

WRITING THE PERFECT COUNTRY WESTERN SONG: SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

section 105.001. Tex. Fam. Code § 105.001.

For a thorough list of issues to be determined at temporary hearing, see Larry Martin’s Temporary Hearing Issues List in the Appendix.

1. Temporary orders for the preservation of property and protection of the parties.

Under Texas Family Code 6.502, while a suit for dissolution of marriage is pending, the court may grant temporary injunction for the *preservation of property and protection of the parties* and deemed *necessary and equitable*, including orders directed at one or both *parties*:

- (1) requiring a sworn inventory and appraisal of the real and personal property owned or claimed by the parties and specifying the form, manner, and substance of the inventory and appraisal and list of debts and liabilities;
- (2) requiring payments to be made for support of either spouse;
- (3) requiring the production of books, papers, documents, and tangible things by a party;
- (4) ordering payment of reasonable attorney’s fees and expenses;
- (5) appointing a receiver for the preservation and protection of the property of the parties;
- (6) awarding one spouse exclusive occupancy of the residence during the pendency of the case;
- (7) prohibiting the parties, or either party, from spending funds beyond an amount the court determines to be for reasonable and necessary living expenses;
- (8) awarding one spouse exclusive control of a party’s usual business or occupation; or prohibiting an act described by Section 6.501(a).

Tex. Fam. Code 6.502(a).

Typically, the court does not have the authority to issue temporary orders directed at third parties unless they are joined as parties in the divorce. Keep in mind that the statute specifically provides the court with

CHAPTER 3 TEMPORARY ORDERS HEARING

the authority to issue temporary orders directed at one or both *parties*, and “parties”, in the contest of 6.502, means *spouses*. *Commonwealth Mortg. Corp. v. Wadkins*, 709 S.W.2d 679, 680.

2. Temporary orders for the safety and welfare of the child.

Texas Family Code 105.001 provides that the court may make a temporary order, including the modification of a prior temporary order, for the safety and welfare of the child, including an order:

- (1) for the temporary conservatorship of the child;
- (2) for the temporary support of the child;
- (3) restraining a party from disturbing the peace of the child or another party;
- (4) prohibiting a person from removing the child beyond a geographical area identified by the court; or
- (5) for payment of reasonable attorney’s fees and expenses.

Tex. Fam. Code §105.001(a).

As in a final trial, the rebuttable presumptions established in favor of the applications of the guidelines for a child support order and for the standard possession order under Chapters 153 and 154 apply to temporary orders. Tex. Fam. Code §105.001(g).

3. Temporary orders in a suit for modification.

Pursuant to section 156.006(a), the court may render a temporary order in a suit for modification, except as provided by Subsection (b):

(b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child under the final order unless,

- (1) the order is necessary because the child’s present circumstances would significantly impair the child’s physical health or emotional development;

WRITING THE PERFECT COUNTRY WESTERN SONG: SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

CHAPTER 3

(2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months and the temporary order is in the best interest of the child; or

(3) the child is 12 years of age or older and has filed with the court in writing the name of the person who is the child’s preference to have the exclusive right to designate the primary residence of the child and the temporary order designating that person is in the best interest of the child.

Tex. Fam. Code §156.005(a), (b). Whether temporary orders effectively change the person with the exclusive right to designate the primary residence does not turn on the trial court’s characterization of its ruling, but on the substance of the temporary order. *In re Sanchez*, 228 S.W.3d 214, 217 (Tex. App. – San Antonio 2007, orig. proceeding.)

4. Issues not decided at temporary orders hearing.

While temporary orders often set the stage for the final orders, the issues germane to a temporary orders hearing are limited to orders necessary for the preservation of property, protection of the parties, and safety and welfare of the children during the time that the case is pending. Necessarily, there are certain determinations that are outside the scope of a temporary orders hearing, including characterization, valuation, final property division, final custody and/or possession.

B. Identify client objectives/priorities and manage client expectations.

**Brad Paisley:
“I’m Gonna Miss Her”**

*Well I love her
But I love to fish
I spend all day out on this lake
And hell is all I catch
Today she met me at the door
Said I would have to choose
If I hit that fishin' hole today
She'd be packin' all her things
And she'd be gone by noon*

*Well I'm gonna miss her
When I get home*

But right now I'm on this lakeshore

*And I'm sittin' in the sun
I'm sure it'll hit me
When I walk through that door tonight
That I'm gonna miss her
Oh, lookie there, I've got a bite.*

Review with the client early in the relationship what the client hopes to achieve through the temporary hearing (as well as the final hearing). Sometimes clients do not have a realistic understanding of the process or what to expect. Often, clients will have misperceptions about the application of the law to their situation. Educating a client about the realities of the court proceedings can help a client have realistic expectations for the temporary hearing. Clearly define for the client the issues that will be determined at the temporary hearing and the issues that are not on the table.

