

CHAPTER 6

Resolving Issues before Trial

- A. Preliminary Considerations
- B. The Order to Show Cause
- C. The Noticed Motion
- D. Responding to the OSC; Motion
- E. Temporary and Ex Parte Orders
- F. Domestic Violence Prevention Act

CHAPTER OVERVIEW

This chapter, like the last one, explores the procedural aspects of working one's way through the court system in an attempt to actually process the dissolution, legal separation, or nullity action. However, this chapter picks up where the last chapter left off, concentrating on the manner of procedures used by the parties to ongoing litigation in this area to obtain temporary relief while awaiting the trial.

There is often a gap of several months between the time a dissolution or legal separation action is commenced and the date of trial. During this interim period, emotions between the spouses are typically at an all-time high, and the atmosphere is volatile to say the least. Many questions must be confronted by the parties, even those who do not desire to seek "revenge" against a spouse: who will live in the house?; who will have custody of the children, and who will visit?; how much should child or spousal support be?; who will pay the bills?; how can I keep my spouse from harassing me?

A. Preliminary Considerations

These questions must be resolved in a manner that is enforceable and that establishes the ground rules for the parties to follow during this difficult time. Fortunately, there are procedures for doing just that. Most notable is the Order to Show Cause. While other methods are also available in one form or another, they typically are centered around either the order to show cause or a noticed motion.

A. Preliminary Considerations

Before learning the nuts and bolts of “law and motion” and “order to show cause” practice, some initial concepts must be identified, discussed, and explained, including temporary orders, *ex parte* relief, injunctions, and stipulations.

Temporary orders are just that: orders made at the request of either party (assuming sufficient factual and legal bases exist) during the time period between the filing of the Petition and the trial of the action. These orders are sometimes called *pendente lite*, which is Latin for “pending trial.” Included in this term are virtually all orders made pretrial, whether restraining orders, injunctive orders, or orders made regarding child custody, support, and other financial matters. In fact, the most commonly requested temporary orders are those that determine preliminary custody, visitation, support, and attorney’s fees, along with injunctive orders designed to restrain behavior.

Ex parte is a term used to describe the process undertaken when the requesting party does not (or can not) give the responding party¹ the usually required notice of the request. For example, as a general rule the party responding to (or opposing) the requested temporary orders must be given notice of the request 15 days before the hearing date (the date on which the court will address the matter and rule upon it). This time period is extended an additional five days by Code of Civil Procedure section 1013 if the request is served by mail.²

Sometimes certain orders must be made immediately. For example, orders restraining a spouse from taking the children out of state would be moot (of no effect) if, by the time the request came before the judge, that spouse had already taken the children and left. Accordingly, the *ex parte* procedure was created to allow notice to the responding party consisting of a matter of *hours* rather than days to cut short the usual 15- to 20-day waiting period and thus provide relief on an expedited basis. This concept will be discussed at greater length later in this section.

An *injunction* can be either *preliminary* or *permanent*. Code of Civil Procedure sections 525 et seq. discuss these concepts in detail. By definition, an injunction is an order of court that either prohibits someone from doing an act (a *prohibitory* injunction) or one that requires, or compels, a person to perform some act (a *mandatory* injunction). Prohibitory injunctions are much more

6. Resolving Issues before Trial

common, although in family law both types are regularly issued. Examples of prohibitive injunctions include stay away and non-harassment and non-molestation orders. An example of a mandatory injunction would be an order that a party must move out of the family residence.

A *temporary restraining order*, or TRO, is typically issued ex parte. It is of brief duration (usually no more than 21 days) and expires at the time of the hearing on the preliminary injunction. Its purpose is to maintain the status quo (or provide immediate relief) during the 15- to 20-day waiting period for the hearing on the subject of the TRO.³

The *preliminary injunction* is an order of court made only after a noticed hearing. As will be seen when the various judicial council forms are reviewed below, a preliminary injunction is what the requesting party, through the order to show cause, is actually seeking (from the perspective of injunctive relief). The purpose of this order is to maintain the status quo pending trial. The TROs that preceded the issuance of the preliminary injunction (if requested and obtained) will be merged into (that is, become) the preliminary injunctive orders, which then continue until further order of court or trial (which for all practical purposes is the same as “further order of court”).

A *permanent injunction* is an injunctive order that continues to exist after the trial. It is issued (if requested and supported by sufficient evidence) following the trial and, as its name implies, continues until further order of court.

A *stipulation* simply refers to an agreement entered into between the parties to litigation. This can be the result of rational discussion between opposing parties and a desire to save legal fees, or it can represent the unenthusiastic capitulation of one side to the requests of the other. The motivation for this type of agreement can be varied. However agreement is reached, it is essential that its provisions be written down as soon as possible and that the agreement be turned into an order accordingly. In this fashion it will become enforceable. Further, no matter how well the parties are getting along, an oral agreement is only as good as the paper on which it is written.

B. The Order to Show Cause

As stated above, the usual manner in which requests for orders pending trial are brought to the court is through use of an Order to Show Cause or a motion. Ex parte temporary restraining orders are equally available in both procedures, although TROs are typically sought in the context of a preliminary injunction, which is raised through an OSC.

An Order to Show Cause (OSC) is issued by the court pursuant to application made ex parte by the requesting party.⁴ It is then served upon the responding party, being certain to provide for the minimum amount of notice required by statute: 15 days (or 20 if served by mail). The Order to Show Cause is in

B. The Order to Show Cause

actuality an order to appear, directed to the responding party to appear at the hearing date referenced thereon and *show cause* why the relief requested in the attached application should not be granted. If the responding party chooses to ignore the order and not attend the hearing, the hearing will be held without his input and orders will be made accordingly. There follows an explanation of the forms used when utilizing this procedure.

1. The Face Sheet

The process of preparing an Order to Show Cause entails the use of several documents. The first such document is form FL-300, which is in essence a cover sheet and is the first document in the application packet. Figure 6-1 on page 363 is a reproduction of this form.

As can be seen from Figure 6-1, the top third of this form is reserved for information relating to the attorney's identity and relationship to the party submitting the form, the title of the case, location of the court and case number, and a laundry list of subjects to be addressed by the court at the hearing (depending upon what is requested in the OSC). This section presents a fair checklist of the areas of relief most commonly requested by participants to a marital termination action. If this filing is the initial OSC (the first time orders are requested from the court), chances are good that every box will be checked (if there are children of this union) so as to resolve as many of these issues pretrial as possible.

Item 1 is completed by inserting the name of the party expected to respond to this order. This is typically either the petitioner or the respondent.

Item 2 explains the nature of the order and the requirement to appear at the hearing. In this regard the reader's attention is directed to the lower portion of the form consisting of the box just below the judge's signature. This box contains additional warnings, which should not be ignored. Item 2 also sets forth the location and date and time for the hearing. This is done to ensure proper notice to the responding party.

The item in the center of the page above item 3 contains instructions pertinent to issues regarding children (specifically custody and visitation—not support) wherein the litigants are referred to the mediation *before* their hearing date.⁵

For purposes of this discussion, the important point to bear in mind is that if custody or visitation is at issue in the OSC, then an appointment

6. Resolving Issues before Trial

Figure 6-1
Form FL-130 — Order to Show Cause

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): TELEPHONE NO.: FAX NO.: ATTORNEY FOR (Name):		1285 FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:		
ORDER TO SHOW CAUSE FOR ☐ MODIFICATION ☐ Child Custody ☐ Visitation ☐ Injunctive Order ☐ Child Support ☐ Spousal Support ☐ Other (specify): ☐ Attorney Fees and Costs		CASE NUMBER:

1. TO (name):

2. YOU ARE ORDERED TO APPEAR IN THIS COURT AS FOLLOWS TO GIVE ANY LEGAL REASON WHY THE RELIEF SOUGHT IN THE ATTACHED APPLICATION SHOULD NOT BE GRANTED. *If child custody or visitation is an issue in this proceeding, Family Code section 3170 requires mediation before or concurrently with the hearing listed below.*

a. Date:	Time:	☐ Dept.:	☐ Rm.:
----------	-------	---------------------------------	-------------------------------

b. Address of court ☐ same as noted above ☐ other (specify):

c. ☐ The parties are ordered to attend custody mediation services as follows:

3. IT IS FURTHER ORDERED that a completed *Application for Order and Supporting Declaration*, a blank *Responsive Declaration*, and the following documents shall be served with this order:

a. (1) ☐ Completed *Income and Expense Declaration* and a blank *Income and Expense Declaration*
 (2) ☐ Completed *Financial Statement (Simplified)* and a blank *Financial Statement (Simplified)*
 (3) ☐ Completed *Property Declaration* and a blank *Property Declaration*
 (4) ☐ Points and authorities
 (5) ☐ Other (specify):

b. ☐ Time for ☐ service ☐ hearing is shortened. Service shall be on or before (date):
 Any responsive declaration shall be served on or before (date):

c. ☐ You are ordered to comply with the temporary orders attached.

d. ☐ Other (specify):

Date: _____

JUDGE OF THE SUPERIOR COURT

NOTICE: If you have children from this relationship, the court is required to order payment of child support based on the income of both parents. The amount of child support can be large. It normally continues until the child is 18. You should supply the court with information about your finances. Otherwise, the child support order will be based on the information supplied by the other parent.

You do not have to pay any fee to file responsive declarations in response to this order to show cause (including a completed *Income and Expense Declaration* (form 1285.50) or *Financial Statement (Simplified)* (form 1285.52) that will show your finances). In the absence of an order shortening time, the original or the responsive declaration must be filed with the court and a copy served on the other party at least five court days before the hearing date.

Form Adopted by Rule 1285
 Judicial Council of California
 1285 (Rev. January 1, 1999)
 Mandatory Form

ORDER TO SHOW CAUSE
 (Family Law-Uniform Parentage)

Family Code, §§ 216, 271-272, 2030-2034,
 2045, 2254, 4330-4339, 4359, 4370,
 4455, 4801; Government Code, § 26929

B. The Order to Show Cause

for the parties must be made (and kept) with the mediator *before* the hearing. The court will not entertain a hearing on these issues until and unless the parties have been to mediation. Because the mediation process typically does not require extensive participation by the attorneys, if the parties wait until the day of the hearing to attend mediation, they may find themselves paying their attorneys to sit around and wait for them while the mediation process takes place, since the lawyers are present on that day anyway. It is not unusual for this process to take several *hours* (usually after a wait of at least one to two hours if the parties simply “walk in” on the day of the hearing without an appointment). This can add up to several hundred, if not *thousands*, of dollars of wasted attorney time.

Item 3 of the OSC form FL-130 lists additional orders that are available to the judge. Item 3(1) reflects the inclusion of an Income and Expense Declaration (discussed below). This form is almost always required with Orders to Show Cause. Item 3(a)(3) is usually not required, or even desirable in this author’s opinion. The forms referenced in this item (Property Declaration) are typically used in preparation for trial or whenever the division and distribution of assets is in issue. At the initial OSC stage (or at any time pretrial) these issues are rare.

Item 3(4) refers to a document filed containing legal authority in the form of a discussion of cases and statutes as they apply to the specific requests made in the OSC. Unless the OSC presents unusual or untested legal arguments, points and authorities are usually not required. If such a document is included with the OSC packet, this box must be checked since these papers must be served in their entirety on the responding party. A good rule of thumb is that if the judge is receiving papers filed by a party, the other party must also be given a copy of those papers. If there are other documents to be served with the OSC not otherwise listed in item 3, this is the area to so list them.

Item 3.b. is appropriate if the requesting party is seeking an order to shorten time for the setting of the hearing. One of the more commonly requested *ex parte* orders is for an order shortening time. The reader will recall that an *ex parte* request is typically used to obtain temporary restraining orders upon very short notice (usually only a few hours). In those situations where immediate relief is not required, yet a delay of time equal to the typical 15- to 20-day notice period is unacceptable (for good cause, not simply because the requesting party does not want to wait that long), a request can be made to the court to shorten this notice period. The courts generally do not like to do this because it can (and usually does) work a hardship both on the responding party and on the court, which has to rearrange its schedule to accommodate this case, which is being set outside of the usual timetable. However, if good cause for shortening time can be shown, then the court will shorten the time and allow the hearing to be set on less than 15 days’ notice.

Item 3.c. is to be checked if temporary orders have been requested (and obtained). The mechanics of obtaining temporary orders involves preparing all the papers necessary for an OSC and including with them a separate form (FL-305 or sometimes, in the event of allegations of domestic violence, DV-110. et.

6. *Resolving Issues before Trial*

al.), which sets forth the orders requested and obtained. As such, if form FL-305 (discussed below) has been completed and signed by the judge, this box is checked.

Item 3.d. contains orders not otherwise provided for by the options immediately above. If there is something else that either the requesting party or judge believes should be ordered, it should be itemized here. A separate sheet, labeled “Attachment 3.d.” may be used if there is not enough room on the form. An example of such an order would be one that requires the responding party to bring to the hearing his most recent pay stubs and last three years’ income tax returns (if financial issues are to be determined), or similar items of interest or necessity to the requesting party at the time of the hearing.

Assuming all is in order, the date and time is set by the clerk, the form is signed by the judge, and the OSC is ready to be served upon the responding party.

2. **The Application for Order and Supporting Declaration**

Figure 6-2 is the front side (page one) of form FL-310, “Application for Order and Supporting Declaration.” This document accompanies the OSC face sheet when an order to show cause is filed,⁶ and is self-explanatory. The form is divided up into 9 different pre-printed requests, each dealing with a different subject matter.

