parties present could not have resulted in a better understanding and, I believe, a satisfactory determination of the action at issue," etc.

10th. After the unfortunate result of that case, I, as presiding judge of the court, refused, in my discretion, to grant any such *ex parte* order against husband or wife, depriving them of home or children, without a hearing after due notice.

11th. I call attention, by way of illustration, to the following cases, giving the numbers of the cases as they appear in the clerk's office, but omitting the names of the parties.

A. On June 16th, 1942, in case No. A-34319, for separate maintenance, the wife came into court with her attorney, with a complaint in due form, asking an *ex parte* restraining order against the husband from molesting or interfering with the plaintiff. The court informed the attorney that since the *Mulvihill* case it was not granting such injunctions and restraining orders without notice to the defendant. Upon inquiry the court was informed that the defendant was employed right in the municipal building where the court was being held. By request of the court the defendant was notified, and immediately came into court, much surprised at what was going on, as he and the plaintiff were living together with their three children in their home, jointly owned by them up to that very time. The plaintiff was sworn and testified, but did not *prima facie* substantiate her complaint. The defendant then and there took the stand and testified, denying any cause for making the complaint. The attorney for the plaintiff, upon hearing their testimony, with the consent of his client, then and there dismissed the case.

B. In case No. A-35544, filed October 28th, 1942, by the husband against his wife, was an application for an *ex parte* restraining order, and asking,

"That this court enter a restraining order herein restraining and enjoining the defendant, either directly or indirectly from interfering with this plaintiff, from going to his place of business, and from calling up and contacting the friends and business associates

of this plaintiff, and from making any remarks to them concerning this plaintiff."

The court informed the attorney it was requiring that a notice be given to defendant in all such cases before hearing or making such orders. The record shows no further action in said case.

12th. Numerous other cases could be cited as filed in the clerk's office of similar purport.

All such cases that asked the ejecting of the husband or wife out of the home were denied a hearing until a notice was given the defendant. As a result, as shown by the records, seldom is any notice ever served and the injunction feature is generally abandoned.

13th. The rule says that these drastic orders may be made *ex parte* "without notice or bond, as may be just." I submit that the court is not in a position to do justice in an *ex parte* hearing without notice in a domestic relations case between husband and wife involving the right of either to be ejected from the home, or an order restraining the defendant from speaking or communicating with plaintiff until further order of court, a violation of which order will subject the defendant to punishment for contempt of court.

14th. The records of this court show that where these harsh orders are made by the court without notice to the husband or the wife in such cases, ejecting a defendant from his or her home, changing the custody of infants, and the like, creates a situation where there is no likelihood for a reconciliation between them. I do not recall of a single case in my experience where a reconciliation was thereafter brought about between the parties.

15th. There is another reason, in my opinion, why those harsh orders are unnecessary as a matter of protection of a defendant. Such a preliminary injunction or restraining order is of no effect upon a defendant until served. I respectfully submit that when a defendant is served with a copy of a petition or complaint, summons and notice to appear in court on a day certain, when such an order is to be asked for, that notice and papers so served have all of the restraining effect on a defendant as a restraining order without notice does not create a feeling that an unfair prejudicial order does which has been entered without an opportunity to be heard.

16th. I find that on the face of it, a rule that safeguards defendants' interests in their property rights, as to preliminary injunction, by requiring a notice and bond, and all the safeguards of having the injunction "expire by its terms within such time after entry not to exceed 10 days," etc.. as provided in said Rule 65 (a) to (d), that it is unreason-

able, inequitable and against public policy that a husband or wife in divorce or other proceedings may be ejected from their home or deprived of the custody of their "infants," without notice to them as a defendant in the case of the time and place of such an application, or hearing before the court, but instead a private *ex parte* hearing, even though the defendant may be at that time in the home—in a place of business in the city, or even in the building where the court is being held, as per the instances as above stated.

17th. But it has been argued that said rule gives the court authority to proceed without notice to a defendant husband or wife, but the rule further says, *"as may be just."*

The construction of the phrase *"as may be just"* is squarely up to the court to say whether it is "just" for a husband or wife to come into court *ex parte* and get drastic orders of ejecting either one or the other out of the home in "divorce, alimony, separate maintenance or custody of infants" without notice to the husband or wife.

The word "just" has been defined by many authorities. I will only cite the following, "Volume 23, *Words and Phrases,* permanent edition." I quote therefrom, p. 436:

"The word 'just' is derived from the Latin *'justus,'* which is from the Latin *'jus,'* which means a right, and more technically a legal right—a law. Thus *'jus dicere'* was to pronounce the judgment; to give the legal decision.

"The word 'just' is defined by the *Century Dictionary* as right in law or ethics, and in the *Standard Dictionary* as conforming to the requirements of right or of positive law, and in *Anderson's Law Dictionary* as probable, reasonable. *Kinney's Law Dictionary* defines 'just' as fair, adequate, reasonable, probable; and *justa causa* as a just cause, a lawful ground."

Volume 35 *Corpus Juris,* on page 431, I quote as follows:

"92. A maxim meaning 'Law is the science of what is good and just.'

"93. A maxim meaning 'Law is a rule of right; and whatever is contrary to the rule of right is an injury.'

"94. A maxim meaning 'Right and fraud never dwell together.'

"95. A maxim meaning 'A right does (or can) not arise out of a wrong.' "

18th. The court finds from the records that from the date when said rule was effective, April 6th, 1941, to May 25th, 1942, the date of the *Mulvihill* case, that ninety-eight (98) such injunctions and restrain-

ing orders were granted *ex parte* and without notice to the defendant, as aforesaid.

After the above said case the court made an investigation of the facts and a study of the law as hereinbefore stated, and in all subsequent applications for such injunctions and restraining orders in suits for "divorce, alimony, separate maintenance or custody of infants," the court ruled that the husband or wife as defendant therein must be given notice of the time and place of hearing so as to have an opportunity to appear before the court and be heard.

The records of the court show that after said ruling the applications for such *ex parte* injunctions and restraining orders, ejecting one or the other from the family home without notice, etc., rapidly fell off, and at the present time have entirely stopped.

The court finds from experience and investigation that it is inequitable, unfair, unjust and against public policy to make such orders against a husband or wife without notice having first been given the defendant.

The court rules that it cannot be in a position to make an order in such cases "as may be just" without notice to a defendant, so that it can hear both sides of the domestic controversy if a defendant cares to contest. That to proceed otherwise as against the person in a divorce case, as distinguished from property rights, is against public policy.

Correspondence

Central City 11-13-42

Blank Blank Co.
Sir

The State of ..... ask you to get a appointment thru the courts to handle anything that is left to you. However I have myself a lawyer a 2 Buck one and has a office But cannot keep no help He ran for State Senator "Republican" ticket got elected and got drunk all the same time so if I can ever catch him in shape I hope to get the business we have taken care of.

Not changing the subject to much—Pvt John C. Doe USMC the boy the Japs could not kill is a nephew of mine

A J DOE
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