

"THE FIRST-TO-THE-BANK SYNDROME"

by

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A. Preliminary Injunctions - their meaning and effect

Injunctive relief will be granted in equity when the party's legal remedies are inadequate and in Arizona the procedure is governed by the provisions of A.R.S. §§12-1801 to 12-1808 and Rule 65 of Civil Procedure as amended.

Injunctions may take the form of:

- (1) temporary restraining orders,
- (2) preliminary injunctions, and
- (3) permanent injunctions.

These general laws and rules governing injunctions must be read together with the special provisions for dissolution matters. Specifically, it is provided that no temporary restraining order may issue without notice in a dissolution case unless the court finds that irreparable injury will result without the order [A.R.S. §25-351D]. No bond is required unless the court deems it appropriate [A.R.S. §25-315D]. Ordinarily a temporary restraining order lasts for only 10 days. However, in dissolution actions, any temporary order terminates only when the petition is dismissed or the decree is entered unless revoked or modified prior to the decree [A.R.S. §25-315F].

In all actions for the dissolution of marriage or for legal separation, the Clerk of the Court shall pursuant to order of the Superior Court issue a preliminary injunction in the following manner:

1. The preliminary injunction shall be directed to each

party to the action and contain the following orders:

a. That both parties are enjoined from transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.

b. That both parties are enjoined from molesting, harassing, disturbing the peace of or committing an assault or battery on the person of the other party or any natural or adopted child of the parties.

c. That both parties are enjoined from removing any natural or adopted child of the parties then residing in Arizona from the jurisdiction of the court without the prior written consent of the parties or the permission of the court.

2. The preliminary injunction shall include the following statement:

"Warning

This is an official court order. If you disobey this order the court may find you in contempt of court. You may also be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this order.

You or your spouse may file a certified copy of this order with your local law enforcement agency. A certified copy may be obtained from the clerk of the court that issued this order. If you are the person that brought this action,

you must also file evidence with the law enforcement agency that this order was served on your spouse.

This court order is effective until a final decree of dissolution or legal separation is filed or the action is dismissed."

3. The preliminary injunction shall be effective against the petitioner upon filing the petition and against the respondent upon service of a copy of the order. In the event of service by registered mail under the rules of civil procedure, the order shall be effective upon receipt of the order. The order shall remain effective until further order of the court or the entry of a decree of dissolution or legal separation.

4. At the time of filing the petition for dissolution or legal separation, the copies of the preliminary injunction shall be issued to the petitioner or the agent, servant or employee filing the petition for dissolution or legal separation. The petitioner shall be deemed to have accepted service of the petitioner's copy of the preliminary injunction and to have actual notice of the contents thereof by filing or causing to be filed a petition for dissolution or legal separation. The petitioner shall cause a copy of the preliminary injunction to be served upon the respondent together with a copy of the summons and petition for dissolution or legal separation.

5. The preliminary injunction shall have the force and effect of an order of the Superior Court signed by a judge and shall be enforceable by all remedies made available by law, including contempt of court. The provisions of Rules 65(a)(1) and 65(e) of the Rules of Civil Procedure shall not

be applicable to the preliminary injunction.

In a proceeding for dissolution of marriage, for legal separation or for maintenance or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance or temporary support of a child, natural or adopted, common to the parties entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

As party of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary restraining order or preliminary injunction for any of the following relief:

a. Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm may otherwise result.

b. Providing other injunctive relief proper in the circumstances.

The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if no order is issued until the time for responding has elapsed. No bond shall be required unless the court deems it appropriate.

On the basis of the showing made, and in conformity with

§§25-318 and 25-319, the court may issue a preliminary injunction and an order for temporary maintenance or support in amounts and on terms just and proper in the circumstances. The court may also make temporary orders respecting the property of the parties, as may be necessary.

A temporary order or preliminary injunction:

a. Does not prejudice the rights of the parties or any child which are to be adjudicated at the subsequent hearings in the proceeding.

b. May be revoked or modified before final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under §25-327 and as provided in Rule 65 of the Rules of Civil Procedure.

c. Terminates when the final decree is entered or when the petition for dissolution or legal separation is dismissed.