Items 1 through 3 concern issues regarding children. In item 1, if custody is an issue to be decided at the hearing, the appropriate box pertinent to “Petitioner” or “Respondent” is checked to identify the requesting party. The box immediately next to item 1, “child custody,” is checked and then the information in items 1a and 1b is filled out. If there is more than one child, then the name and age for each child should be listed under item 1a and the *name* of the party requesting custody (not their legal status [that is, “Petitioner” or “Respondent”]) should be inserted.

As with all other forms, if there is insufficient space to list all of the children of this union, then a page labeled “Attachment 1 — Child Custody” can be added to this form.

Item 1.c. is checked if orders previously have been entered on this subject in this case and the requesting party seeks to have those orders modified. This information advises the court of the existence of those

Figure 6-2
Form FL-310 — Application for Order
and Supporting Declaration (front)

1285.20

PETITIONER/PLAINTIFF:

CASE NUMBER:

RESPONDENT/DEFENDANT:

(THIS IS NOT AN ORDER)

☐ Petitioner ☐ Respondent ☐ Claimant requests the following orders be made:

1. ☐ CHILD CUSTODY ☐ To be ordered pending the hearing
 - a. Child (name and age)
 - b. Request custody to (name)
 - c. ☐ Modify existing order
 - (1) filed on (date):
 - (2) ordering (specify):
2. ☐ CHILD VISITATION ☐ To be ordered pending the hearing
 - a. ☐ Reasonable
 - b. ☐ Other (specify):
 - c. ☐ Petitioner ☐ Respondent shall not remove the minor child or children of the parties
 - (1) ☐ from the State of California.
 - (2) ☐ other (specify):
 - d. ☐ Modify existing order
 - (1) filed on (date):
 - (2) ordering (specify):
3. ☐ CHILD SUPPORT (A Wage and Earnings Assignment Order will be issued.)
 - a. Child (name and age)
 - b. Monthly amount (if not by guideline)
\$
 - c. ☐ Modify existing order
 - (1) filed on (date):
 - (2) ordering (specify):
4. ☐ SPOUSAL SUPPORT (A Wage and Earnings Assignment Order will be issued.)
 - a. ☐ Amount requested (monthly): \$
 - b. ☐ Terminate existing order
 - (1) filed on (date):
 - (2) ordering (specify):
 - c. ☐ Modify existing order
 - (1) filed on (date):
 - (2) ordering (specify):
5. ☐ ATTORNEY FEES AND COSTS a. ☐ Fees: \$ b. ☐ Costs: \$
6. ☐ PROPERTY RESTRAINT ☐ To be ordered pending the hearing
 - a. The ☐ petitioner ☐ respondent ☐ claimant are restrained from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.
☐ and applicant will be notified at least five business days before any proposed extraordinary expenditures and an accounting of such will be made to the court.
 - b. ☐ Both parties are restrained and enjoined from cashing, borrowing against, canceling, transferring, disposing of or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability held for the benefit of the parties or their minor children.
 - c. ☐ Neither party shall incur any debts or liabilities for which the other may be held responsible, other than in the ordinary course of business or for the necessities of life.

NOTE: TO OBTAIN DOMESTIC VIOLENCE (PERSONAL CONDUCT AND HARASSMENT) RESTRAINING ORDERS, YOU MUST USE THE FORMS APPLICATION AND DECLARATION FOR ORDER (DOMESTIC VIOLENCE PREVENTION) (FORM DV-100) AND ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER (CLETS) (DOMESTIC VIOLENCE PREVENTION) (FORM DV-110).

(Continued on reverse)

Form Adopted by Rule 1285.20
Judicial Council of California
1285.20 [Rev. January 1, 1999]
Mandatory Form

APPLICATION FOR ORDER AND SUPPORTING DECLARATION
(Family Law-Uniform Parentage)

Family Code, §§ 2045, 6224, 6226,
6320-6326, 6380-6383



6. *Resolving Issues before Trial*

orders, when they were entered, and their content. Note that item 1a is simply a generic child custody request, which includes both legal and physical custody (concepts discussed earlier in the section dealing with child custody).

Item 2 deals with child visitation. Item 2.a. requests that the court enter a “reasonable” visitation order. If there is little dispute between the parties pertinent to how visitation should be structured, or if the parties are capable of governing their affairs such that specifically stated visitation orders are not necessary (that is, they are able to work these issues out by mutual agreement), then the requesting party need only check box 2.a. On the other hand, if the requesting party is desirous of obtaining specific orders for visitation, which detail when the visiting parent picks the child up and drops the child off, specifically stating which days and holidays are to be appropriate for visitation and which are not, then item 2.b. should be checked and an appropriately labeled attachment should be added to these papers setting forth the specific visitation plan proposed by the applicant.

Item 2.d. should always be checked, selecting as appropriate. An example of information to be inserted into this item would include a restriction on taking the child(ren) out of the particular county or geographic area in which the matter is pending. It is typical in southern California to restrict transport of the minor children pending hearing or trial to the seven southern California counties: Ventura, Los Angeles, Orange, San Diego, Riverside, Kern, and San Bernardino. Item 2.e. is the same as item 1.c.: It is used if the request being considered by the court is not an initial request but one to modify orders previously entered.

Item 3 contains a request for an award of child support. As a practical matter, whenever the issue of custody of children is presented to the court, the court also has before it the issue of child support. You will recall that the OSC face sheet (form FL-300) contains the following warning pertinent to child support: *“Notice: if you have children from this relationship, the court is required to order payment of child support based on the incomes of both parents. . . .”* This language puts the recipient of the Order to Show Cause on notice that the issue of child support, even if not checked by the requesting party, can become an appropriate issue for determination by the court. Of course, it is always good practice specifically to put the responding party on notice that this subject will be discussed at the time of the hearing. It is also good practice to indicate, as to each child, the amount of support requested on a monthly basis.⁷ As with the previous two sections, item 3.c. references modification requests.

Item 4 is used if the requesting party seeks an award of spousal support. When requesting spousal support, the requesting party should insert the specific amount requested for the court’s guidance and also to provide the responding party with notice not only that the request will be made, but also notice of the amount to be sought.⁸ This is very important in the event that the responding party chooses to ignore this OSC and not appear at the hearing. The court can

B. The Order to Show Cause

only enter orders against a responding party to the extent that the responding party was given notice of the relief to be sought. Arguably, if a requesting party checks the box and asks for \$100 per month for spousal support and then upon attending the hearing changes his mind and decides to ask for \$500 per month, the court is precluded from making such a large award since the responding party was not given notice of the fact that an award in excess of \$100 would be sought.

Item 4.c. contains a request to modify an existing order of spousal support. Item 4.b. contains a request to terminate an existing spousal support order. In both instances, the court requires information regarding the date and other specifics of those prior orders.

Item 5 requests an award of attorney's fees and costs. In many instances one party to a family law action may be entitled to receive a contribution from the other party to his attorney's fees and costs incurred in the prosecution of (or in responding to) that action. In order to avail himself of this opportunity, the payment must be specifically requested in this item 5. Since the actual amount of fees is unknown until the conclusion of the proceedings, when requesting fees it is simply best to insert the word "reasonable" following the dollar sign in item 5a; when requesting a contribution to costs, notice is deemed sufficient if the word "actual" is inserted alongside the dollar sign in item 5b.

Items 6 and 7, on pages 1 and 2, contain general requests for injunctive relief, both prohibitive and mandatory. Item 6 is a request for certain property restraints.

Item 7 is entitled "Property Control," and seeks exclusive use of particular assets.

Figure 6-3 is the back side (page two) of form FL-310. This side is set up substantially similar to side 1 and contains requests pertinent to property restraints and control and related matters, and provides for a discussion of the propriety of the issuance of these orders by the requesting party, which is set forth in that party's declaration.

Item 6 contains language very similar to the automatic temporary restraining orders found on the back side of the summons (form FL-110). It is usually a good practice for the requesting party to voluntarily check all the boxes in item 6 so as to make these orders mutual. It is always easier for the court to justify restraining one party from exercising this type of control over property if the requesting party is also willing to submit to the same restrictions. Setting this request up in this fashion also typically makes the request much more palatable from the responding party's standpoint. Usually, if any of the requests in item 6 are

Figure 6-3
Form FL-310 — Application for Order and
Supporting Declaration (back)

6. Resolving Issues before Trial

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	

7. ☐ PROPERTY CONTROL ☐ To be ordered pending the hearing
- a. ☐ Petitioner ☐ Respondent are given the exclusive temporary use, possession, and control of the following property we own or are buying (*specify*):
- b. ☐ Petitioner ☐ Respondent are ordered to make the following payments on liens and encumbrances coming due while the order is in effect:
- | <u>Debt</u> | <u>Amount of payment</u> | <u>Pay to</u> |
|-------------|--------------------------|---------------|
| | | |
8. ☐ I request that time for service of the Order to Show Cause and accompanying papers be shortened so that they may be served no less than (*specify number*): _____ days before the time set for the hearing. I need to have the order shortening time because of the facts specified in the attached declaration.
9. ☐ OTHER RELIEF (*specify*):
10. ☐ FACTS IN SUPPORT of relief requested and change of circumstances for any modification are (*specify*):
☐ contained in the attached declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
 (TYPE OR PRINT NAME)

▶ _____
 (SIGNATURE OF APPLICANT)

B. *The Order to Show Cause*

being made, all of the boxes should be checked with the exception of the box referencing “claimant.”

Item 7 is that portion of the form where the applicant requests that she be given exclusive use, possession, and control of certain property pending the hearing or trial. For example, the requesting party may seek to have the exclusive use of the couple’s car. This portion of the form would also be used by the applicant to request the exclusive use of the family home.⁹ If there is insufficient space to list the various assets over which the requesting party seeks exclusive use and control, then a document labeled “Attachment 7.a.” can be attached.

Item 7.b. contains requests by the applicant that certain ongoing community debts be paid by the responding party as they come due.¹⁰ Depending upon the financial situation of the parties, the court certainly has the power to make these kinds of orders. Item 7.b. of the application is an often ignored portion of the application, and foolishly so since this request is very powerful and can be a life saver for an applicant with little or no income.

Item 8 contains the request for shortening time for service of the Order to Show Cause, which was discussed above. The applicant is expected to insert the number of days notice requested by her to be ordered by the court as being sufficient notice of the hearing. As a practical matter, however, the court will not entertain requests that it believes, in its own discretion, to be excessive or impermissible. The court will generally not shorten time for service of any papers to such a point that contemplates less than three court days between the date of service and the date of hearing.

Item 9 contains an area for the applicant to insert any requests that have not been covered by the standard form set forth in the preceding sections of the application. An example of such a request might include the return of a specific asset, the delivery of certain documents, or exchange of financial information. An additional sheet may be attached if needed.

Item 10 is perhaps the most important aspect of this application. Here the applicant provides the court with the factual bases for making the orders requested. These orders are not granted in a vacuum. All orders requested of the court must be supported by admissible evidence that gives rise to the necessity and propriety of granting these requests. Such evidence takes the form of *facts* given to the court to evaluate and consider prior to issuing these orders. It is thus absolutely crucial to give the court all the facts that support the applicant’s particular request. *Exactly* what happened between the parties that justifies this relief? *When* did this take place? For the applicant to simply state her fears, speculations, and conclusions as to ultimate facts is insufficient to justify granting the orders requested at an order to show cause hearing. The court must have specific facts and must have *all of them*.

The preparation of an adequate declaration is a process of trial and error. There are no magic words to be used nor is there any specific form.¹¹ It is good practice to structure the applicant’s declaration along the same lines as the form

6. *Resolving Issues before Trial*

FL-310 application and structure: a paragraph-by-paragraph analysis of the request and recitation of facts in support of each request, which follows (or tracks) the application itself. This will make the declaration much more readable from the court's perspective and will also provide a structure for the applicant to follow when formulating her thoughts with regard to the declaration. As regards each individual subject of which an order is being requested, it is usually good practice for the applicant to "tell his story" (which is, after all, the factual basis for the requested relief) on a chronological basis. Once again, this is usually the most logical structure for a factual discussion of these various subject areas and also serves as a good structure for the applicant to follow in preparing the declaration.

An example of a declaration in support of an application for temporary orders as contained in an Order to Show Cause is set forth below:

DECLARATION OF JANE DOE

1. I am the Respondent in the above-entitled action. This declaration is made in support of an Order to Show Cause Re: Determination of Arrearages and Penalties.
2. I have personal knowledge of all of the following facts set forth herein and if called to testify as a witness, I am competent to testify thereon.
3. On December 11, 1995, the court ordered that Petitioner pay to me as and for child support the sum of \$400.00 per month, payable one-half on the 1st and one-half on the 15th of each month commencing on January 1, 1996, and continuing until the occurrence of standard termination conditions relative to child support, none of which has occurred to date.
4. As is set forth in more detail on the schedule attached to this Order to Show Cause, Petitioner made some sporadic payments through November 2003. These payments were never timely made, nor were they made in the court ordered amount. From and since November 1, 2003, I have not received any child support payments. The total amount of arrearages now due, with interest thereon (as of this writing), is \$15,532.90.
5. Petitioner's failure to make his child support payments has created an extreme financial hardship on me and has hindered my ability to provide for our children, John Doe and Jake Doe. I am informed and believe that Petitioner is gainfully employed and has been, throughout the duration of this order, financially capable of making these child support payments. I have at no time ever agreed, either explicitly or by implication, to waive any of these payments. I therefore request that this Court determine the amount of child support and accrued interest to be in the amount requested herein.

B. The Order to Show Cause

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____, at Los Angeles, California.