III. Request for Relief – The Road Map

**Johnny Cash:
“I’ve Been Everywhere”**

*I've been everywhere, man.
I've been everywhere, man.
Crossed the desert's bare, man.
I've breathed the mountain air, man.
Of travel I've had my share, man.
I've been everywhere.*

Keeping track of where the parties wants to go with the case can be challenging. An easy way to educate the judge on the relief a client seeks is to provide a summary list of the relief requested. It should state precisely in shorthand terms the relief the client wishes for the judge to award. Judges often use this document as a checklist for their ruling, especially if he or she is only provided with one by one party.

Because this document should be used as an exhibit at trial, and because it almost certainly must be admitted into evidence when the client testifies, preparation of the summary Request for Relief should be the first step in preparation for the temporary hearing. To maintain focus, compare all preparation thereafter to the Request for Relief to make sure that the overall goal is being advanced.

WRITING THE PERFECT COUNTRY WESTERN SONG: CHAPTER 3
SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

Use the Request for Relief in preparing the client for the temporary hearing. Make sure the client understands each request and how that request relates to the client's overall objectives. Review with the client how to get the exhibit into evidence.

Compare your Request for Relief to the pleadings, and specifically the request for temporary hearing, to ensure that the pleadings support a request for each item of relief. If time permits, amend pleadings if they do not match the Request for Relief.

The Request for Relief can also be used to narrow the focus of the entire hearing. As decisions must be made to choose which witnesses to use at the hearing and which documents will make the best exhibits, refer back to the Request for Relief as to where the witness or exhibit fits into the road map of the hearing.

For an example of a Request for Relief, see the Appendix.

IV. Strategy and Themes
George Strait:
“The Chair”

Well, excuse me, but I think you've got my chair.

*No, that one's not taken, I don't mind
If you sit here, I'll be glad to share.
Yeah, it's usually packed here on Friday nights.*

The Request for Relief can also be the starting point of preparing the strategy and themes for the entire hearing. A list of evidentiary facts or bullet-points can be added that support each item requested. This bullet-point list can then be plugged into the outline for each witness' testimony.

Theme development can be key to the overall preparation for the temporary hearing. Themes can bring cohesion to the message to be presented and leave a memorable impact on the judge. Who among us can forget the most memorable theme of a trial in recent history: If the glove don't fit, you must acquit.

V. Witnesses
Johnny Cash
“Daddy Sang Bass”

Daddy sang bass,
Mama sang tenor.
Me and little brother would join right in there.

Witness selection can be crucial to the presentation of a temporary hearing, particularly when dealing with severe time limits.

It is crucial that witnesses appear to the judge as open, honest, not defensive, not arrogant, impartial although biased for one side of the case.

Discuss with all witnesses the following concepts:

1. Always tell the truth.
2. Do not exaggerate – be precise in your answers. (Accuracy equals truth.)
3. Listen carefully to the question.
4. If necessary, repeat the question to yourself.
5. Make certain you understand the question asked.
6. Ignore the voice inflection or demeanor of the opposing attorney.
7. Do not feel rushed – take your time when answering.
8. If you forget the question, ask for it to be repeated.
9. Answer only the question asked – stay focused on the question.
10. Do not answer questions with questions.
11. Answer orally, distinctly and loud enough for all to hear.
12. Be confident and firm in your answer.
13. Do not guess unless specifically asked to guess.
14. Do not box yourself in – watch questions such as “all” and “every”.
15. Always be courteous – do not argue with the opposing attorney.
16. Remain calm – remember to take deep breaths.
17. If the questioning attorney is objecting to the answer and saying, “objection, nonresponsive” then listen more

WRITING THE PERFECT COUNTRY WESTERN SONG: SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

CHAPTER 3

carefully and just answer the question asked.

18. You are “on stage” from the time you arrive at the courthouse.

It is also preferable to prepare a witness outline for each witness. It does not have to be a full script of the questions and anticipated answers; instead, it can be a bullet point list of topics to cover. Also, give consideration prior to the hearing to the order in which to call the witnesses from a strategic perspective.