A person who disobeys or resists an injunction issued pursuant to subsection A, paragraph 1, subdivision (b) or subsection C, paragraph 1, of this section is subject to arrest and prosecution for interference with judicial proceedings pursuant to §13-2810 and the following procedures apply:

1. Any party may cause a certified copy of the injunction and return of service on the other party to be registered with the sheriff having jurisdiction of the area in which the party resides. The party originally registering the injunction shall register any changes or modifications of the injunction with such sheriff. For enforcement by arrest

and prosecution for interference with judicial proceedings, a certified copy of the injunction, whether or not registered with such sheriff, is presumed to be a valid existing order of the court until a final decree of dissolution or legal separation is entered or the action for dissolution or legal separation is dismissed.

2. A peace officer may, with or without a warrant, arrest a person if he has probable cause to believe that an offense under this subsection has been committed and he has probable cause to believe that the person to be arrested has committed the offense, whether such offense is a felony or a misdemeanor and whether such offense was committed within or without the presence of the peace officer. The release procedures available under §13-3883, paragraph 4 and §13-3903 are not applicable to arrests made pursuant to this subsection.

3. A peace officer making an arrest pursuant to this subsection is not civilly or criminally liable for the arrest if the officer acts upon probable cause and without malice.

4. A person arrested pursuant to this subsection may be released from custody in accordance with the rules of criminal procedure or other applicable statute. An order for release, with or without an appearance bond, shall include pretrial release conditions necessary to provide for the protection of the alleged victim and other specifically designated persons and may provide additional conditions which the court deems appropriate, including participation in any counseling programs available to the defendant.

5. The remedies provided in this subsection for enforcement of the preliminary injunction are in addition to any other civil or criminal remedies available, including civil contempt of court. The use of one remedy does not prevent the simultaneous or subsequent use of any other.

Under prior law it was provided that after a divorce action was filed, the husband, as manager of the community, should not contract any debts on account of community property nor dispose of such property. Now a preliminary injunction automatically issues when the petition is filed to restrain both spouses from transferring, encumbering, concealing, selling, or otherwise disposing of any property except in the usual course of business or for necessities without the written consent of the parties or the permission of the court [A.R.S. §25-315A].

B. Dissipation of assets after issuance of Restraining Order

A.R.S. §25-315(A)(5):

"The Preliminary Injunction shall have the force and effect of an Order of the Superior Court signed by a Judge and shall be enforceable at all remedies made available by law, including contempt of Court."

I could find no specific cases which define the rights of the Court to afford relief due to a violation of the Preliminary Injunction, other than the statute. Of course, the remedies which would be available would include an offset in favor of one spouse and against the other equal in value to the property which has wrongfully been appropriated in

violation of the Preliminary Injunction, which is effectively the grant of a money judgment to one of the spouses. Also, the potential ramifications of a contempt order include incarceration, fine, and most commonly, the award of costs and attorney's fees to the opposing party.

1. Preservation of Property - The trial court has the jurisdiction to preserve the property involved in a divorce suit during the pendency of the action. The court may make temporary orders respecting the property to avoid the property from being lost, removed from the jurisdiction, materially injured, dissipated or being the subject of waste. Saxon v. Riddel, (1972) 16 Ariz. App. 325, 493 P.2d 127.

2. Sale of Property - In absence of evidence that co-owned real property needed to be sold to preserve any equities therein, or that it was in any danger of being materially injured, lost, removed, dissipated, or wasted, court had no jurisdiction to decree sale of co-owned real property prior to final determination of merits of the divorce action even though sale of property at that time might have been financially advantageous to both parties. Saxon v. Riddel, supra.

3. Burden of Proof - Party asserting community liability for indebtedness based upon contract entered into with husband subsequent to commencement of divorce proceedings has burden of proving existence of community benefitting intent at time debt was incurred, or that use of such funds were for community purpose. Wilson v. Polacek, (1971) 15 Ariz. App. 139, 486 P.2d 819.

C. Refusal of Spouse to Work

A.R.S. §25-319(A)

"(a) In a proceeding for dissolution of marriage, a legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: (1) lacks sufficient property, including property apportioned to such spouse, to provide for his or her reasonable needs; and (2) is unable to support himself or herself through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to support himself or herself."