Jane Doe

It has been this author's practice to prepare these declarations by dictation with the applicant present. In such fashion, the client is able to express her thoughts to the lawyer who can then accurately and concisely dictate them in an organized manner. The advantage of having the client present when this is occurring is that the client can stop the dictation and make corrections as the declaration is being prepared. This tends to be much quicker and also provides for direct input from the client, which is essential in the preparation of the declaration. The client also feels to be more a part of the process rather than a mere observer. This is very important because most clients have never been to a lawyer before and are particularly vulnerable due to the nature of what they are going through. By working with the attorney instead of just watching (or learning about the work after the fact), the client is able to develop a sense of being in control of her life, which is very important at this time.

Successful preparation of these declarations is a trial and error process that is directly related to the amount of experience one has in their preparation. Over time the reader will develop his or her own style and become comfortable with preparing these declarations based upon the facts given by the client.

There is almost never enough space on the application form to accommodate a declaration sufficient to justify a request contained in the form FL-310. As such, both boxes at item 10 are usually checked and the multipage declaration discussed above is attached at the end of this document.

The reader should note that the application form itself is a declaration that is signed under penalty of perjury by the client. This means that the information contained in this document constitutes admissions that can later be used against the client. The client's information as set forth in these documents also carries with it the same force and effect as if the client was testifying in court before a judge. As such, great care must be taken in every aspect of preparing these documents and the supporting declaration.

A final note about the importance of the declaration¹² accompanying the Application for Order (as well as the declaration(s) accompanying the responding papers, discussed below) is appropriate. As the reader might imagine, when papers such as these are filed with the court, they are by no means the *only* such papers being reviewed and scheduled for hearing. Literally *dozens* of similar requests are also being filed by other persons and are being scheduled for hearing on the same day.

There are a finite number of judges, commissioners, and judges pro tempore available to hear these OSCs when they come up on the calendar.¹³ In larger

6. *Resolving Issues before Trial*

counties such as Los Angeles and San Francisco it is not uncommon for one judge to have 15 to 20 of these Orders to Show Cause on calendar for hearing on any given day. Inasmuch as putting the petitioner and respondent on the stand to testify to certain facts germane to the issues framed by the OSC can typically require at least one-half of a court day, at best only approximately two matters can be resolved on any given day. The rest are moved to the next (or some other) day. But what of the 15 or 20 matters scheduled for *that* day? They too have to be moved to accommodate the transferred items.

It is easy to see how it could be virtually impossible in this system to get these matters heard by a judge in a timely fashion. Something had to be done and, as can be imagined, something was. The judges are given discretion to clear their heavily congested calendars and get these cases resolved. To that end, most local rules make it clear that taking oral testimony at an OSC will be the exception and not the rule. Most judges thus expect all issues to be *fully* and *completely* discussed in the supporting and opposing declarations. This has been given approval by the appellate court even if it means that the rulings will be made by the judge's consideration of the papers filed and *nothing else*. This is known as the *Reifler* or *Stevenot* rule, named after two cases that considered this very issue: *Reifler v. Superior Court*, 39 Cal. App. 3d 479 (1974), and *Marriage of Stevenot*, 154 Cal. App. 3d 1051 (1984). The *Stevenot* case tempered *Reifler's* blanket approval of the "declarations only" approach by allowing, in addition to the declarations, the cross-examination of some of the declarants and direct questioning by the judge on issues deemed to be important to the inquiry.

Either way, the consequences of weak (or missing) declarations in support of or in opposition to the requested relief can be disastrous. Remember, the parties are real people with real problems that must be addressed immediately. If time were not of the essence in these matters, they would simply wait until the trial. They cannot afford to go into court unprepared.

3. **The Income and Expense Declaration**

Whenever financial relief is sought (support or attorney's fees being the most common such requests), the court requires that both parties submit a form document that details their income and expenses (hence the name). This form is a four page document adopted for use by the Judicial Council, thus making its use mandatory. Not unlike a tax return, this form is often met with anxiety by clients, not for the information it seeks, but because most people shy away from numbers-oriented forms fearing they will be too difficult to fill out. This form is quite self-explanatory, however, and if the directions printed on it are followed carefully, it is actually quite simple.

The first page of this form is actually somewhat of a summary of the general information relative to the person filling it out and a slight "re-cap" of some of the other information provided by the subsequent pages. Along with that

B. The Order to Show Cause

information, general information regarding age, employment and education is sought, along with tax information and an estimate of the other party's income. There is also requested in item 4 information related to the user's understanding as to the income of the other party to the proceeding. This is a very important item and should not be overlooked, or ignored simply because exact information is not available. If the matter turns out to be uncontested (that is, only the party seeking the relief appears in court and the other party chooses to ignore the proceeding, the court must have some information about that person's income; without it, it may not enter any financial orders. Therefore, even if it is a wild guess based on past experience, make sure that this question is filled out. A sample of this page one to the income and expense declaration is presented at figure 6-11 below.

Page two of FL-150 provides the income information of the party filling it out. Its main section (items 5, 6, 7 and 8) requests information related to income received during the 12-month period preceding completion of the form from salary, wages, and bonuses, and so on, along with the same numbers for the immediately preceding month. Income from all sources (for example, rental income, stock dividends, interest, royalties) is also requested. This income portion of this form essentially seeks all pertinent information relative to the income of the party filling it out, in a manner of presentation that is (in this author's opinion) clear and easy to understand.

Figure 6-4 contains a sample of this portion of form FL-150. Note that the information sought is that of income received during the "last 12 months" not during the "last year." This is an important distinction. It is not uncommon for persons going through a dissolution or

Figure 6-4
Form FL-150 — Income Section

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: INCOME INFORMATION OF (name):	CASE NUMBER:
---	--------------

1. Total gross salary or wages, including commissions, bonuses, and overtime paid during the last 12 months: 1. \$ _____

2. All other money received during the last 12 months except welfare, AFDC, SSI, spousal support from this marriage, or any child support. Specify sources below:

Include pensions, social security, disability, unemployment, military basic allowance for quarters (BAQ), spousal support from a different marriage, dividends, interest or royalty, trust income, and annuities.
 Include income from a business, rental properties, and reimbursement of job-related expenses.

▶ Prepare and attach a schedule showing gross receipts less cash expenses for each business or rental property.

2a. \$ _____

2b. \$ _____

2c. \$ _____

2d. \$ _____

3. Add lines 1 through 2d 3. \$ _____

Divide line 3 by 12 and place result on line 4a.

similar proceeding (to the extent it is possible) to “monkey around” with their income once they learn that their financial situation will be strictly scrutinized (somewhat along the lines of “the less I make, the less I have to pay/the more I can get”). To prevent this, the court seeks the *historical* income information obtained by averaging the income received over the preceding 12 months, believing (correctly so in this author’s opinion) that this will create a much more realistic income picture for the people involved. There is also an instruction near the top of this form to include the last two month’s pay stubs. Do not ignore this instruction.

In the older version of this form, the second, or middle, portion of this form contained items that took the preparer from gross to net income.¹⁴ This new form does not require the preparer to provide this information. As of this writing, virtually every family court in California utilizes some form of computer software in the calculation of support, and such software contains all the requisite tax tables to allow the user to see the effect of the operation of the tax laws on an individual’s income without the need to put the preparer of this form through the difficulty of trying to figure this out for themselves. The court is of course interested in learning the amount of gross income (as opposed to just net income) because sometimes people will over withhold from their pay checks, deferring the income over withheld until it is returned to them in a tax refund. Indeed, in the example in the last footnote, the individual grossed \$3,000 per month and would normally be expected to net \$2,400 per month, which becomes the basis of his “ability to pay” or “need for payment.” Suppose however that this person had his employer withhold based not on four withholding allowances, but on zero?¹⁵ In this situation, the person’s “take home” (or net) pay drops to approximately \$2,250 per month. Theoretically, since he will no doubt take all four deductions when filing his tax return, this over withheld \$150 per month will come back to

B. The Order to Show Cause

him as an \$1,800 dollar tax refund. This must be added back in to his monthly take home pay, however, to give a realistic picture of his true financial situation.¹⁶ Accordingly, the software discussed in this paragraph seeks to avoid this game that taxpayers play by demonstrating an accurate picture of the gross to net calculation.

The newer version of this form does not concentrate on a tax calculation or analysis. Rather (in item 10) it simply requests a listing if the deductions that are claimed by the person completing the form, deductions that can then be explored in greater detail wither by the court or the opposing attorney.

Figure 6-5 shows the layout of this part of the form. Most of the information sought is available on the wage earner's paycheck stub. If not, an

Figure 6-5
Form FL-150 — Deductions Section

12	Average last 12 months:	Last month:
4. Gross income	4a. \$	4b. \$
5. State income tax	5a. \$	5b. \$
6. Federal income tax	6a. \$	6b. \$
7. Social Security and Hospital Tax ("FICA" and "MEDI") or self-employment tax, or the amount used to secure retirement or disability benefits	7a. \$	7b. \$
8. Health insurance for you and any children you are required to support	8a. \$	8b. \$
9. State disability insurance	9a. \$	9b. \$
10. Mandatory union dues	10a. \$	10b. \$
11. Mandatory retirement and pension fund contributions	11a. \$	11b. \$
<i>Do not include any deduction claimed in item 7.</i>		
12. Court-ordered child support, court-ordered spousal support, and voluntarily paid child support in an amount not more than the guideline amount, actually being paid for a relationship other than that involved in this proceeding:	12a. \$	12b. \$
13. Necessary job-related expenses (attach explanation)	13a. \$	13b. \$
14. Hardship deduction (Line 4d on Child Support Information Form)	14a. \$	14b. \$
15. Add lines 5 through 14 Total monthly deductions:	15a. \$	15b. \$
16. Subtract line 15 from line 4 Net monthly disposable income:	16a. \$	16b. \$

accountant or experienced family law practitioner can assist in obtaining these figures.

Set forth in Figure 6-6 is the third section of this form, item number 11. This seeks general information regarding the size and content of the party's estate (cash on hand, liquid assets, and general net worth). This information is generally used to provide the court a better understanding of "where the parties are coming from" in the context of their requests for financial orders.

Page three of form FL-150 is the expense portion of the Income and Expense Declaration. It is divided into five sections.

B. *The Order to Show Cause*

Figure 6-6
Form FL-150 — “Assets” Section

17. AFDC, welfare, spousal support from this marriage, and child support from other relationships received each month	17. \$ _____
18. Cash and checking accounts:	18. \$ _____
19. Savings, credit union, certificates of deposit, and money market accounts:	19. \$ _____
20. Stocks, bonds, and other liquid assets:	20. \$ _____
21. All other property, real or personal (<i>specify below</i>):	21. \$ _____

▶ **Attach a copy of your three most recent pay stubs.** Page _____ of _____

Form Adopted by Rule 1285.50a
Judicial Council of California
1285.50a (Rev. January 1, 1995)

INCOME INFORMATION
(Family Law)

Question 12, shown in Figure 6-7, requests the name, age, relationship, and gross monthly income of all persons living in the preparer’s home. This item also requests information as to the contributions made, if any, by the various people living in the household.

Figure 6-7
Form FL-150 — General Information Section

PETITIONER/PLAINTIFF:		CASE NUMBER:	
RESPONDENT/DEFENDANT:			
EXPENSE INFORMATION OF (name):			

a. List all persons living in your home whose expenses are included below and their income: ☐ Continued on Attachment 1a.	1. 2. 3. 4.	<u>name</u> 	<u>age</u> 	<u>relationship</u> 	<u>gross monthly income</u>
b. List all other persons living in your home and their income: ☐ Continued on Attachment 1b.	1. 2. 3.				

Items 13 and 14 require the user to indicate his average monthly expenses in various common categories. Many people will try to exaggerate these numbers believing that high personal expenses will save them from paying what might otherwise be a reasonable amount of support or attorney’s fees or might establish a much greater “need” for such support than is actually the case. This is a foolish assumption. The attorneys, or the court, can inquire into these expenses and request to see verification (for example, receipts and monthly bills). Since these papers are filled out and signed under *penalty of perjury*, if the numbers cannot be backed up, there will be some serious explaining to do with potentially grave consequences if one is caught lying. Estimates made in the

6. Resolving Issues before Trial

absence of receipts are allowed so long as they are reasonable and can be so demonstrated through testimony or other evidence. These sections are shown in Figure 6-8.

Figure 6-8
Form FL-150 — Monthly Expenses Section

2. MONTHLY EXPENSES	
a. Residence payments	
(1) ☐ Rent or ☐ mortgage \$ _____	e. Food at home and household supplies . . . \$ _____
(2) If mortgage, include:	f. Food eating out \$ _____
Average principle \$ _____	g. Utilities \$ _____
Average interest \$ _____	h. Telephone \$ _____
Impound for real property taxes \$ _____	i. Laundry and cleaning \$ _____
Impound for homeowner's insurance . . . \$ _____	j. Clothing \$ _____
(3) Real property taxes (if not included in item (2)) \$ _____	k. Insurance (life, accident, etc. Do not include auto, home, or health insurance) . . . \$ _____
(4) Homeowner's or renter's insurance (if not included in item (2)) \$ _____	l. Education (specify): \$ _____
(5) Maintenance \$ _____	m. Entertainment \$ _____
b. Unreimbursed medical and dental expenses \$ _____	n. Transportation and auto expenses (insurance, gas, oil, repair) \$ _____
c. Child care \$ _____	o. Installment payments (insert total and itemize below in item 3) \$ _____
d. Children's education \$ _____	p. Other (specify): \$ _____
q. TOTAL EXPENSES (a-p) \$ _____ (do not include amounts in a(2))	
3. ITEMIZATION OF INSTALLMENT PAYMENTS OR OTHER DEBTS ☐ Continued on Attachment 3.	

