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Plan that Trip 30-Days in Advance

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As family law practitioners we all are familiar with the family law automatic temporary restraining orders found at Family Code Section 2040(a), which bind every petitioner immediately upon filing a summons and petition for dissolution, legal separation or paternity and every respondent immediately upon being served with same. Also included is Family Code Section 2040(a)(1), which restrains both parties from removing a minor child or children from the state of California without the prior written consent of the other party or court order. Further, litigants often include this restraining order (or a variant thereof) in judgments of dissolution, legal separation or paternity, which makes the restraining order permanent.

As a result of this particular automatic temporary restraining order (or a permanent version contained in a judgment), when a recalcitrant parent refuses the other parent's consent to out of state travel with a minor child or children, family law attorneys file orders to show cause or even *ex parte* applications (emergency hearings requiring only 24 hours notice) asking the court to permit such travel. However, although most practitioners and judges think that giving only 16 court days notice is required for the filing of such a request in accordance with Code of Civil Procedure Section 1005(b), or even proceeding *ex parte*, this is not so! Code of Civil Procedure Section 917.7 *automatically* stays for 30 days any court order authorizing a parent to travel out of state with a minor child *even if the purpose of the trip is purely temporary*, such as a weekend away to attend a wedding, graduation, Bar or Bat Mitzvah, or even a funeral, which is something that provides no advance notice. And, if the purpose of the trip is a two week vacation in Hawaii before school starts in September, failure to comply with this law or to obtain the other parent's prior written consent will confine the use of flip flops and sun block to the California coast, Lake Arrowhead or Hurricane Harbor in Valencia.

The actual language of Section 917.7 provides, "[I]n the absence of a writ or order of a reviewing court providing otherwise, the provisions of...[a] judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of seven calendar days from the entry of the judgment or order by a juvenile court in a dependency hearing, or for a period of 30 calendar days from the entry of judgment or order by



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any other trial court. The periods during which these provisions allowing, or eliminating restrictions against, removal of the minor child from the state are stayed, are subject to further stays as ordered by the trial court...pursuant to this section.”

Further, the language and purpose of the statute appears to indicate that the only way to waive this is by agreement of the parties. This can be done before a judgment is entered by inserting a provision in a temporary custody order authorizing each party to take the minor child(ren) out of state without the prior written consent of the other or court order (subject to whatever notification provisions and related conditions the parties elect), or, if the parties choose to address the problem on an “as needed” basis, they can file individual stipulations and orders authorizing travel in each situation. If a judgment on the merits already has been entered and the judgment contains a *ne exeat* provision, the parties also can implement the stipulation and order option post-judgment or amend the judgment to remove the *ne exeat* provision should they want an all encompassing waiver.

Section 917.7 derives from former Code of Civil Procedure Section 949a, added by Stats. 1955, c. 170, p. 639, Section 1 (as subsequently amended). The primary focus for enacting former Section 949a appears to have been to eliminate the prior automatic stay of custody orders that resulted from the taking of an appeal. *Faulkner v. Faulkner* 148 Cal.App.2d 102, 105-106 (1957).

However, the legislature also added onto the statute the predecessor provision to Section 917.7, i.e., imposition of the 30 day automatic stay on any order allowing, or eliminating restrictions against, removal of a minor child from the state of California. The purpose of this latter provision was articulated in *Faulkner v. Faulkner*, “[w]hen an appeal has been taken or is to be taken, removal [of a minor child or children] from the jurisdiction seriously affects both the appellate court’s jurisdiction and the right of appeal. (See e.g., *Lerner v. Superior Court*, 38 Cal.2d 676 [242 P.2d 321]; *Gantner v. Superior Court*, 38 Cal.2d 688 [242 P.2d 328].)”

As stated in California Education of the Bar, California Child Custody Litigation and Practice (2008) at Section 4.10A, “As a practical matter, counsel must anticipate the automatic stay and ensure that requests to take a child out-of-state are made and decided more than 30 days before the scheduled travel. *The automatic stay applies equally to brief trips out of state and to out-of-state moves.* The purpose is to give the party objecting to the child’s removal adequate time to seek appellate review. The stay ensures California has meaningful and enforceable jurisdiction over the child.”

Therefore, the lesson to be learned is that in requesting a court order authorizing travel with minor child(ren) outside of the state of California, even for limited purposes, a hearing must be held and a ruling obtained in excess of 30 days before the scheduled travel. (This assumes, of course, that one does not request a writ or order of the reviewing court to provide otherwise and/or that opposing counsel does not request a further stay from the trial and/or appellate court, which is granted.) Alter-



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natively, one must obtain the other parent's prior written consent. Perhaps offering to reciprocate with a recalcitrant other parent by agreeing to pre-approve his or her next out of state visit with the children will enable one to work around the mandate of Section 917.7. Nonetheless, if your client wants or needs to take the child(ren) out of state for a funeral and the client's "ex" refuses consent, your client may not take the child(ren) without risk of being in contempt of a court order, i.e., the family law automatic temporary restraining order.

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