A. Client Preparation

**Z.Z. Top:
“Sharp Dressed Man”**

*Clean shirt, new shoes
And I dont know where I am goin to.
Silk suit, black tie,
I dont need a reason why.
They come runnin just as fast as they can
Coz every girl crazy bout a sharp dressed man.*

Client preparation to testify at trial begins with the initial client interview. First, spend time with the client learning the client’s full history and background. Learn about educational background and work history. Ask questions about how they met, what things were like early in the marriage, what have been the sources of problems during the course of the marriage. Find out the client’s expectations for the proceedings and discuss the reasonableness of those expectations. Also, discuss the opposing party’s likely expectations and whether those are reasonable. Lastly, discuss any surprise issues that may come up – what will the opposing party use as a “gotcha” to gain leverage from the client and what “gotcha” evidence does the client have on the opposing party.

Getting on the same page with the client as to realistic expectations gives both the attorney and the client a comfort in anticipating likely outcomes. Give the client an overview of how the courthouse works – from the role of court personnel to the appropriate dress and demeanor for court proceedings. An educated client who knows what to expect in the courtroom will not be as subject to stress and will be better able to focus on the testimony.

Prepare the client to answer questions about

his and his spouse’s strengths and weaknesses. If the client cannot articulate some strengths of the opposing party and some weaknesses of himself, he will appear to lack credibility and will not be perceived as a parent who will foster a good relationship between both parents and the children.

B. Narrowing the Focus

**Garth Brooks:
“Friends in Low Places”**

*Blame it all on my roots
I showed up in boots
And ruined your black tie affair
The last one to know
The last one to show
I was the last one
You thought you'd see there
And I saw the surprise
And the fear in his eyes
When I took his glass of champagne
And I toasted you
Said, honey, we may be through
But you'll never hear me complain*

*'Cause I've got friends in low places
Where the whiskey drowns
And the beer chases my blues away
And I'll be okay
I'm not big on social graces
Think I'll slip on down to the oasis
Oh, I've got friends in low places.*

All variety of people can make excellent witnesses: neighbors, teachers, school counselors, school administrators, co-workers, friends, clergy, children’s coaches, parents of the children’s friends, church members, daycare workers, social workers, psychologists, and professionals the family may have used, CPAs, attorneys, extended family members, eye-witnesses, healthcare providers, physical trainers, etc. But, not every one of these people in each case should be called as witnesses. The list of potential witnesses should be pared down prior to the hearing to the most important three to four, assuming that the time constraints of the hearing permit that many witnesses.

Have the client make a list of which witnesses might be favorable for the case and which witnesses can be expected to testify for the opposing party. Also,

WRITING THE PERFECT COUNTRY WESTERN SONG: SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

have the client detail what each witness knows with as much specificity as possible.

Interview the witnesses before you hearing to ensure that the witness has knowledge that is actually relevant. Inform the witness at the beginning of the conversation as to who you represent – the client and not the witness. Most importantly, the attorney should confirm for himself whether the witness is competent to testify and that he or she is able to communicate that information effectively.

C. Subpoenas

Getting witnesses to a temporary hearing can be challenging. Sometimes the client hires the attorney late in the process, leaving little preparation time. Or, information is not provided to the lawyer timely to make decisions about which witnesses could provide persuasive evidence.

Some witnesses, such as daycare workers, school teachers, or counselors, may not appear without a subpoena. So, it should be emphasized to the client to get information to the attorney as early as possible to provide the most time to prepare for the hearing.

VI. Exhibits

Hank Williams:

“Your Cheatin’ Heart”

*Your cheatin' heart will tell on you
When tears come down like falling rain
You'll toss around and call my name
You'll walk the floor the way
I do your cheatin' heart will tell on you.*

To get documents to the temporary hearing time may not permit getting documents by release. Subpoenas for documents will be the best procedure to get the documents to the hearing. Note, however, that subpoenas to a party have particular rules that prohibit use of subpoenas to circumvent discovery rules.

Local rules of the county where the case is pending can provide a method for obtaining documents. Most local rules require the exchange of a

CHAPTER 3

TEMPORARY ORDERS HEARING

financial information statement prior to the temporary hearing, providing information relevant to each party’s monthly expenses and income. The Family Code also provides specific provisions for disclosures in connection with child support cases. Section 154.063 requires a party to furnish information sufficient to accurately identify the party’s net resources and ability to pay child support, and requires the party to produce income tax returns for the previous two years, a financial statement, and pay stubs.

In obtaining medical or mental health records, the requesting party must comply with the provisions of HIPPA. When requesting records from the opposing party, he or she may assert the privilege to prevent release, sparking a complex and expensive battle to obtain the information. Thus, the requesting party should send the releases early in the litigation to ensure that sufficient time exists in the case as a whole to have the hearings necessary to obtain the information.