The last section on this page of FL-150 (item 15) deals with information pertaining to attorney's fees — how much they are, how much has already been paid, and what the billing arrangement with the attorney is. This information is needed so the court can, in conjunction with the other parts of this form, determine an equitable allocation of attorney's fees between the parties. It is shown in Figure 6-9.

Figure 6-9
Form FL-150 — Attorney's Fees

4. ATTORNEY FEES	
a. To date I have paid my attorney for fees and costs: \$ _____	The source of this money was:
b. I owe to date the following fees and costs over the amount paid:	
c. My arrangement for attorney fees and costs is:	
I confirm this information and fee arrangement. 	
(SIGNATURE OF ATTORNEY)	
(TYPE OR PRINT NAME OF ATTORNEY)	
Page _____ of _____	

Form Adopted by Rule 1285.50b
Judicial Council of California
1285.50b [Rev. January 1, 1995]

EXPENSE INFORMATION
(Family Law)

B. The Order to Show Cause

Page 4 of form FL-150 (shown in Figure 6-10 on page 380) is only required in cases where child support is in issue. This is explained in greater detail in the chapter dealing with child support. For now, the reader should simply become familiar with its format.

The Income and Expense Declaration (all four pages) is generally stapled together to form one document, separate from the other forms in the OSC packet. It is filed at the same time as the OSC, however, as it is essential to a review of any financial issues at the hearing on the order to show cause where financial relief is being sought.

4. Temporary Orders

Temporary Orders are available in an OSC proceeding and are typically used to maintain the status quo between the time of filing the OSC papers and the hearing date set by the court: in other words, immediate relief on very short notice.¹⁷ These will be discussed in greater detail in the section below dealing with these types of orders. Judicial Council form FL-305 shown in Figure 6-12 on page 382 is the document in which those requests are made in this context.

The first item to notice on this form is that, unlike form FL-310 (Application for Order and Supporting Declaration), which is merely an application signed by the party requesting the relief, this form, when properly filled out and signed by the judge, constitutes the actual court order on the subject covered in the form.

The format of FL-305 is rather similar to that of FL-310. This explains the notation at the top of form FL-310 (the Application for Order) that “*This Is Not An Order,*” which helps to reduce any confusion created in the mind of the recipient of these forms.

Figure 6-10
Form FL-150 — Child Support Information

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: CHILD SUPPORT INFORMATION OF (name):	CASE NUMBER:
--	--------------

THIS PAGE MUST BE COMPLETED IF CHILD SUPPORT IS AN ISSUE.

1. Health insurance for my children ☐ is ☐ is not available through my employer.
 - a. Monthly cost paid by me or on my behalf for the children only is: \$ _____
Do not include the amount paid or payable by your employer.
 - b. Name of carrier:
 - c. Address of carrier:
 - d. Policy or group policy number:

2. Approximate percentage of time each parent has primary physical responsibility for the children:
 Mother % Father %

3. ☐ The court is requested to order the following as additional child support:
 - a. ☐ Child care costs related to employment or to reasonably necessary education or training for employment skills
 - (1) Monthly amount currently paid by mother: \$ _____
 - (2) Monthly amount currently paid by father: \$ _____
 - b. ☐ Uninsured health care costs for the children (for each cost state the purpose for which the cost was incurred and the estimated monthly, yearly, or lump sum amount paid by each parent):
 - c. ☐ Educational or other special needs of the children (for each cost state the purpose for which the cost was incurred and the estimated monthly, yearly, or lump sum amount paid by each parent):
 - d. ☐ Travel expense for visitation
 - (1) Monthly amount currently paid by mother: \$ _____
 - (2) Monthly amount currently paid by father: \$ _____

4. ☐ The court is requested to allow the deductions identified below, which are justifiable expenses that have caused an extreme financial hardship.

	Amount paid per month	How many months will you need to make these payments
a. ☐ Extraordinary health care expense (specify and attach any supporting documents):	\$ _____	_____
b. ☐ Uninsured catastrophic losses (specify and attach supporting documents):	\$ _____	_____
c. ☐ Minimum basic living expenses of dependent minor children from other marriages or relationships who live with you (specify names and ages of these children):	\$ _____	_____
d. Total hardship deductions requested (add lines a - c):		
	\$ _____	

Page ____ of ____

Figure 6-11
Form FL-150 — Income and Expense Declaration

Form Adopted by Rule 1285.50
Judicial Council of California
1285.50 [Rev. January 1, 1995]
Mandatory Form



Figure 6-12
Form FL-305 — Temporary Orders

PETITIONER/PLAINTIFF: _____ RESPONDENT/DEFENDANT: _____	CASE NUMBER: 1285.05
--	-----------------------------

TEMPORARY ORDERS
 (Attachment to Order to Show Cause)

NOTE: TO OBTAIN DOMESTIC VIOLENCE (PERSONAL CONDUCT AND HARASSMENT) RESTRAINING ORDERS, YOU MUST USE FORMS APPLICATION AND DECLARATION FOR ORDER (DOMESTIC VIOLENCE PREVENTION) (FORM DV-100) AND ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER (CLETS) (DOMESTIC VIOLENCE PREVENTION) (FORM DV-110).

1. ☐ **PROPERTY RESTRAINT**
 - a. ☐ Petitioner ☐ Respondent is restrained from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.
☐ The other party is to be notified of any proposed extraordinary expenditures and an accounting of such is to be made to the court.
 - b. ☐ Both parties are restrained and enjoined from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability held for the benefit of the parties or their minor child or children.
 - c. ☐ Neither party shall incur any debts or liabilities for which the other may be held responsible, other than in the ordinary course of business or for the necessities of life.
2. ☐ **PROPERTY CONTROL**
 - a. ☐ Petitioner ☐ Respondent is given the exclusive temporary use, possession, and control of the following property the parties own or are buying (*specify*): _____
 - b. ☐ Petitioner ☐ Respondent is ordered to make the following payments on liens and encumbrances coming due while the order is in effect:

<u>Debt</u>	<u>Amount of payment</u>	<u>Pay to</u>
-------------	--------------------------	---------------
3. ☐ **MINOR CHILDREN**
 - a. ☐ Petitioner ☐ Respondent shall have the temporary physical custody, care, and control of the minor children of the parties, ☐ subject to the other party's rights of visitation as follows: _____
 - b. ☐ Petitioner ☐ Respondent shall not remove the minor child or children of the parties
 - (1) ☐ from the State of California.
 - (2) ☐ from the following counties (*specify*): _____
 - (3) ☐ other (*specify*): _____
4. ☐ **OTHER ORDERS (*specify*):** _____

Date: _____

JUDGE OF THE SUPERIOR COURT

5. The date of the court hearing is (*insert date when known*): _____**CLERK'S CERTIFICATE**

I certify that the foregoing is a true and correct copy of the original on file in my office.

[SEAL]

Date: _____

Clerk, by _____, Deputy

Form Adopted by Rule 1285.05
 Judicial Council of California
 1285.05 (Rev. January 1, 1999)
 Mandatory Form

TEMPORARY ORDERS
 (Family Law—Uniform Parentage)



Family Code, §§ 2045, 6224, 6226, 6302,
 6320-6326, 6390-6393

C. *The Noticed Motion*

Form FL-305 sets forth options (much like the FL-310 form) in the areas most commonly subject to temporary orders. These are primarily designed to restrict or restrain conduct related to property (items 1 and 2) and orders regarding the children (item 3). These orders, when signed by the judge, are effective immediately¹⁸ and are enforceable by all law enforcement personnel as well as in a civil contempt matter.

The structure of the form is essentially similar to the Application for Order (form FL-310), and it is completed in the same manner as discussed above pertinent to that form. The reader should note that once the form is signed by the judge, whatever is contained in the form constitutes a court order. It is filled out by the applicant, however. As such, care must be taken in its preparation,¹⁹ and the applicant should not be surprised if the judge modifies the form to convert it from a list of what the applicant *wants* to a list of what the court is willing to *give*. To accomplish this, the judge will simply cross out entire sections or portions of sections that she feels should not be made part of the order. Most judges also have a stamp that they place next to other items that they will not order *ex parte* but will consider ordering after a hearing.

While not essential from a jurisdictional perspective, many court clerks and judges require that these various forms that make up the entire OSC/Temporary Order²⁰ packet (forms FL-300, FL-305, FL-310, FL-150 and the supporting declaration) be placed in a particular order when stapled together to form the document commonly described as the “OSC.” That order is as follows:

1. The face sheet (form FL-300) plus any attachments
2. Temporary Orders (form FL-305) and any attachments
3. Application for Order and Supporting Declaration (form FL-310)
4. (Filed as a separate document at the same time as the above if financial relief is sought), the Income and Expense Declaration (form FL-150)

This includes not only the attachment pages used but also the multi-page declaration of the applicant in support of the requested relief and any other declarations and documents the applicant would like the court to consider.

C. **The Noticed Motion**

A *motion*, much like an order to show cause, is simply a written request to the court that it provide the applicant with the relief requested therein. It is called a *noticed motion* because the opposing party must be given *notice* of the request at least 21 days before the hearing held by the court. At this hearing the court will listen to the arguments of both sides and will decide whether to grant the *moving*

6. Resolving Issues before Trial

party (the one asking for the court's ruling) the relief he has requested.²¹ It is very similar to the order to show cause procedure and the forms used are nearly identical.

Shown on page 385 in Figure 6-13 is the face sheet for a noticed motion. The reader will note its similarity to the face sheet used in Orders to Show Cause (form FL-310). There are, however, some significant differences between a noticed motion and an Order to Show Cause. For example, a noticed motion cannot be used until and unless the other party has appeared in the action, and it can never be used to obtain *ex parte* temporary restraining orders or orders pertaining to child custody. An Order to Show Cause can be used in these circumstances. A noticed motion does not require the attendance of the other party at the hearing and is typically accompanied by a Memorandum of Points and Authorities (a legal brief addressing the facts of the case and the law supporting the relief requested); an Order to Show Cause *does* require the attendance of the parties and is almost never accompanied by a Memorandum of Points and Authorities. Further, and perhaps most importantly, with certain limitations, at the hearing on an Order to Show Cause the court will hear testimony from witnesses (somewhat like a mini-trial),²² whereas such testimony is almost never allowed in a hearing on a noticed motion.

By way of definition, a noticed motion is simply an application to a court for an *order* (an instruction issued by the court that is not contained in a judgment) to obtain relief or instructions pretrial. This procedure is discussed generally at sections 1005 et seq. of the Code of Civil Procedure.²³

Because of the similarities between noticed motions and OSCs, coupled with the limitations of the noticed motion procedure mentioned above, they are rarely used in family law matters.

1. The Face Sheet

Judicial Council form FL-301(adopted for use) shown in Figure 6-13 is the form to use when requesting relief from the court by way of a noticed motion. The reader will note its similarity to FL-300, used with Orders to Show Cause. As might be expected, it is completed in essentially the same manner.

Of note is the fact that this form simply conveys *notice* to the other party that on the referenced day and time the relief described in the motion will be requested. The responding party can either respond or not, depending upon her particular desire.²⁴

C. The Noticed Motion

Figure 6-13
Form FL-301 — Notice of Motion

1285.10

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): 		FOR COURT USE ONLY 		
TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR (Name): SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:				
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:				
<table style="width: 100%; border: none;"> <tr> <td style="width: 33%; vertical-align: top;"> NOTICE OF MOTION ☐ Child Custody ☐ Child Support ☐ Attorney Fees and Costs </td> <td style="width: 33%; vertical-align: top;"> ☐ MODIFICATION ☐ Visitation ☐ Spousal Support </td> <td style="width: 33%; vertical-align: top;"> ☐ Injunctive Order ☐ Other (specify): </td> </tr> </table>			NOTICE OF MOTION ☐ Child Custody ☐ Child Support ☐ Attorney Fees and Costs	☐ MODIFICATION ☐ Visitation ☐ Spousal Support
NOTICE OF MOTION ☐ Child Custody ☐ Child Support ☐ Attorney Fees and Costs	☐ MODIFICATION ☐ Visitation ☐ Spousal Support	☐ Injunctive Order ☐ Other (specify):		

CASE NUMBER: _____

1. TO (name): _____

2. A hearing on this motion for the relief requested in the attached application will be held as follows:

a. Date: _____	Time: _____	☐ Dept.: _____ ☐ Rm.: _____
----------------	-------------	--

b. Address of court ☐ same as noted above ☐ other (specify): _____

3. Supporting attachments:

a. Completed Application for Order and Supporting Declaration and a blank Responsive Declaration b. ☐ Completed Income and Expense Declaration and a blank Income and Expense Declaration c. ☐ Completed Financial Statement (Simplified) and a blank Financial Statement (Simplified)	d. ☐ Completed Property Declaration and a blank Property Declaration e. ☐ Points and authorities f. ☐ Other (specify): _____
--	---

Date: _____

(TYPE OR PRINT NAME) ORDER (SIGNATURE)

4. ☐ Time for ☐ service ☐ hearing is shortened. Service shall be on or before (date): _____

5. Any responsive declaration shall be served on or before (date): _____

6. If child custody or visitation is an issue in this proceeding, Family Code section 3170 requires mediation before or concurrently with the hearing listed above. The parties are ordered to attend orientation and mandatory custody services as follows:

Date: _____

JUDGE OF THE SUPERIOR COURT

NOTICE: If you have children from this relationship, the court is required to order payment of child support based on the income of both parents. The amount of child support can be large. It normally continues until the child is 18. You should supply the court with information about your finances. Otherwise, the child support order will be based on the information supplied by the other parent.