Pursuant to A.R.S. §25-319, the court may grant maintenance to either spouse only if it finds that the spouse seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment or is the custodian of a child whose age or condition requires the custodial spouse to stay at home or if the spouse seeking maintenance lacks earning ability adequate to support himself or herself. If a spouse is capable of supporting himself or herself through regular employment he or she is not entitled to spousal maintenance even if they refuse to work. McDermott vs. McDermott, 129 Ariz. 76, 628 P.2d 959 (App. 1981). In McDermott, supra., the parties had been married for nine and

one-half years. The wife, age 30, was an experienced teacher who had a B.A. in Education and an Arizona Teaching Certificate. She had worked during the first six years of the marriage, then stopped teaching because she was "burned out." At the time of the trial the wife was employed by the City of Tucson as an administrative assistant earning approximately \$13,800.00 per year. The husband was attending school at the time of trial and working toward the completion of his doctorate degree, earning approximately \$400.00 per month gross income. Wife requested maintenance so that she could attend school and pursue a post graduate degree. The trial court held that the wife had sufficient earning ability to support herself and was not, based on that alone entitled to any spousal maintenance. However, the trial court granted maintenance as a matter of "equity" of \$500.00 per month provided that the wife returned to school. The maintenance was to continue for a period not to exceed 33 payments so long as the wife remained a student in good standing. The Court of Appeals vacated the maintenance award holding that if the spouse was capable of supporting herself through regular employment she was not entitled to spousal maintenance in accordance with A.R.S. §25-319. Thus, McDermott, supra., stands for the principal that a spouse who is capable of supporting herself, who wishes not to work for a period of time to obtain additional training, is not entitled to maintenance.

Where a spouse seeking maintenance is employed but does not earn sufficient income to support himself or herself,

they are not entitled to maintenance unless they prove that they lack the earning ability to support himself or herself. In Neal vs. Neal, 116 Ariz. 590, 570 P.2d 758 (1977), the parties were married for 23 years and their main source of income was the husband's salary from the Air Force. At the time of trial the wife was employed as a part-time cleaning person working two days per week and receiving a net weekly pay of approximately \$50.00. Additionally, she had recently voluntarily terminated another part-time job. Her children were ages 11 and 15 and had no physical condition which required her to care for them at home. Under these circumstances the trial court awarded the wife \$1.00 of spousal maintenance. The Supreme Court vacated the maintenance award reasoning that because the record of the lower court proceeding did not reveal any evidence of wife having a physical condition preventing her full employment the only reasonable conclusion was that she was capable of supporting herself through regular employment. Therefore, the wife failed to satisfy the requirements of A.R.S. §25-319(A)(2) and she was not entitled to any spousal maintenance.

D. Securing of Assets

1. Emptying the bank accounts

During marriage, each of the spouses have equal management, control and disposition rights over their community property and have equal power to bind the

community. A.R.S. §25-214(B). Subsection (C) of this statute provides that:

"Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except the joinder of both spouses is required in the following cases:

1. Any transaction for acquisition, disposition or encumbrance of an interest in real property other than unpatented mining claims or leases of less than one year.

2. Any transaction of guarantee, indemnity or suretyship."

However, upon the filing of a Petition for Dissolution, the Clerk of the Court, pursuant to A.R.S. §25-3015, issues a Preliminary Injunction directed to each of the spouses which contains the following orders:

- "1. That both parties are enjoined from transferring, encumbering, concealing, selling or otherwise disposing of any of the joint, common or community property of the parties, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the Court."

Therefore, once the Preliminary Injunction has been issued and served upon the spouse, any misappropriation of community funds by withdrawing same from a bank account and applying the funds for something other than the usual course of business or the necessities of life, is a violation of the Preliminary Injunction.

It is also well worth remembering that once a property's status as community or separate has become fixed, the property retains that character until changed by agreement of

the parties, or by operation of law. Potthoff v. Potthoff, 128 Ariz. 557, 627 P.2d 708 (App. 1981). Therefore, although a spouse may withdraw community funds from a bank account and deposit them elsewhere, this does not change the character of the funds. It remains community property.

There are various ways in which a Court may account for one spouse's wrongful appropriation of community funds. A.R.S. §25-318(a) provides that in a proceeding for dissolution of marriage the Court shall divide the community, joint tenancy and the property held in common equitably without regard to marital misconduct. However, the statute also provides that:

"Nothing in this section shall prevent the Court from considering excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common."

