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Opinion No. 03-117

Constitutionality of Tenn. Code Ann. § 36-4-106(d) — Statutory Injunctions in Divorce Cases

QUESTIONS

1. Are the automatic, temporary injunctions issued at the commencement of a divorce under Tenn. Code Ann. § 36-4-106(d) unconstitutional because they do not follow the requirements of Tenn. R. Civ. P. 65.04(2)?

2. If a judge does not sign the injunctions under Tenn. Code Ann. § 36-4-106(d), can they be enforced or punished by contempt?

OPINIONS

1. No. The temporary injunctions in Tenn. Code Ann. § 36-4-106(d) are constitutional because Tenn. R. Civ. P. 65.07 allows the existence of contrary statutory provisions governing injunctions.

2. Yes. Once service of process of the complaint and summons, which must include the text of the temporary injunctions in Tenn. Code Ann. § 36-4-106(d), is accomplished, the injunctions become an order of the court, and may be enforced or punished by contempt.

ANALYSIS

1.

The Tennessee Legislature recently enacted Tenn. Code Ann. § 36-4-106(d), which provides, in relevant part, as follows:

> Upon the filing of a petition for divorce or legal separation except on the sole ground of irreconcilable differences and upon personal service of the complaint and summons on the respondent or upon waiver and acceptance of service by the respondent, the following temporary injunctions shall be in effect against both parties until the final decree of divorce or order of legal separation is entered, the petition is

> dismissed, the parties reach agreement, or until the court modifies or dissolves the injunction, written notice of which shall be served with the complaint:
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> (1)(A) An injunction restraining and enjoining both parties from transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the court, of any marital property. Nothing herein is intended to preclude either of the parties from seeking broader injunctive relief from the court.
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> (2) An injunction restraining and enjoining both parties from voluntarily canceling, modifying, terminating, assigning or allowing to lapse for nonpayment of premiums, any insurance policy, including, but not limited to, life, health, disability, homeowners, renters, and automobile, where such insurance policy provides coverage to either of the parties or the children, or that names either of the parties or the children as beneficiaries without the consent of the other party or an order of the court. "Modifying" includes any change in beneficiary status.
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> (3) An injunction restraining both parties from harassing, threatening, assaulting or abusing the other and from making disparaging remarks about the other to or in the presence of any children of the parties or to either party's employer.
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> (4) An injunction restraining both parties from relocating any children of the parties outside the state of Tennessee, or more than one hundred (100) miles from the marital home, without the permission of the other party or an order of the court, except in the case of a removal based upon a well-founded fear of physical abuse against either the fleeing parent or the child. In such cases, upon request of the nonrelocating parent, the court will conduct an expedited hearing, by phone conference if appropriate, to determine the reasonableness of the relocation and to make such other orders as appropriate.

Tenn. Code Ann. §§ 36-4-106(d)(1)-(4).

The temporary injunctions in § 36-4-106(d) do not apply to the parties if the petition for divorce is based upon irreconcilable differences. Section 36-4-106(d)(6) also provides that "nothing in this subsection (d) shall preclude any party from applying to the court for an order of injunctive or extraordinary relief against any other party named in any petition as provided by law or rule."

You have asked about the legality of Tenn. Code Ann. § 36-4-106(d), suggesting that the legislation may raise separation of powers issues. Because the Tennessee Rules of Civil Procedure governing temporary injunctions, and enacted by the Supreme Court, permit the existence of contrary statutory provisions in this regard, § 36-4-106(d) does not raise a separation of powers problem.

It is "well settled that Tennessee courts have inherent power to make and enforce reasonable

rules of procedure." *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998) (citations omitted). Moreover, as recognized by the Legislature, the Supreme Court "has the power to prescribe by general rules . . . the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings." Tenn. Code Ann. § 16-3-402. The Tennessee Supreme Court has interpreted this provision to mean that "no court other than the Supreme Court can make rules governing the procedure in other courts." *State v. Best*, 614 S.W.2d 791, 793 (Tenn. 1981) (citing Tenn. Code Ann. §§ 16-3-401 and -407).

Pursuant to its inherent power to prescribe rules of procedure, the Supreme Court promulgated Tenn. R. Civ. P. 65.04(2), which sets forth the following requirements to obtain a temporary injunction:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that acts or omissions of the adverse party will tend to render such final judgment ineffectual.

The Tennessee Supreme Court also promulgated Rule 65.07, which provides for an exception applicable to the portions of Rule 65 that govern restraining orders and injunctions. Rule 65.07 states, in relevant part, that "[t]he provisions of this Rule *shall be subject to any contrary statutory provisions governing restraining orders or injunctions*." Tenn. R. Civ. P. 65.07 (emphasis added). As the Tennessee Court of Appeals recently noted, "Rule 65.07 preserves statutory provisions for injunctive relief which conflict with the rules." *Schmitt v. Smith*, 2001 WL 1516999, *7 (Tenn. Ct. App. 2001) (citation omitted).