You do not have to pay any fee to file responsive declarations in response to this Notice of Motion (including a completed Income and Expense Declaration (form 1285.50) or Financial Statement (Simplified) (form 1285.52) that will show your finances). In the absence of an order shortening time, the original of the responsive declaration must be filed with the court and a copy served on the other party at least five court days before the hearing date.

(See reverse for Proof of Service by Mail)

Form Adopted by Rule 1285.10
 Judicial Council of California
 1285.10 (Rev. January 1, 1999)
 Mandatory Form

NOTICE OF MOTION
 (Family Law - Uniform Parentage)

Government Code, § 26826

6. *Resolving Issues before Trial*

Figure 6-13 (continued)

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	

7. PROOF OF SERVICE BY MAIL

a. I am over the age of 18, not a party to this action, and am a resident or employed in the county where the mailing took place.
My residence or business address is:

b. I served copies of the following documents by enclosing them in a sealed envelope with postage fully prepaid, depositing them in the United States mail as follows:

(1) Papers served:

- (a) *Notice of Motion* and a completed *Application for Order and Supporting Declaration* and a blank *Responsive Declaration*
- (b) ☐ Completed *Income and Expense Declaration* and a blank *Income and Expense Declaration*
- (c) ☐ Completed *Financial Statement (Simplified)* and a blank *Financial Statement (Simplified)*
- (d) ☐ Completed *Property Declaration* and a blank *Property Declaration*
- (e) ☐ Points and authorities
- (f) Other (specify):

(2) Manner of service:

- (a) Date of deposit:
- (b) Place of deposit (city and state):
- (c) Addressed as follows:

c. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

C. The Noticed Motion

As discussed above, various court proceedings require that advance notice of their pendency be given to the other side. A noticed motion is no exception. The notice required is set out in C.C.P. section 1005(b)²⁵ and is generally 21 calendar days from the date of service. If service is by mail, then an extra five days are automatically added. This means, for example, that if a noticed motion is served on the other side by mail on the first day of the month, the first day upon which the request could be heard by the court would be 26 days later, on the 26th day of that month²⁶ (assuming that day is not a weekend or holiday in which event it would be heard on the next available court day).

The reader will note that near the bottom of this form is a section entitled “Order.” On those occasions where waiting the usual time period required for notice is seen to be detrimental to a party’s request, the party can ask the court to shorten this time period to allow the hearing to go forward on less than 21 days’ notice. Such a request is made in this section. The factual and legal bases for the request are set out in the Application for Order and Supporting Declaration form (form FL-310), which is attached to this document when filing the motion.

2. The Application for Order and Supporting Declaration

Whenever a request is made to the court by noticed motion (or by OSC for that matter), it must be accompanied by an Application for Order and Supporting Declaration, form FL-310. This form was discussed at length in the section dealing with the Order to Show Cause. The comments made there have equal application here, and the reader is referred to that discussion for more information regarding this form.

3. The Income and Expense Declaration

If any financial issues are to be addressed by the court pursuant to the noticed motion, even only attorney’s fees and costs, this document (form FL-150) must be completed and submitted to the court. This document is discussed in full in the section dealing with the Order to Show Cause. The reader is referred to that discussion for more information on this subject.

4. Points and Authorities

In addition to the documents discussed above, inasmuch as a noticed motion typically addresses questions of *law* rather than questions of *fact* (which are typically dealt with using the Order to Show Cause procedure) even though not always required, it is generally a good idea to submit a memorandum of points

and authorities to the court along with your noticed motion. This book will not discuss in detail the structure and content of a memorandum of points and authorities. That is better left to a class or treatise on legal writing. Some general points are worthwhile, however.

A Memorandum of Points and Authorities (sometimes called “P’s & A’s”) requires no particular format except that required by common sense and good writing skills. It can either be a separately captioned (and filed) document or merely stapled to the Notice of Motion face sheet and the Application for Order and Supporting Declaration.²⁷ The Memorandum of Points and Authorities should generally start out with an introductory paragraph or section to alert the court to the nature of the case and what is being requested. It is also a good idea to describe for the court the procedural posture of the case (for example, when the case was filed, what motions have been heard, whether there is a trial date approaching). This is also the first opportunity to state the reasons the relief you sought should be granted.

The next section should be preceded by an indented paragraph that acts as a heading for that section and contains in one or two sentences the point you are trying to make to the court. For example:

Good Cause Exists for Continuing the Trial of the Instant Matter Because the Respondent Has Frustrated Petitioner’s Attempts to Obtain Responses to Discovery

This alerts the court to the nature of your point and acts as a preview of the discussion that follows.

The main body of this section contains the argument, factual and legal, annotated by citations to the law (cases and codes) that support your point. This main body of text is generally thought of as the “authority” for your point (hence the term, *points and authorities*). The process of point followed by a discussion of the supporting authorities continues in this fashion for as many points as are desired to be made. Obviously, the points are selected on the basis of their likelihood to support the overall position framed by the request. For example, as used above, the overall request was to continue the trial.

Finally, a concluding section (usually labeled “Conclusion”) is used to summarize and reiterate the nature of your request and to argue for the court to grant that request. This should be concise, typically no more than two or three paragraphs and is fundamentally a function of two concerns: first is that brevity is treasured by the court. Remember, your case is but one among hundreds that the judge must review and rule upon, and the time available for reading it is limited. Second, most jurisdictions have page limitations on the length of points and authorities, which, if not adhered to, can sometimes cause the court to reject your filing. The rule here is “less is more.” Follow it.

C. The Noticed Motion

Below is an example of points and authorities, which, if written properly, should be self-explanatory as to the nature of the request and the reasons for granting the motion. These P's and A's have been captioned as a separate document. This is not always necessary, however. It is equally acceptable to attach the memorandum to the motion papers themselves (forms FL-301 and FL-310) with a heading across the top (in place of the caption): "Memorandum of Points and Authorities." The captioned document would appear as follows:

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In Re the Marriage of:	)	CASE NO. 123 456
	)	
Petitioner: Jane Doe,	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES IN
	)	SUPPORT OF MOTION TO
and	)	BIFURCATE DISSOLUTION
	)	OF MARRIAGE
Respondent: John Doe	)	
	)	
_____	)	

1. The Court In A Proceeding For Dissolution Of Marriage Has Discretion To Order The Trial Bifurcated So As To Have A Separate And Early Trial On The Dissolution Issue And Enter A Separate Interlocutory Judgment.

California Practice Guide, Family Law, Section 8:203 et seq. (The Rutter Group, 2005).

2. The Authority Of The Court To Order Separate Hearings On Issues Is Found In Family Code Section 2337.

California Family Code Section 2337 specifically provides that upon noticed motion the Court may "sever and grant an early and separate trial on the issue of the dissolution of the status of the marriage apart from other issues." Fam. Code §2337(a).

Said section further provides that said order may be made conditionally upon certain indemnification and other protections afforded to parties pending final judgment. Fam. Code §2337(b). This moving party has no objection to entry of any such reasonable precautions.

In establishing "irreconcilable differences" as the sole ground of dissolution except in cases of incurable insanity, the Legislature made possible a prompt and economical determination of the issue of the parties' marital status. At the same time the minimum waiting period for a final decree was changed from one

6. *Resolving Issues before Trial*

year after the interlocutory (former Civ. Code, Section 132) to six months after service of process (Family Code Section 2339). All of this reflects the legislative policy of permitting the prompt severance of a marriage relationship which has proved unworkable. This is the same philosophy which the California Supreme Court had expressed as a reason for recognizing the concept of divisible divorce long before the Legislature had modernized the statutory procedure. (126 Cal. Rptr. at page 630).

Section 1048(b) of the California Code of Civil Procedure also provides general authority for the bifurcation of trials. See *McLellan v. McLellan* (1972) 23 Cal. App. 3d 343, 353-354, 100 Cal. Rptr. 258. The aforementioned section of the Code of Civil Procedure (to wit, Section 1048(b)) provides in pertinent part:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.

Such bifurcation is even recognized when dealing with putative spouses and “quasi-marital property.” (See Section 2251 of the Family Code.)

3. **Bifurcations Are Clearly Recognized In General Civil Actions.**

California Code of Civil Procedure, Section 598.

By application of Family Law Rule 5.21, Section 598 of the California Code of Civil Procedure is authority itself for bifurcation in family law matters. Rule 5.21 provides:

Except as otherwise provided in these rules, all provisions of law applicable to civil actions generally apply to a proceeding under the Family Code if they would otherwise apply to such proceeding without reference to this rule. To the extent that these rules conflict with provisions in other statutes or rules, these rules prevail.

4. **The Issue Of Dissolution May Be Tried Before The Trial Of The Collateral Issues Regarding Division Of Marital Property, Custody Of Minor Children, Spousal Support, Child Support And The Like.**

In re Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, 137 Cal. Rptr. 568.

In light of the above codification and legal precepts, the petitioner submits that she has authority to seek, and secure a bifurcation of the within trial so as to litigate and dispense with the issue of marriage first.

C. *The Noticed Motion*

The law and codification are clear that bifurcations are called for as a matter of justice and equity. They clearly assist in the economical and expeditious flow of litigation.

Dated:

Feinberg & Waller

by: Marshall W. Waller
Marshall W. Waller
Attorney for Petitioner

D. Responding to the OSC; Motion

When faced with either an OSC or a Noticed Motion, a party has two choices: one, simply agree with the relief sought or some similarly acceptable compromise (thus obviating the OSC or motion proceedings) or, second, oppose the request. Assuming the latter decision is made, various forms must be prepared and filed with the court for consideration prior to the hearing.²⁸ Considerations as to affirmative relief are also appropriate at this stage. A party responding to an OSC (or noticed motion) is allowed, pursuant to Family Code section 213, not only to object to the relief sought in the application, but to propose affirmative relief of his own so long as the affirmative relief is on the same issue(s) raised by the applicant party. The uniqueness of this ability becomes worth comment when consideration is given to the due process notice requirement.

As stated above, an applicant (in either an Order to Show Cause or motion proceeding) must give a minimum of 21 days' notice of intent to seek the relief requested in his moving papers (that is, the application). The responding party need only file her opposition (at the same time giving the other party notice of that opposition) a mere ten *calendar* days²⁹ before the hearing. Because the applicant has placed a particular issue before the court himself (for example, child support or custody), he cannot be heard to complain if the responding party makes a different suggestion *on the same issues* on only five days' notice. This distinction becomes more evident by viewing an example of its operation: Assume a party files an Order to Show Cause for spousal support and in his papers asks the court to award him \$500 per month. He has his OSC issued and then has it served on his wife. He has given at least 21 days' notice of this request, so his wife cannot complain about not having been given enough time to prepare a response. The husband in this scenario has prepared for his wife responding in one of two ways: Either she agrees with the request (\$500) or she opposes the request and the court decides how much he should get. What he may not be counting on, however, is that his wife has a third alternative: She can, as part of her responding position, ask the court to order her husband to pay *her* child support. And, since he raised the issue in his OSC, she does not have to file

6. *Resolving Issues before Trial*

her own OSC; she is allowed by Family Code section 213 to ask for her own affirmative relief on only ten days' notice. While this might not seem to be enough notice for her request to her husband to satisfy the due process requirements, because he raised the issue himself, he is deemed to be already "on notice" of the possibility that *any* aspect of relief related to that issue might be raised. If the responding party wishes to have orders made on issues *not* framed by the applicant's papers, she will have to file her own OSC or noticed motion. But as long as the moving party has raised an issue, it becomes fair game for the court to make any order related to that issue.

The "Responsive Declaration" adopted by form FL-320 (Figure 6-14) is the document that the responding party will use to either simply object or request affirmative relief. For the most part, its structure mirrors that of the Application for Order and Supporting Declaration (form FL-310) and it is prepared in much the same way.

This form can be used when responding to an Order to Show Cause *or* a Noticed Motion. The choices available are simple and correspond to the orders requested in the application: (a) consent to the order requested, (b) consent to an order proposed by the party responding to the OSC or motion (that is, a request for affirmative relief), or (c) a simple statement indicating a flat opposition to the requested relief.

Also noteworthy is the fact that the party responding to an Order to Show Cause or Noticed Motion is given the opportunity to attach a declaration of her own (or as many additional declarations as she deems necessary) to her responding papers. This opportunity must not be overlooked. The earlier discussion relative to the applicant's supporting declaration should be reviewed at this time as its comments have equal application here.

The Income and Expense Declaration (form FL-150) must also accompany the responsive declaration if financial issues are to be determined at the hearing. A Memorandum of Points and Authorities is also advised, especially if the applicant has presented them.