When using voluminous documents in a temporary hearing, it is advisable to use summaries. Because time is frequently limited in temporary hearings, the litigants may not have time to thoroughly provide evidence from voluminous documents, and the judge may not have sufficient time to review and analyze all of the information. So, putting the information into a summary will assist the judge in getting down to the relevant points quickly.

Other types of exhibits that can be helpful include calendars, police reports, school records, and custody exhibits, bank records, and tax returns. Timelines can be very effective, but are infrequently utilized. Judges have to keep track of the various dates involved in a case with little familiarity with the issues. A timeline can be helpful to educate the judge at the temporary hearing, as well as provide information throughout the case. For some examples of exhibits that the panel has used in prior hearings, see the Appendix.

VII. Organization of Materials

Being well-organized can help the attorney with presentation of the issues for the temporary hearing. Much like for a final hearing, an organized trial notebook can keep the information readily available and easy to use during the hearing. Include

**WRITING THE PERFECT COUNTRY WESTERN SONG:
SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS**

CHAPTER 3

TEMPORARY ORDERS HEARING

in the trial notebook the relevant live pleadings and motions set for the hearing. Include the request for relief at a place where it can be easily located and referenced frequently during the hearing. Have a separate tab in the notebook for each witness and include in that tab not only notes regarding the questions for that witness, but also other relevant documents regarding that witness as well as the subpoena. Keep a copy of each exhibit in the notebook either organized in the order the attorney plans to present during the hearing or organized by the witnesses through which the document is to be offered.

It can also be effective to take proposed temporary orders to the hearing containing the relief requested on behalf of the client. Although the judge may not always utilize the proposed orders in the exact form, the orders can make the judge's job easier in reaching a decision and may provide an outlet to reach a decision.

VIII. Presentation at the Hearing.

Preparation is essential to winning, but only carries the case halfway. Effective presentation at the temporary hearing provides persuasive reasons for the judge to grant the relief your client seeks.

A. Opening Statement

Tompall Glaser:

“Put Another Log On the Fire”

*Put another log on the fire.
Cook me up some bacon and some beans.
And go out to the car and change the tire.
Wash my socks and sew my old blue jeans.
Come on, baby, you can fill my pipe,
And then go fetch my slippers.
And boil me up another pot of tea.
Then put another log on the fire, babe,
And come and tell me why you're leaving me.*

Judges frequently view opening statements differently than a jury would in a final trial. Commonly, judge prefer that opening statement in a temporary hearing be a succinct overview of the relief requested by each side, as opposed to a persuasive argument of the facts of the case. Balancing the direct presentation of the relief requested with an overview of the most important facts to be presented can provide an

opportunity for persuasion of the client's case.

B. Evidence and Objections

The judge is presumed to be able to disregard inadmissible evidence that might be admitted during a temporary hearing. Thus, presentation at the temporary hearing should focus less on objections to the presentation of evidence and more on the substance of the evidence presented. Because time limits frequently inhibit the amount of evidence to be presented, the presentation should get straight to the point. Use of timelines, summaries, and other documentary evidence can shorted the time spent in testimony reviewing those facts and allow for more development of the client's story.

Even at temporary hearing, the presentation should focus on the storytelling aspect of the client's case. To effectively boil the client's story down, even the most complex case should be able to be summarized in three sentences or less.

Toby Keith:

“I Wanna Talk About Me”

*We talk about your dreams and we talk about
your schemes
your high school team and your moisturizer
creme
We talk about your nanna up in Muncie,
Indiana
We talk about your grandma down in Alabama*

*We talk about your guys of every shape and
size
The ones that you despise and the ones you
idolize
We talk about your heart, bout your brains and
your smarts
And your medical charts and when you start
You know talking about you makes me grin
But every now and then*

*I wanna talk about me
Wanna talk about I
Wanna talk about number one
Oh my me my
What I think, what I like, what I know, what I
want, what I see*

WRITING THE PERFECT COUNTRY WESTERN SONG: SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING

CHAPTER 3

*I like talking about you you you you, usually,
but occasionally
I wanna talk about me*

Rick Robertson recommends reading *Winning With Stories* by Jim Perdue to expand an attorney's storytelling ability at trial.

Direct examination provides the key opportunity to present the client's story. Simplify the questioning to provide open ended questions that provide the client the opportunity to present the essence of his story to the judge. Keep sight of the overall goal of the relief requested to maintain focus.