Here, it is clear that Tenn. Code Ann. § 36-4-106(d) conflicts with Tenn. R. Civ. P. 65.04(2). The requirements needed to obtain the temporary injunctions under § 36-4-106(d) are as follows: that a petition for divorce or legal separation be filed; that service or waiver of service of the petition occur; and that the provisions of the temporary injunctions be attached to the summons and complaint and that they be served contemporaneously with the same. Once these requirements are met, the temporary injunctions *shall* be in effect against the two parties named in the petition, and they become an order of the court. Tenn. Code Ann. § 36-4-106(d).

In contrast, the requirements of Rule 65.04(2) are that a movant seeking a temporary injunction must "clearly show," before such an injunction *may* issue, by "verified complaint, affidavit or other evidence" the following: that the movant's rights are being or will be violated by an adverse party; and that the movant will suffer immediate and irreparable injury. Unlike Rule 65.04(2), § 36-4-106(d) does not require that a petitioner "clearly show" that his or her rights are being or will be violated and that he or she will suffer immediate and irreparable injury. In fact, a petitioner does not have to "clearly show" anything before the temporary injunctions issue. Under § 36-4-106(d), the temporary injunctions "shall be in effect" upon filing of the petition for divorce

and upon service thereof. Given their differing requirements for the issuance of a temporary injunction, § 36-4-106(d) and Rule 65.04(2) are in conflict with each other.

Notwithstanding this conflict, § 36-4-106(d) is constitutional. Section 36-4-106(d) is constitutionally valid because Tenn. R. Civ. P. 65.07 allows contrary statutory provisions governing injunctions. Because only the Supreme Court may promulgate rules of procedure, *Reid*, 981 S.W.2d at 170, it follows that the Supreme Court properly promulgated Tenn. R. Civ. P. 65.07, which allowed the Legislature to enact statutory provisions regarding injunctions that conflict with the Court's own rules.[1] *See Schmitt v. Smith*, 2001 WL 1516999, *7. Section 36-4-106(d) is clearly a "contrary statutory provision" under Rule 65.07 because it provides for mandatory, temporary injunctions to be in place upon the filing and service of a divorce petition. Section 36-4-106(d) alters the traditional requirements of temporary injunctions in divorce cases as allowed by Rule 65.07.

2.

You also have asked whether the mandatory temporary injunctions in § 36-4-106(d) are enforceable or punishable by contempt if a judge does not sign them. A court order is defined as "a direction of a court or judge made or entered in writing, and not included in a judgment." 8 Tenn. Jur. *Courts* § 6 (2002). Moreover, it is a fundamental principle that "a Court speaks through its orders and decrees entered upon the minutes of the court." *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977).

The statute requires that the provisions of the temporary injunctions "shall be attached to the summons and the complaint and shall be served with the complaint." Tenn. Code Ann. § 36-4-106(d)(5). Upon fulfillment of these conditions, the temporary injunctions in § 36-4-106(d) "become an order of the court." *Id.* The injunctions are in effect "against both parties" until *either* of the following four events occur: (1) "the final decree of divorce or order of legal separation is entered"; (2) "the petition is dismissed"; (3) "the parties reach agreement"; or (4) "until the court modifies or dissolves the injunction." *Id.* § 36-4-106(d).

In contrast to § 36-4-106(d), Rule 65.04(4) provides, in relevant part, that a temporary injunction "*shall be signed by the judge granting it* and shall forthwith be filed in the clerk's office and entered." Tenn. R. Civ. P. 65.04(4) (emphasis added). Thus, Section 36-4-106(d) also conflicts with Rule 65.04(4) because the statute does not require the judge's signature to make the temporary injunctions enforceable. For the reasons stated in Question 1, Tenn. R. Civ. P. 65.07 allows this conflicting statutory provision to exist.

Thus, once the requirements in § 36-4-106(d) are met, the temporary injunctions become an order of the court and are fully enforceable by contempt. In divorce cases, a judge's signature is

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[1] For this reason, Tenn. Code Ann. § 16-3-406, which provides that after the rules of procedure by the Supreme Court are adopted "all laws in conflict therewith shall be of no further force or effect," is inapplicable to an analysis of the validity of Tenn. Code Ann. § 36-4-106(d).

unnecessary to make the automatic temporary injunctions enforceable. The temporary injunctions in § 36-4-106(d), which must be attached to the summons and the complaint, become an order of the court upon service of process of the complaint and summons.

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