D. Responding to the OSC; Motion

Figure 6-14
Form FL-320 — Responsive Declaration to Order to Show Cause
or Notice of Motion

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address): 		1285.40 FOR COURT USE ONLY	
TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR (Name): _____			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:			
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT:			
RESPONSIVE DECLARATION TO ORDER TO SHOW CAUSE OR NOTICE OF MOTION			
HEARING DATE:	TIME:	DEPARTMENT OR ROOM:	CASE NUMBER:

1. ☐ **CHILD CUSTODY**
 - a. ☐ I consent to the order requested.
 - b. ☐ I do not consent to the order requested but I consent to the following order:

2. ☐ **CHILD VISITATION**
 - a. ☐ I consent to the order requested.
 - b. ☐ I do not consent to the order requested but I consent to the following order:

3. ☐ **CHILD SUPPORT**
 - a. ☐ I consent to the order requested.
 - b. ☐ I consent to guideline support.
 - c. ☐ I do not consent to the order requested, but I consent to the following order:
 - (1) ☐ Guideline
 - (2) ☐ Other (specify):

4. ☐ **SPOUSAL SUPPORT**
 - a. ☐ I consent to the order requested.
 - b. ☐ I do not consent to the order requested.
 - c. ☐ I consent to the following order:

5. ☐ **ATTORNEY FEES AND COSTS**
 - a. ☐ I consent to the order requested.
 - b. ☐ I do not consent to the order requested.
 - c. ☐ I consent to the following order:

(Continued on reverse)

Form Adopted by Rule 1285.40
Judicial Council of California
1285.40 [Rev. January 1, 1999]
Mandatory Form

RESPONSIVE DECLARATION TO ORDER TO SHOW CAUSE
OR NOTICE OF MOTION
(Family Law - Uniform Parentage)



Figure 6-14 (continued)

PETITIONER/PLAINTIFF:	CASE NUMBER:
RESPONDENT/DEFENDANT:	

6. ☐ PROPERTY RESTRAINT
- a. ☐ I consent to the order requested.
- b. ☐ I do not consent to the order requested.
- c. ☐ I consent to the following order:
-
7. ☐ PROPERTY CONTROL
- a. ☐ I consent to the order requested.
- b. ☐ I do not consent to the order requested.
- c. ☐ I consent to the following order:
-
8. ☐ OTHER RELIEF, AS REQUESTED IN ITEM 9 OF THE APPLICATION
- a. ☐ I consent to the order requested.
- b. ☐ I do not consent to the order requested.
- c. ☐ I consent to the following order:
-
9. ☐ SUPPORTING INFORMATION
- ☐ contained in the attached declaration.

NOTE: TO RESPOND TO A REQUEST FOR DOMESTIC VIOLENCE (PERSONAL CONDUCT AND HARASSMENT) RESTRAINING ORDERS REQUESTED IN THE APPLICATION AND DECLARATION FOR ORDER (DOMESTIC VIOLENCE PREVENTION) (FORM DV-100), YOU MUST USE THE RESPONSIVE DECLARATION TO ORDER TO SHOW CAUSE (DOMESTIC VIOLENCE PROTECTION) (DV-120).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

E. Temporary and Ex Parte Orders

Earlier in this chapter we touched upon the availability of temporary orders, typically obtained on an ex parte basis focusing on the preparation of the forms associated with making these requests. There follows a review of the various (and more common) statutory bases for requesting these orders.

The Family Code is replete with statutes that authorize a request for a temporary order. These orders are requested on an ex parte basis and are designed to provide immediate relief during the period between filing the request and the time the court conducts its hearing. A pure temporary order (although not generally thought of as such) also includes orders granted at an OSC or motion hearing following normal notice and designed to last until the time of trial (that is, orders *pendente lite*). It is important to note that there is no difference between “temporary” and “normal” orders. Nor is there any such distinction with ex parte orders. They are all *orders*; fully enforceable, modifiable, and subject to the same bases for review as so-called “normal” orders: those entered after a hearing held on 21 days’ notice. The only difference lies in the amount of *time* given for notice. The ex parte order is one given at very short (if any) notice but is in every other respect the same as orders granted after notice, or even after trial.

The first time parties to a marital dissolution, legal separation, nullity action, or action under the Uniform Parentage Act are granted temporary restraining orders is when the family law summons (discussed in detail in the preceding chapter) is issued. These orders, authorized by Family Code sections 231 to 235 and described in section 2040, are automatic and become effective as against the petitioner once the summons is issued, and effective against the respondent when served. These orders are fully enforceable and are modifiable, just as orders obtained after a hearing.

The next kind of temporary order available on shortened notice is described in Family Code sections 240 et seq. This section of the Code is entitled “Ex Parte Temporary Restraining Orders and Support Orders Issued Without Notice.” Its title is quite informative. This statute authorizes the issuance of TROs without *any* notice whatsoever. Of course, the circumstances under which the normal requirements of due process will be waived are strictly construed and very limited. In fact, section 241 actually establishes that TROs will *not* be issued without notice “unless it appears from facts shown by the affidavit [declaration] in support of the application for the order, that *great or irreparable injury would result to the applicant before the matter can be heard on notice* [emphasis added].”

The highlighted portion of this statute describes the circumstances under which a request for TROs without giving notice to the responding party will be tested. As can be seen, this is not a black and white inquiry. These requests will be decided on a case-by-case basis by the judge hearing the matter. Assuming the

6. *Resolving Issues before Trial*

case is pleaded convincingly and the facts exist to justify this request, it stands a good chance of being granted, but it is a difficult hurdle to overcome.

Assuming the request is granted, the court is obligated to set the matter over for a full hearing “on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date of the order.” (Family Code section 242.) In other words, as soon as possible. Once the matter is heard, it will take precedence over all other matters on the calendar except others like it and those entitled by law to an even higher priority.

We have thus far reviewed examples of Temporary Orders and temporary orders issued under circumstances of normal notice, shortened notice, and, in extreme cases, no notice whatsoever. The substantive context in which these orders are requested and granted is also very diverse. The automatic restraining orders contained in the Summons cover many of the instances in which this type of relief typically will be requested: preventing the parties from removing the children from the state or disposing of their property, and things of this nature. The Family Code has also established general and specific statutory provisions for the grant of this type of relief as well.

Family Code sections 3060 to 3064 establish a statutory scheme for the request for temporary custody orders during the pendency of the litigation, and sections 3600 to 3604 provide for pendente lite support orders. Sections 3620 to 3634 establish a means of obtaining expedited child support while an action is pending and section 4620 allows the court to, on an ex parte basis, restrain a party from disposing of his assets during the pendency of a request for the establishment of a deposit of assets to secure payment of future child support.³⁰

F. Domestic Violence Prevention Act

Discussed above are some of the statutory circumstances under which an applicant may, during the pendency of the overall litigation (for example, dissolution of marriage) obtain temporary orders. There are special circumstances, however, contained in the Family Code, which do not require underlying litigation to provide the applicant a means of obtaining a court order. Division 10 of the Family Code, entitled “Prevention of Domestic Violence,” found at sections 6200 et seq., is such a circumstance.

The “Domestic Violence Prevention Act (DVPA),” as this set of statutes is known, was established with the expressed purpose “to prevent the recurrence of acts of violence and sexual abuse and to provide for separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.” (Family Code section 6220.) So important is the prevention of domestic violence to the California legislature that an entire *Division* of the Family Code has been devoted to this subject. This

F. Domestic Violence Prevention Act

act is designed to make this order easily obtainable by persons free of charge without the necessity of hiring attorneys. Of course, the parties are free to use lawyers if they can afford to do so but the forms are designed to be easily understood and used by laypersons.

Orders may be obtained in the context of the Domestic Violence Prevention Act in basically two ways: The party may file for relief by filing an application and declaration under the DVPA, having a hearing on the application set, and requesting, if appropriate, the issuance of temporary orders ex parte. The other means of invoking the DVPA is when a law enforcement officer requests orders under its provisions. These orders are known as *Emergency Protective Orders* and are prepared and applied for by law enforcement personnel. These actions are provided for in Part 3 of Division 10 and are found in Family Code sections 6240 to 6273.

These emergency protective orders are basically prepared “in the field” under circumstances in which a law enforcement officer³¹ appears on the scene of an incident of domestic violence (usually at someone’s specific request) and, after assessing the situation, determines that reasonable grounds exist to believe any (or all) of the following statutory bases (Family Code section 6250) exist:

(a) That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.

(b) That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.

(c) That a child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction.

(d) That an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.

The law enforcement officer will, once he has satisfied himself as to the existence of one of the following conditions, then transmit (by telephone) his beliefs to a judicial officer³² who is empowered to issue protective and restraining orders over the telephone. By statute (Family Code section 6251), prior to being able to issue these orders, the judicial officer must make *both* of the following factual findings:

(a) That reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists, that a child is in immediate and

6. *Resolving Issues before Trial*

present danger of abuse or abduction, or that an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code.

(b) That an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, child abduction, or abuse of an elder or dependent adult.

Assuming the requisite findings are made, the judicial officer can issue such orders as protective orders, orders delegating temporary care and control of minor children of the battling parties, and an order placing those children in the care of the party to the dispute who is not the one to be restrained (that is, the one who is not causing the trouble). These orders will only last for five business days or seven calendar days after their issuance, during which time the party who is not being restrained is expected to make application for more permanent orders.

Once the law enforcement officer has received the orders from the judicial officer, he is then required to reduce them to writing, sign them, serve the restrained person with a copy, give a copy to the *protected person* (the non-restrained party), keep a copy, and file a copy with the court as soon as possible. He is also required to carry a copy of the order with him while on duty. As might be expected, the judicial council has adopted a form for this purpose. It is set forth in its entirety (both front and back pages thereof) in Figure 6-15 on pages 399 and 400. The specific contents of this form are described by Family Code section 6253.

Once prepared, signed, and served, this order carries with it during its short life the effect of a “regular” court order, which means it is as subject to enforcement by appropriate personnel as any other court order.

The other manner in which the provisions of the DVPA may be invoked is if the endangered person herself makes application for orders. Sections 6300 et seq. of the Family Code discuss this avenue of relief in detail. These sections allow for the issuance of DVPA orders with or without notice and is available to any victim of domestic violence, as that term is defined in Family Code section 6211:

“Domestic violence” is abuse perpetrated against any of the following persons:

- (a) A spouse or former spouse.
- (b) A cohabitant or former cohabitant, as defined in Section 6209.
- (c) A person with whom the respondent is having or has had a dating or engagement relationship.
- (d) A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).
- (e) A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.

F. Domestic Violence Prevention Act

(f) Any other person related by consanguinity or affinity within the second degree.

Figure 6-15
Form EPO-001 — Emergency Protective Order (CLETS)

APPLICATION FOR EMERGENCY PROTECTIVE ORDER (CLETS)		1295.90
(Name): _____ has provided the information in Items 1-5.		LAW ENFORCEMENT CASE NUMBER: _____
1. PERSON(S) TO BE PROTECTED (insert names of all persons to be protected by this order): _____		
2. PERSON TO BE RESTRAINED (name): _____		
Sex: ☐ M ☐ F Ht.: _____ Wt.: _____ Hair color: _____ Eye color: _____ Race: _____ Age: _____ Date of birth: _____		
3. The events that cause the protected person to fear immediate and present danger of domestic violence, child abuse, child abduction, elder, or dependent adult abuse, or stalking (including workplace violence, or civil harassment) are (give facts and dates; specify weapons): _____		
4. ☐ The person to be protected lives with the person to be restrained and requests an order that the restrained person move out immediately from the address in item 9.		
5. a. ☐ The person to be protected has minor children in common with the person to be restrained, and a temporary custody order is requested because of the facts alleged in item 3. A custody order ☐ does ☐ does not exist.		
b. ☐ The person to be protected is a minor child in immediate danger of being abducted by the person to be restrained because of the facts alleged in item 3.		
6. ☐ A child welfare worker or probation officer has advised the undersigned that a juvenile court petition ☐ will be filed. ☐ will NOT be filed.		
7. ☐ Adult Protective Services has been notified.		
8. Phone call to (name of judicial officer): _____ on (date): _____ at (time): _____		
☐ The judicial officer granted the Emergency Protective Order that follows.		
By: _____ (PRINT NAME OF LAW ENFORCEMENT OFFICER) _____ (SIGNATURE OF LAW ENFORCEMENT OFFICER)		
Agency: _____ Telephone No.: _____ Badge No.: _____		
EMERGENCY PROTECTIVE ORDER		
9. To restrained person (name): _____		
a. ☐ You must not contact, molest, harass, attack, strike, threaten, sexually assault, batter, telephone, send any messages to, follow, stalk, destroy any personal property, or disturb the peace of each person named in item 1.		
b. ☐ You must ☐ stay away at least _____ yards from each person named in item 1.		
☐ stay away at least _____ yards from ☐ move out immediately from _____		
(address): _____		
10. ☐ (Name): _____ is given temporary care and control of the following minor children of the parties (names and ages): _____		
11. Reasonable grounds for the issuance of this order exist and an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, child abduction, elder or dependent adult abuse, or stalking (including workplace violence or civil harassment).		
12. THIS EMERGENCY PROTECTIVE ORDER WILL EXPIRE AT 5:00 P.M. ON: _____		
To protected person: If you need protection for a longer period of time, you must request permanent protective orders at (court name and address): _____		
INSERT DATE OF FIFTH COURT DAY OR SEVENTH CALENDAR DAY, WHICHEVER IS EARLIER. DO NOT COUNT DAY THE ORDER IS GRANTED		
PROOF OF SERVICE		
13. Person served (name): _____		
14. I personally delivered copies to the person served as follows: Date: _____ Time: _____		
Address: _____		
15. At the time of service I was at least 18 years of age and not a party to this cause.		
16. My name, address, and telephone number are (this does not have to be server's home telephone number or address): _____		
☐ California sheriff or marshal		
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.		
Date: _____		
(TYPE OR PRINT NAME OF SERVER) _____ (See reverse for important notices)		(SIGNATURE OF SERVER) _____
Form Adopted for Mandatory Use Judicial Council of California 1295.90 (Rev. January 1, 2000) Approved by DOJ		EMERGENCY PROTECTIVE ORDER (CLETS) (Domestic Violence, Child Abuse, Elder or Dependent Adult Abuse, Workplace Violence, Civil Harassment)
ONE copy to court, ONE copy to restrained person, ONE copy to protected person, ONE copy to issuing agency		Family Code, § 6240 et seq. Penal Code, § 646.91

Figure 6-15 (continued)

**EMERGENCY PROTECTIVE ORDER
WARNINGS AND INFORMATION**

VIOLATION OF THIS ORDER IS A MISDEMEANOR PUNISHABLE BY A \$1,000 FINE, ONE YEAR IN JAIL, OR BOTH, OR MAY BE PUNISHABLE AS A FELONY. PENAL CODE SECTION 12021(g) PROHIBITS ANY PERSON SUBJECT TO A RESTRAINING ORDER FROM PURCHASING OR ATTEMPTING TO PURCHASE OR OTHERWISE OBTAIN A FIREARM. SUCH CONDUCT IS SUBJECT TO A \$1,000 FINE AND IMPRISONMENT OR BOTH. THIS ORDER SHALL BE ENFORCED BY ALL LAW ENFORCEMENT OFFICERS IN THE STATE OF CALIFORNIA WHO ARE AWARE OF OR SHOWN A COPY OF THE ORDER. UNDER PENAL CODE SECTION 13710(b), "THE TERMS AND CONDITIONS OF THE PROTECTION ORDER REMAIN ENFORCEABLE, NOTWITHSTANDING THE ACTS OF THE PARTIES, AND MAY BE CHANGED ONLY BY ORDER OF THE COURT."