Maintaining focus on the goal of the requested relief is even more key during cross-examination. It is easy to get caught up in addressing issues raised by the other side and get off track of the points needed to present the client's goals. Cross-examination can be made more effective by limiting the question to one fact at a time. Keep the questions short and close-ended to keep the responses limited and the focus off of the opposing party's story.

**C. Attorneys Fees
Warren Zevon:
"Lawyers, Guns, and Money"**

*Send lawyers, guns and money
The shit has hit the fan.*

Frequently, attorneys fees become an essential part of the temporary hearing. Where one party has control of the majority of the assets and the other party has little access to assets to use to pay attorneys fees, the attorney must make an effective and persuasive case for granting an award of attorneys fees. In some counties, judges are reluctant to allow any additional opportunity to present a request for temporary relief, so it becomes even more important to accurately predict the amount of fees that will be required to litigate the case.

An estimated summary of expected attorneys fees and expense can be an effective exhibit for use at temporary hearing to support a request for fees. Also essential to the attorneys fees request is the identification of a source of community funds from which to take the attorneys fees. To prepare an

estimate of attorneys fees, evaluate the special issues related to the specific case. Is there a community property business to value? Is there a special characterization issue where records need to be subpoenaed? Is there a custody issue that will require special evaluations? Give the judge (and the client) a realistic assessment of how much it will take to litigate the case and address upfront the issue of how those fees are going to be paid.

Remember to include an estimate of permissible fees for the legal assistant. To receive an award for legal assistants, the evidence must show the qualifications of the legal assistant, that the work was performed under the supervision of the attorney, the nature of the work performed, the hourly rate, and the number of hours of work performed or expected. *Gill Savings Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697, 702 (Tex. App. – Dallas 1988, writ denied).

See the Appendix for an example of exhibits related to the issue of attorneys fees.

D. Closing Argument

Some judges do not prefer to hear closing argument. As formerly practicing attorneys, judges tend to be very astute in getting the picture of the relief requested from the evidence presented and the summary of relief requested. Knowing the preferences of the judge who will decide the case will help the attorney know to what extent persuasive argument can be utilized during closing argument.

**IX. Time Limits
Alabama:
"I'm In A Hurry"**

*Oh, I hear a voice
That says I'm running behind
Better pick up my pace
It's a race and there ain't no room for someone
in second place*

*I'm in a hurry to get things done
Oh I rush and rush until life's no fun
All I really gotta do is live and die
But I'm in a hurry and don't know why.*

Due to the crowded dockets of many courts,

**WRITING THE PERFECT COUNTRY WESTERN SONG: CHAPTER 3
SUCCESSFUL PREPARATION AND TRIAL OF A TEXAS TEMPORARY ORDERS HEARING**

judge are increasingly limiting the time available to present a temporary hearing. It becomes essential for the attorney to be familiar with the practices and procedures of the court prior to appearing for the temporary hearing. It can spell disaster for the attorney to show up for temporary hearing with several witnesses and planning for an hour-long presentation, only to learn that the court's practice is to limit the evidentiary presentation to 20-minutes per side.

Trying a temporary hearing under time constraints can be challenging. Preparation before the hearing can be even more essential. Summary exhibits, timelines, and requests for relief become more than a luxury, but are essential to conveying the client's message in a short time frame. Using fact or expert witnesses beyond the parties also becomes next to impossible. The time allowed to present a case is a matter soundly within the trial judge's discretion and will not be disturbed absent an affirmative showing of injury to the complaining party. *Pirrung v. T. & N.O.R. Co.*, 350 S.W.2d 50 (Tex. Civ. App. – Houston 1961, no writ).

On the other hand, with courts increasingly utilizing time limits, the attorney needs to keep in mind the constitutional balance between the judge's desire to efficiently manage his or her docket versus the client's constitutional right of due process and access to the courts. The Constitution recognizes

higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1214_ (1972); U.S.C.A.Const. Amend. 14. "The parties to a cause upon trial have a right to a reasonable time to argue the facts to the jury; and an arbitrary and unreasonable restriction upon the summing up, as where the judge limited the counsel to 10 minutes, is an abuse of discretion, and is ground of reversal." *Nesbitt v. Walters*, 38 Tex. 576 (Tex. 1873).

To preserve error on a challenge to a trial court's limitation of time, the litigant must specifically point to the injury to be suffered by way of the limitation. In other words, what specific evidence, that is relevant and no duplicative, the litigant will not be able to present due to the time constraints. The litigant should also argue the constitutionality of the restrictions and pint to the unfairness of the restrictions applies as compared to the other party.