

RESOLUTION 05-04-2017

DIGEST

Family Law: Automatic Temporary Restraining Orders Contained in Summons

Amends Family Code section 2040 to include a prohibition against modifying or allowing insurance to lapse in Automatic Temporary Restraining Orders.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 2040 to include a prohibition against modifying or allowing insurance to lapse in Automatic Temporary Restraining Orders. This resolution should be approved in principle because it ensures continuing insurance coverage and eliminates surprise lapses in coverage.

The prohibition applies to all types of insurance – health, life, automobile, renters, etc. Health insurance coverage can be one of the most valuable benefits of marriage, particularly where one party is unemployed and older, and insurance premiums can exceed \$1200 per month for that individual. Often, vehicle insurance for a party’s vehicle is part of a joint policy under one party’s name, which often provides a discounted rate for both parties.

This prohibition precludes one party from surreptitiously cancelling all insurance coverage for the other party without that party’s express knowledge and consent so there is no surprise lapse in coverage, which can result in significant debt for the uninsured party. Maintaining insurance until an agreement as to insurance coverage can be reached, or an order is in place, is paramount to protecting the assets of the parties. This prohibition on modifying or allowing insurance to lapse also would not interfere with the payor spouse’s claim for reimbursement for costs incurred to maintain the insurance coverage during the relevant time period.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2040 to read as follows:

- 1 § 2040
- 2 (a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure,
- 3 the summons shall contain a temporary restraining order:
- 4 (1) Restraining both parties from removing the minor child or children of the parties, if
- 5 any, from the state, or from applying for a new or replacement passport for the minor child or
- 6 children, without the prior written consent of the other party or an order of the court.
- 7 (2) Restraining both parties from transferring, encumbering, hypothecating, concealing,
- 8 or in any way disposing of any property, real or personal, whether community, quasi-community,

9 or separate, without the written consent of the other party or an order of the court, except in the
10 usual course of business or for the necessities of life, and requiring each party to notify the other
11 party of any proposed extraordinary expenditures at least five business days before incurring
12 those expenditures and to account to the court for all extraordinary expenditures made after
13 service of the summons on that party.

14 Notwithstanding the foregoing, nothing in the restraining order shall preclude a party
15 from using community property, quasi-community property, or the party's own separate property
16 to pay reasonable attorney's fees and costs in order to retain legal counsel in the proceeding. A
17 party who uses community property or quasi-community property to pay his or her attorney's
18 retainer for fees and costs under this provision shall account to the community for the use of the
19 property. A party who uses other property that is subsequently determined to be the separate
20 property of the other party to pay his or her attorney's retainer for fees and costs under this
21 provision shall account to the other party for the use of the property.

22 (3) Restraining both parties from cashing, borrowing against, canceling, transferring,
23 disposing of, modifying, allowing to lapse or changing the beneficiaries of any insurance or other
24 coverage, including life, health, automobile, and disability, held for the benefit of the parties and
25 their child or children for whom support may be ordered, without the written consent of the other
26 party or an order of the court.

27 (4) Restraining both parties from creating a nonprobate transfer or modifying a
28 nonprobate transfer in a manner that affects the disposition of property subject to the transfer,
29 without the written consent of the other party or an order of the court.

30 (b) Nothing in this section restrains any of the following:

31 (1) Creation, modification, or revocation of a will.

32 (2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to the
33 instrument, provided that notice of the change is filed and served on the other party before the
34 change takes effect.

35 (3) Elimination of a right of survivorship to property, provided that notice of the change
36 is filed and served on the other party before the change takes effect.

37 (4) Creation of an unfunded revocable or irrevocable trust.

38 (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section
39 260) of Division 2 of the Probate Code.

40 (c) In all actions filed on and after January 1, 1995, the summons shall contain the
41 following notice:

42 "WARNING: California law provides that, for purposes of division of property upon
43 dissolution of marriage or legal separation, property acquired by the parties during marriage in
44 joint form is presumed to be community property. If either party to this action should die before
45 the jointly held community property is divided, the language of how title is held in the deed (i.e.,
46 joint tenancy, tenants in common, or community property) will be controlling and not the
47 community property presumption. You should consult your attorney if you want the community
48 property presumption to be written into the recorded title to the property."

49 (d) For the purposes of this section:

50 (1) "Nonprobate transfer" means an instrument, other than a will, that makes a transfer of
51 property on death, including a revocable trust, pay on death account in a financial institution,
52 Totten trust, transfer on death registration of personal property, revocable transfer on death deed,
53 or other instrument of a type described in Section 5000 of the Probate Code.

54 (2) "Nonprobate transfer" does not include a provision for the transfer of property on
55 death in an insurance policy or other coverage held for the benefit of the parties and their child or
56 children for whom support may be ordered, to the extent that the provision is subject to
57 paragraph (3) of subdivision (a).

58 (e) The restraining order included in the summons shall include descriptions of the
59 notices required by paragraphs (2) and (3) of subdivision (b).

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: The automatic temporary restraining orders contained in a Family Law Summons (Judicial Council Form FL-100) effective upon personal service of the petition and summons on the respondent pursuant to Family Code Section 233(a) include provisions restraining the cancelling, borrowing against, transferring, changing beneficiaries or disposing of life, health, automobile and disability insurance. However, there is no statutory restriction against allowing such insurance to lapse or modifying such insurance. This places litigants in the position of either allowing non-consented modifications to occur or allowing non-consented lapses to occur, even if within the financial ability of the party allowing the lapse to occur, or seek court relief which has its own financial implications. In addition, circumstances can arise where a modification or lapse in insurance can have significant future financial impact, such as where the covered individual is unable to obtain similar insurance, such as life insurance, due to age, health or financial circumstances. Also, other automatic temporary restraining orders contained in Family Code Sections 2040(a)(1), (2), and (4) exclude those actions to which the parties have in writing consented to or from which the court has ordered relief. In its present form Section 2040(a)(3) does not have such exclusions.

The Solution: The proposed amendment would: 1) harmonize Family Code Section 2040(a)(3) with Section 2040(a)(1), (2), and (4) and allow such section to exclude actions to which the parties have a written consent or where court relief is obtained, and; 2) include as a restrained action modifying any of the described insurance or allowing any of the described insurance to lapse.

IMPACT STATEMENT

This resolution does not have any known effect on any other law, statute or rule, aside from the Judicial Council Form FL-100 to be brought into compliance with the amended statute when it is enacted.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENT AND STATE BAR SECTION COMMENTS

FLEXCOM - Disapprove

Rationale:

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) disapproves this resolution as drafted. FLEXCOM agrees with the proponent that there is a problem that needs to be resolved (for example, letting such insurance lapse without notice). However, FLEXCOM is concerned that adding the prohibitions against “modifying” the insurance can be problematic as there are numerous circumstances beyond a party’s control that could create a “modification,” the most obvious one being where an employer decides to change the health plan/aspects (e.g. deductibles) of the plan available to the employee party.

Further, the parties already have the right to go into court and raise issues of not only maintaining coverage but responsibility for payment.

Disclaimer:

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