To the restrained person: This order will last until the date and time in item 12 on the reverse. The protected person may, however, obtain a more permanent restraining order when the court opens. You may seek the advice of an attorney as to any matter connected with this order. The attorney should be consulted promptly so that the attorney may assist you in responding to the order.

A la persona bajo restricción judicial: Esta orden durará hasta la fecha y hora indicadas en el punto 12 al dorso. La persona protegida puede, sin embargo, obtener una Orden de entredicho (restricción judicial) más permanente cuando la corte abra. Usted puede consultar a un abogado en conexión con cualquier asunto relacionado con esta orden. Debe consultar al abogado sin pérdida de tiempo para que él o ella le pueda ayudar a responder a la orden.

To the protected person: This order will last only until the date and time noted in item 12 on the reverse. If you wish to seek continuing protection, you will have to apply for an order from the court at the address on the reverse, when it opens, or you should apply to the court in the county where you live if it is a different county and the violence is likely to occur there. You may apply for a protective order free of charge. In the case of an endangered child, you may also apply for a more permanent order at the address on the reverse, or if there is a juvenile dependency action pending you may apply for a more permanent order under section 213.5 of the Welfare and Institutions Code. In the case of a child being abducted, you may apply for a *Child Custody Order* from the court at the address on the reverse side of this form. You may seek the advice of an attorney as to any matter connected with your application for any future court orders. The attorney should be consulted promptly so that the attorney may assist you in making your application. You do not have to have an attorney to get the protective order.

A la persona protegida: Esta orden durará sólo hasta la fecha y hora indicadas en el punto 12 al dorso. Si usted desea que la protección continúe, tendrá que solicitar una orden de la corte en la dirección indicada al dorso cuando la corte abra, o tendrá que hacer la solicitud ante la corte del condado donde usted vive, si se trata de un condado diferente y es probable que la violencia ocurra allí. La solicitud de la orden de protección es gratis. En el caso de que un niño o una niña se encuentre en peligro, puede solicitar una orden más permanente en la dirección indicada al dorso o, si hay una acción legal pendiente de tutela juvenil, puede solicitar una orden más permanente conforme a la sección 213.5 del código titulado en inglés *Welfare and Institutions Code*. En el caso del secuestro de un niño o una niña, usted puede solicitar de la corte una Orden para la guarda del niño o de la niña (*Child Custody Order*), en la dirección indicada al dorso de este formulario. Puede consultar a un abogado en conexión con cualquier asunto relacionado con las solicitudes de órdenes de la corte que usted presente en el futuro. Debe consultar a un abogado sin pérdida de tiempo para que él o ella le pueda ayudar a presentar su solicitud. Para obtener la orden de protección no es necesario que un abogado le represente.

To law enforcement: Penal Code section 13710(c) provides that, upon request, law enforcement shall serve the party to be restrained at the scene of a domestic violence incident or at any time the restrained party is in custody. The officer who requested the emergency protective order, while on duty, shall carry copies of the order. The emergency protective order shall be served upon the restrained party by the officer, if the restrained party can reasonably be located, and a copy shall be given to the protected party. A copy also shall be filed with the court as soon as practicable after issuance. The availability of an emergency protective order shall not be affected by the fact that the endangered person has vacated the household to avoid abuse. A law enforcement officer shall use every reasonable means to enforce an emergency protective order issued pursuant to this subdivision. A law enforcement officer acting pursuant to this subdivision shall not be held civilly or criminally liable if he or she has acted in good faith with regard thereto.

If a child is in danger of being abducted: This order will last only until the date and time noted in the *Emergency Protective Order*. You may apply for a child custody order from the court, on the reverse side of this form.

En el caso de peligro de secuestro de un niño o de una niña: Esta orden será válida sólo hasta la hora y fecha indicadas en la Orden de protección de emergencia (*Emergency Protective Order*). Usted puede solicitar de la corte una Orden para la guarda del niño o de la niña (*Child Custody Order*), en la dirección indicada al dorso.

This emergency protective order is effective when made. This order shall expire not later than the close of judicial business on the fifth day of judicial business following the day of its issue. An emergency protective order is also available to prevent the occurrence of child abuse.

6. *Resolving Issues before Trial*

The term “abuse,” used in the above definition, is itself defined by statute. Family Code section 6203 provides as follows:

“For purposes of this act, “abuse” means any of the following:

- (a) Intentionally or recklessly to cause or attempt to cause bodily injury.
- (b) Sexual assault.
- (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
- (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.”

The orders available on an ex parte basis to the applicant include exclusion of the restrained person from the family home, a determination of temporary custody and visitation, a restraint on the use or disposal of community and separate property, and orders for exclusive use of certain assets and property (for example, a car) as well as the payment of certain debts. After a hearing the court can additionally award payment of child support, payment of restitution to the protected party for out-of-pocket expenses caused by the incident leading up to the application, attorney’s fees and costs, and can even include an order that the restrained party (or both if the court so decides) participate in counseling.

These orders will last, if issued ex parte, until the date of the hearing on the application (usually about three weeks’ time). After notice and hearing, these orders will generally last three years unless otherwise specified by the court. They are subject to full enforcement as are any other court orders, the violation of which is punishable as a crime under Penal Code section 273.6, which reads as follows:

(a) Any intentional and knowing violation of a protective order, as defined in Section 6218 of the Family Code, or of an order issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code, is a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.

(b) In the event of a violation of subdivision (a) which results in physical injury, the person shall be punished by a fine of not more than two thousand dollars (\$2,000), or by imprisonment in a county jail for not less than 30 days nor more than one year, or by both that fine and imprisonment. However, if the person is imprisoned in a county jail for at least 48 hours, the court may, in the interest of justice and for reasons stated on the record, reduce or eliminate the 30-day minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the

F. Domestic Violence Prevention Act

safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

(c) Subdivisions (a) and (b) shall apply to the following court orders:

(1) Any order issued pursuant to Section 6320 or 6389 of the Family Code.

(2) An order excluding one party from the family dwelling or from the dwelling of the other.

(3) An order enjoining a party from specified behavior which the court determined was necessary to effectuate the order described in subdivision (a).

(4) Any order issued by another state that is recognized under Part 5 (commencing with Section 6400) of Division 10 of the Family Code.

(d) A subsequent conviction for a violation of an order described in subdivision (a), occurring within seven years of a prior conviction for a violation of an order described in subdivision (a) and involving an act of violence or "a credible threat" of violence, as defined in subdivision (c) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison.

(e) In the event of a subsequent conviction for a violation of an order described in subdivision (a) for an act occurring within one year of a prior conviction for a violation of an order described in subdivision (a) that results in physical injury to a victim, the person shall be punished by a fine of not more than two thousand dollars (\$2,000), or by imprisonment in a county jail for not less than six months nor more than one year, by both that fine and imprisonment, or by imprisonment in the state prison. However, if the person is imprisoned in a county jail for at least 30 days, the court may, in the interest of justice and for reasons stated in the record, reduce or eliminate the six-month minimum imprisonment required by this subdivision. In determining whether to reduce or eliminate the minimum imprisonment pursuant to this subdivision, the court shall consider the seriousness of the facts before the court, whether there are additional allegations of a violation of the order during the pendency of the case before the court, the probability of future violations, the safety of the victim, and whether the defendant has successfully completed or is making progress with counseling.

(f) The prosecuting agency of each county shall have the primary responsibility for the enforcement of orders described in subdivisions (a), (b), (d), and (e).

(g)(1) Every person who owns, possesses, purchases, or receives a firearm knowing he or she is prohibited from doing so by the provisions of a protective order as defined in Section 136.2 of this code, Section 6218 of the Family Code, or Section 527.6 or 527.8 of the Code of Civil Procedure, or Section 15657.03 of the Welfare and Institutions Code, shall be punished under the provisions of subdivision (g) of Section 12021.

6. *Resolving Issues before Trial*

(2) Every person subject to a protective order described in paragraph (1) shall not be prosecuted under this section for owning, possessing, purchasing, or receiving a firearm to the extent that firearm is granted an exemption pursuant to subdivision (f) of Section 527.9 of the Code of Civil Procedure, or subdivision (h) of Section 6389 of the Family Code.

(h) If probation is granted upon conviction of a violation of subdivision (a), (b), (c), (d), or (e), the court shall impose probation consistent with the provisions of Section 1203.097, and the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(1) That the defendant make payments to a battered women's shelter or to a shelter for abused elder persons or dependent adults, up to a maximum of five thousand dollars (\$5,000), pursuant to Section 1203.097.

(2) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

(i) For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under subdivision (e), the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

There are, of course, judicial council forms for this process. The application form itself, reflected by form DV-100, is four pages long and is set out in Figure 6-16. This form is self-explanatory. Its preparation should pose no problem to the applicant or the paralegal assisting him.

One interesting note before leaving this area is appropriate. In virtually all civil and criminal matters, a party is allowed to either represent himself or have an attorney represent him in court. Other than this person (with certain limited exceptions, for example, an interpreter), no one else is to accompany the party to the counsel table. Recognizing the highly volatile and emotional nature of an abusive situation, however, Family Code section 6303 specifically authorizes a "support person" to attend the DVPA hearing with the applicant and to be present with him at counsel table. The support person may, in fact, accompany the appli-

Figure 6-16
Form DV-100—Application and Declaration for Order

6. Resolving Issues before Trial

Figure 6-16 (continued)

PERSON SEEKING ORDER (name):	CASE NUMBER:
PERSON TO BE RESTRAINED (name):	

5. The person to be restrained has (check at least one box):
- ☐ assaulted or attempted to assault me or another member of my household.
 - ☐ caused, threatened, or attempted bodily injury to me or another member of my household.
 - ☐ made me or another member of my household afraid of physical or emotional harm.
 - ☐ sexually assaulted or attempted to sexually assault me or another member of my household.
 - ☐ stalked me.
 - ☐ other (describe in item 20).
6. a. The person to be restrained and I (you must check (1) or (2) below):
- ☐ have no minor children together.
 - ☐ have minor children together.

Child's name
Birth date
- (3) ☐ A juvenile dependency petition has been filed. (If known, specify case numbers):
- b. If you are seeking an order regarding custody or visitation of your children, you must attach a Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (form MC-150) and a Child Custody, Visitation, and Support Attachment to Application and Declaration for Order (Domestic Violence Prevention) (form DV-100A).

REQUEST THE COURT TO MAKE THE ORDERS INDICATED BY THE CHECK MARKS IN THE BOXES BELOW.

7. ☐ PERSONAL CONDUCT ORDER ☐ To be ordered now and effective until the hearing.
 Restrained person must not contact, molest, harass, attack, strike, threaten, sexually assault, batter, telephone, send any messages to, follow, stalk, destroy my personal property, disturb my peace, keep me under surveillance, or block my movements in public places or thoroughfares
☐ and that of the other protected persons listed in item 1.
8. ☐ RESIDENCE EXCLUSION ORDER ☐ To be ordered now and effective until the hearing.
 Restrained person must immediately move from and must not return to (address):
 and may take only personal clothing and effects needed until the hearing.
 I am entitled to live at the address above because (specify facts):
9. ☐ STAY-AWAY ORDER ☐ To be ordered now and effective until the hearing.
 Restrained person must stay at least (specify): _____ yards away from the following persons and places:
 (The addresses are optional and you do not have to provide them.)
- ☐ Myself
 - ☐ The other protected persons listed in item 1
 - ☐ My residence (address optional):
 - ☐ My place of work (address optional):
 - ☐ The children's school or place of child care (address optional):
 - ☐ My vehicle (year, make, model, color, and license plate number are optional):
 - ☐ Other (specify):
10. If the restrained person is ordered to stay away from all the places requested in item 9, will the restrained person still be able to get to his or her residence, school, place of employment, or place of worship? ☐ Yes ☐ No (If no, explain):

(THIS IS NOT AN ORDER)
 (Continued on page three)

F. Domestic Violence Prevention Act

Figure 6-16 (continued)

PERSON SEEKING ORDER (name):	CASE NUMBER:
PERSON TO BE RESTRAINED (name):	

11. ☐ FIREARM RELINQUISHMENT (to be ordered now and effective until the hearing)

I request that the restrained person sell or give up any firearms that he or she has or controls for a period not to exceed the duration of the restraining order. (Please describe any use of or threat regarding use of firearms in item 20.)

12. ☐ RECORDING OF PROHIBITED COMMUNICATIONS ☐ To be ordered now and effective until the hearing.

I request the right to record any prohibited communications made to me by the restrained person.