For example, in O'Hair v. O'Hair, 109 Ariz. 236, 508 P.2d 66 (1973), Husband deposited \$150,000 of his sole and separate funds into a joint savings account with his wife. Wife was given the authority to draw funds on the account for household expenses, which he did for approximately one year. Thereafter, the wife withdrew \$75,000 from the account and established a revokable trust naming herself as beneficiary. The trial court held that this appropriation of funds was wrongful and ordered the wife to restore the funds as part of the dissolution. The Supreme Court upheld this ruling.

Had the funds been community, and wife had removed one-half of said funds, this would not be a wrongful appropriation. A wrongful appropriation of funds by a spouse

may also be considered by the Court in determining the amount and period of time during which a spouse may receive spousal maintenance. In pertinent part, the statute, A.R.S. §25-319(B)(7) provides: "Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common" shall be considered in determining the amount and period of time for which maintenance will be ordered. For example, in Sommerfield v. Sommerfield, 121 Ariz. 575, 592 P.2d 771 (1979), the Court awarded the wife maintenance of \$700.00 per month for life or until she was remarried. The parties have been married for 18 years, the wife was 54 years old and had no skills or work experience, while the husband had a steady income of \$39,000 per year from investments. Since the separation, the wife had been employed as a dining room hostess earning approximately \$334 per month net income. In affirming the spousal maintenance awarded by the trial court, the Supreme Court noted that the husband had disposed of at least \$20,000 of a \$30,000 community bank account in violation of the wife's community interest, and this was sufficient to justify, in part, the trial court's maintenance order.

It is apparent that the court has a right of alternative methods of accounting for one spouse's wrongful disposition of the funds in a community bank account. The real problem in these situations is a practical one, which you are well aware of, involving the actual tracing and location of funds and the determination of the amount which has been

misappropriated.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

<u>PETER MURPHY</u>)	
)	
Petitioner,)	
)	
and)	No. <u>DR-525890</u>
)	
<u>BARBARA MURPHY,</u>)	
)	PRELIMINARY INJUNCTION
Respondent,)	AGAINST BOTH PETITIONER
)	AND RESPONDENT

IMPORTANT - YOU SHOULD READ THIS COURT ORDER IMMEDIATELY

Pursuant to order of the Presiding Judge of the Superior Court of Arizona in and for Maricopa County in accordance with A.R.S. §25-315(A), as amended, 1977,

IT IS ORDERED that during the pendency of this action YOU, PETITIONER AND RESPONDENT NAMED ABOVE, as parties to this case, are enjoined from and shall not:

- (a) Transfer, encumber, conceal, sell, or otherwise dispose of any of the joint, common or community property of the parties except in the usual course of business or for the necessities of life, without the written consent of both parties or the permission of the Court.
- (b) Molest, harass, disturb the peace of, or commit an assault or battery on your spouse (Petitioner or Respondent) or any natural or adopted child of the parties.
- (c) Remove any natural or adopted child of the parties presently residing in Arizona from the State of Arizona without the prior written consent of both parties or the permission of the Court.

IT IS FURTHER ORDERED that this injunction is effective against both parties to this action. If you are the Petitioner, the injunction is effective upon filing the Petition for Dissolution or Legal Separation. If you are the Respondent, this injunction is effective upon being served with, or accepting service of, a copy of this injunction upon you.

IT IS FURTHER ORDERED that this injunction has the same force and effect of an order of the Superior Court signed by a Judge and is enforceable by all remedies made available by law, including contempt of Court.

WARNING

This is an official court order. If you disobey this order, the court may find you in contempt of court. You may also be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this order.

You or your spouse may file a certified copy of this order with your local law enforcement agency. The Office of the Maricopa County Sheriff is the preferable local law enforcement agency in which to file the copy of the order. A certified copy may be obtained from the Clerk of the Court that issued this order. If you are the person that brought this action, you must also file evidence with the law enforcement agency that this order was served on your spouse.

This court order is effective until a final decree of dissolution or legal separation is filed or the action is dismissed.

The person filing this order with the local law enforcement agency shall also file any subsequent changes or modifications with that agency.

Issued under my hand and the seal of this Court this 23rd day of August, 1984.

VIVIAN KRINGLE
Clerk of the Court

By D. K. Jewel
Deputy Clerk