13. ☐ PROPERTY CONTROL ☐ To be ordered now and effective until the hearing.

a. I request that I be given the exclusive temporary use, possession, and control of the following property we own or are buying (specify):

b. I request that the restrained person be ordered to make the following payments on debts due while the order is in effect:

Debt/Bill	Amount of payment	Pay to
	0.00	
	0.00	
	0.00	

c. This order is necessary because (specify):

d. ☐ I am married to the restrained person and request that he or she be restrained from transferring, borrowing against, selling, hiding, or in any way disposing of any real or personal property, whether community, quasi-community, or separate, except in the usual course of business or for necessities of life. I further request that the restrained person notify me of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures.

14. ☐ ATTORNEY FEES AND COSTS

I request that my attorney fees and costs be paid by the restrained person as follows (to be awarded attorney fees and costs, you must attach a completed *Income and Expense Declaration* [forms 1285.50, 1285.50a, 1285.50b, and 1285.50c]):

15. ☐ RESTITUTION

I request that the restrained person be ordered to pay the following lost earnings and other actual expenses or costs of services caused directly by the conduct alleged in this application, including but not limited to expenses for medical care and temporary housing:

Type of loss	Pay to	Amount of claim	Due date
		0.00	
		0.00	
		0.00	
		0.00	

16. ☐ BATTERER'S TREATMENT

I request that the restrained person participate in a certified batterer's program.

17. ☐ LAW ENFORCEMENT

I request that copies of orders be given to the following law enforcement agencies:

Law enforcement agency	Address

(THIS IS NOT AN ORDER)

(Continued on reverse)

6. Resolving Issues before Trial

Figure 6-16 (continued)

PERSON SEEKING ORDER (name):	CASE NUMBER:
PERSON TO BE RESTRAINED (name):	

18. ☐ I request a court order waiving the fees payable to a law enforcement agency for serving restraining orders on the restrained person. (If you wish to ask the court to waive the fees payable to law enforcement, you must complete and file with this application an Application for Waiver of Court Fees and Costs [form 982(a)(17)].)

19. ☐ I request that time for service of the Order to Show Cause and accompanying papers be shortened so that they may be served no less than (specify number): _____ days before the date set for hearing. I need this process shortened because of the facts contained in this application. (Add additional facts if necessary):

20. ☐ DESCRIPTION OF CONDUCT

Describe in detail the most recent incidents of abuse. List each incident separately by date. Describe the incident, including who did what to whom, whether any firearms or other weapons were used or threatened, and any injuries. Describe any history of abuse.

☐ Continued on Attachment 20.

21. ☐ OTHER ORDERS (specify other orders you request to help carry out the orders previously requested):

PLEASE NOTE THAT ALL ORDERS ISSUED BY THE COURT, AS WELL AS THIS APPLICATION AND DECLARATION, MUST BE PERSONALLY SERVED ON THE RESTRAINED PERSON. NO PERSON TO BE PROTECTED, INCLUDING YOURSELF, MAY PERSONALLY SERVE THE ORDER.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY SEEKING RESTRAINING ORDER)

(THIS IS NOT AN ORDER)

F. Domestic Violence Prevention Act

cant to any proceeding called for, even confidential mediation proceedings. She cannot, of course, give legal advice, and the court is always free to remove her from the proceedings in its discretion. This provision is, however, a big step in giving access and emotional support to litigants in a judicial proceeding.

Part and parcel of this statutory scheme are provisions related to the enforcement of these laws both here and across state lines. This has been the general purview of Family Code sections 6380 et seq., which generally provide that a protective or restraining order related to domestic or family violence and issued by a court of another state, a tribe, or a military tribunal shall be deemed valid if the issuing court had jurisdiction over the parties and the matter, as well as a system of the electronic sharing of this information across political and geographical borders. It is known as CLETS, which stands for California Law Enforcement Telecommunications System.

Summary

We have seen in this chapter how to prepare for, and prepare, the initial and subsequent Order to Show Cause. This is the basic vehicle used in the family law context to obtain temporary relief pending trial, including, without limitation, child and spousal support, custody and visitation, restraining orders, and certain selected property issues. In addition to the Order to Show Cause procedure, the parties are also free to proceed by way of noticed motion. Each procedure has its pluses and minuses. We have also explored the various responses available to a party served with either an Order to Show Cause or a Noticed Motion. Finally, we have seen that the Family Code includes a very powerful statutory scheme designed for use in the area of domestic violence, the Domestic Violence Prevention Act.

Key Terms

The following is a list of key terms and phrases that you should be able to define and use in context. Only then will you have demonstrated a command of the material in this chapter.

- Order to Show Cause
- Temporary Orders
- ex parte relief
- pendente lite
- injunctions
- stipulations

6. *Resolving Issues before Trial*

- permanent v. preliminary injunction
- licensed clinical social worker (LCSW)
- Application for Order and Supporting Declaration
- declaration
- *Reifler* and *Stevenot* rule
- income and expense declaration
- gross v. net income
- Noticed Motion
- Memorandum of Points and Authorities
- statutory v. common law

Questions for Discussion

1. Define and describe statutory law and common law. Contrast these two concepts.
2. Compare and contrast preliminary and permanent injunctions.
3. Discuss the processes involved in applying for and obtaining temporary restraining orders. Include in your discussion reference to the various forms used.
4. What is the *Reifler* and *Stevenot* rule, and how is it used?
5. What is the difference between gross and net income, and what is the significance of this distinction in the context of an Order to Show Cause?
6. What is a Memorandum of Points and Authorities, and how and when is it used?
7. Describe the circumstances under which Temporary Orders would be requested and issued.

Endnotes

ENDNOTES

1. In this context, the responding party could be either the petitioner or respondent, whichever one is *responding* to the immediate request before the court.
2. The reader will recall that not all documents must be served in person. Service by mail is, in fact, the most common method.
3. A request for initial orders pending trial is typically made upon 15 days' notice to the responding party, 20 if served by mail. Often these requests include an application for issuance of a preliminary injunction, which will only be granted following the noticed hearing and, just as the preliminary injunction serves to preserve the status quo pending trial, the TRO serves to preserve the status quo pending the hearing on the application for a preliminary injunction. This is very useful since it is not uncommon for the waiting period to be well in excess of the 15- or 20-day notice period due to congestion of the court's calendar. Most courts are setting these hearings down within 30 to 45 days of the filing of the request. One way to compel the court to set your request for hearing in no more than 21 to 25 days from the date of filing is to request a TRO. Once granted, the hearing on the preliminary injunction that is the subject of a TRO must be held within 21 to 25 days of issuance of the TRO.
4. The use of the term *ex parte* in this context is quite literal and not used in the sense it has become to be understood in general practice. When one speaks of an *ex parte* hearing or application, reference is usually being made to an emergency situation requiring speed of issuance as the ultimate and immediate goal. In that context the responding party is typically given anywhere from four to 24 hours' notice (depending upon the local rules of the issuing court) and is given the opportunity to oppose the issuance of the orders so requested. In the context referenced above regarding issuance of the OSC, the term simply refers to the fact that the Order to Show Cause itself (which is actually nothing more than an order to appear) is issued without first notifying the responding party. In a practical sense, it is issued automatically by the clerk acting on behalf of the judge at the time it is sent down for filing. A date for hearing is assigned and the OSC is then served upon the responding party, being certain to provide them with (at least) the required 15 to 20 days' notice.
5. The concept of mediation is described in Family Code §§1800-1842. Family Code §§3160-3190 further describe this process and mandate the parties' participation. Mediation is discussed in detail in Chapter 7.
6. This form also accompanies the filing of a motion.
7. As is discussed in greater detail in the section dealing with child support, there are several computer programs and preprinted guidelines available which help the attorneys and the parties determine the probable amount of child support. The calculation of child support is in no small way the function of a comparison of the respective after-tax incomes of the two parties and, as such, these computer

6. Resolving Issues before Trial

programs and preprinted guidelines have become prevalent in current family law practice because these calculations can become very complicated.

8. The same computer programs and preprinted guidelines discussed above regarding child support are also used to calculate *temporary* spousal support.
9. Of course, such a request would usually go hand-in-hand with a request made in item 6 for the exclusion from the residence of the responding party.
10. It is not unusual in a marital termination proceeding that one of the parties enjoys significant financial leverage over the other party. For example, if the applicant is unemployed and has been staying at home taking care of the children and thus has no means of income, he or she could formulate a request for child custody, for exclusive use of the family residence, and also the car that he or she had been driving, and would also, in addition to requesting child support, request that the responding party be responsible for payment of the mortgage (or rent) on the house and also payment of the car loan, so as not to jeopardize the applicant's use of these assets pending the hearing.
11. Most declarations take the form of numbered paragraphs that set forth the bases for the orders requested in an organized (usually chronological) manner.
12. The applicant is not confined to offering only his *own* declaration. As many as are needed to fully (albeit briefly and concisely) explain the factual basis for the requested orders to the judge are allowed.
13. The hearing on an OSC is not unlike a "mini-trial": Sometimes (but not always) evidence is offered and testimony received by witnesses testifying in court on the day of the hearing.
14. Gross income is the total amount received before any deductions are taken from the income for taxes, social security, and similar items. For example, an individual who earns \$36,000 per year does not actually "take home" \$3,000 each month to spend. Assuming this wage earner is married with three dependents, the "net income" (that is, "take home pay") received from a salary of \$36,000 per year (\$3,000 per month) is approximately \$2,400 per month. The balance (\$600) has been withheld by the employer as a pre-payment on income taxes, social security, and the like.
15. This is possible, albeit not recommended.
16. These concepts are discussed in much greater detail in the section of this book dealing with support.
17. Although it is rare, in cases of actual physical violence and articulable threats of such violence against the applicant, the court will sometimes waive the usual notice requirement for an ex parte hearing (anywhere from 4 to 24 hours) and allow the applicant to proceed without *any* notice at all on a request for TROs seeking to impose a restraint on physical conduct and other stay away orders. Good cause for such a request typically depends upon facts and allegations of past physical violence

Endnotes

against the applicant by the responding party and actual threats of continued harm if legal action is commenced.

18. They are not, however, enforceable against the responding party until personal service of the orders is effected on him.
19. This is always a good idea in any event.
20. Temporary orders are not always requested.
21. The court will have already read and considered before the hearing the moving (that is, "asking") and opposition papers filed by the parties' attorneys (or the parties themselves if they have no attorney).
22. The *Reifler* and *Stevenot* cases (discussed above) impact this practice, however.
23. Note that as this book goes to the publisher section 1005 of the Code of Civil Procedure is being amended by the California Legislature. The concepts of the earlier version are not changed, but the specific count of days and the like is, so before reliance on this code section is sought, the reader is cautioned to review the most current and effective version of this section.
24. Note, however, that if the responding party chooses not to appear, the relief requested is not simply given automatically by the court. The applicant must still establish the legal propriety of his request. Such lack of opposition does, however, generally make the courts somewhat more inclined to grant the requested relief.
25. See footnote 23
26. When counting the days for notice, the day of service is not counted.
27. The "caption" of the case is that section of the document containing the names of the parties, the title of the document, and the case number. All papers filed with the court must have this information on their face sheet, or they must be *attached* to a page (that is, face sheet) containing this information. Thus, if the memorandum of points and authorities is going to be filed separately from the motion papers, care must be taken to ensure that they carry the case caption on their front page.
28. The concept of a "hearing" of an OSC or a noticed motion has been referenced, but not fully explored, in this book. Because the focus of this book is a general discussion of basic concepts of family law, a detailed discussion of the "ins and outs" of the court hearing is not germane. Generally, however, the OSC and motion papers are filed with the court and a hearing on the request is scheduled. These hearings are usually heard by judges, although commissioners and judges pro tempore are also used for this purpose. The hearing on the OSC is not unlike a "mini-trial." Evidence is received and testimony by "live" witnesses is often taken (subject to certain limitations discussed earlier in this section). The hearing on the noticed motion typically consists of the lawyers (or the parties in pro per) arguing the facts and the law of their case to the judge in hopes of persuading a favorable outcome.

6. *Resolving Issues before Trial*

29. The discussion above in the section dealing with the Order to Show Cause found at page 361 should be reviewed at this time.
30. These various enabling sections will be discussed later in this book in the areas thereof devoted to their substantive context.
31. The term “law enforcement officer” is defined by statute (Family Code section 6240) to include the following eight categories of enforcement personnel:
 - (b) “Law enforcement officer” means one of the following officers who requests or enforces an emergency protective order under this part:
 - (1) A police officer.
 - (2) A sheriff's officer.
 - (3) A peace officer of the Department of the California Highway Patrol.
 - (4) A peace officer of the University of California Police Department.
 - (5) A peace officer of the California State University and College Police Departments.
 - (6) A peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2 of the Penal Code.
 - (7) A peace officer of the Department of General Services of the City of Los Angeles, as defined in subdivision (c) of Section 830.31 of the Penal Code.
 - (8) A housing authority patrol officer, as defined in subdivision (d) of Section 830.31 of the Penal Code.
 - (9) A peace officer for a district attorney, as defined in Section 830.1 or 830.35 of the Penal Code.
 - (10) A parole officer, probation officer, or deputy probation officer, as defined in Section 830.5 of the Penal Code.
 - (11) A peace officer of a California Community College police department, as defined in subdivision (a) of Section 830.32.
 - (12) A peace officer employed by a police department of a school district, as defined in subdivision (b) of Section 830.32.

The reader should note that as this book goes to the publisher this statute is in the process of being amended by the California Legislature and, as such, care should be used when relying on the information contained herein. Always check the Code to be sure you are using the most recent version of a statute.

32. The presiding judge of each county's superior court is directed by statute to designate at least one judge, commissioner, or referee to be “reasonably available” on a 24-hour basis to issue these orders orally or by telephone.