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'Automatic Orders' Prevent Wrongful Asset Transfers in Divorce Actions

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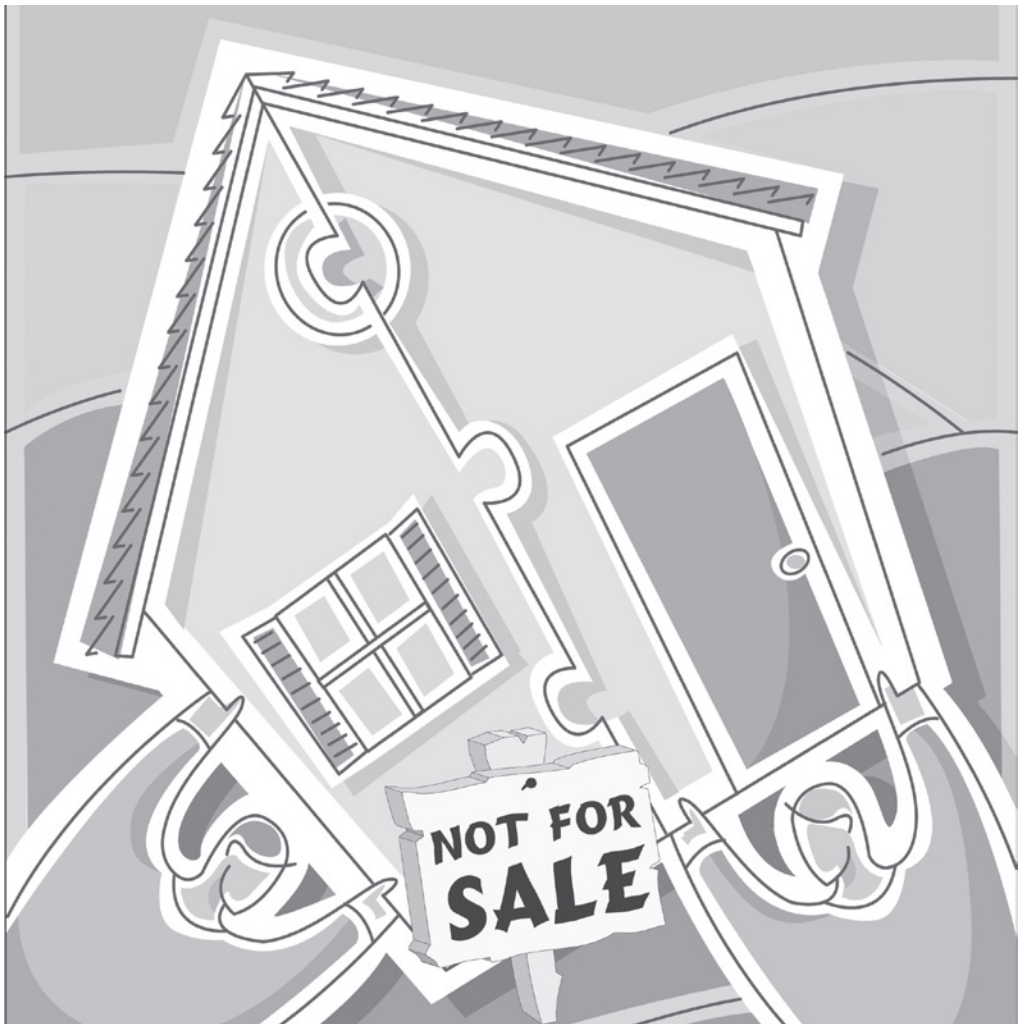
Since 2009, the commencement of a matrimonial action has generated "automatic orders" designed to preserve the financial status quo. Pursuant to DRL §236(B)(2)(b), copies of those automatic orders must be served on the defendant simultaneously with service of the summons; they are binding on the plaintiff "upon the filing of the summons, or summons and complaint," and upon the defendant "upon the service of the automatic orders with the summons."

They remain in effect until the conclusion of the action, "unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged." Pursuant to DRL §236(B)(2)(b)(1)-(5), the automatic orders are as follows:

> (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.



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> (2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

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(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

Prior to the legislative establishment of these automatic orders, matrimonial courts frequently issued orders similar to number (1) above, sometimes providing even greater specificity, of the sort provided in numbers (2) through (5) above. Such orders became known as "*Leibowits* injunctions," after *Leibowits v. Leibowits*,[1] which clarified the rationale for such orders and the authority of the courts to issue them without the movant having fulfilled the normal prerequisites for obtaining a preliminary injunction, including posting an undertaking and other chilling requirements:

> The [DRL] section 234 power to direct one party [to a matrimonial action] to deliver possession [of property] to the other necessarily includes the power to prevent a party from frustrating such delivery by improper disposition of assets. In these days, that power of restraint is vital to meaningful enforcement of the equitable distribution statute [enacted three years earlier, in 1980]. …Absent the authority provided in [DRL §234], a spouse who seeks to prevent the disposition of marital assets would be compelled to obtain a preliminary injunction pursuant to article 63 of the CPLR. Such injunctive relief would, in turn, require the moving party to post an undertaking and establish the probability of success[, which] would chill the efforts of [a] relatively impoverished [spouse] to prevent the more affluent [spouse] from frustrating justice by disposing of marital assets.[2]

But *Leibowits* injunctions were not available just for the asking. In *Guttman v. Guttman*, the First Department explained that "the prevailing rule…is to require that pendente lite restraints on property transfers be supported by proof that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant's ultimate rights in equitable distribution."[3] Finding that "Plaintiff's papers are devoid of any such showing, or even any contention to that effect,"[4] the court vacated the *Leibowits* injunction. Similarly, in *Reich v. Reich*, the Second Department overturned the *Leibowits* injunction granted by the court below, finding that it "was not supported by proof that the defendant was attempting or threatening to dispose of marital assets so as to adversely affect her ultimate rights regarding equitable distribution."[5]

The requirement of such a showing was problematic in a couple of ways. First, the horse might already have bolted by the time the court locked the barn door. Second, the line between marital property and separate property is not always a bright one. Determinations as to whether given assets are marital or separate property (or part one and part the other) often cannot be made until after extensive discovery, testimony and legal argument. Accordingly, in some cases, requiring a party seeking a *Leibowits* injunction to prove that the assets at issue are "marital property" placed an unreasonable burden on the movant. Some courts found ways to protect the moving spouse's equitable distribution interests without making a definitive determination of separate-property claims. In *Nebot v. Nebot*,[6] for example, the Second Department affirmed Supreme Court's order denying the wife's request to enjoin sale by the husband of a house that was primarily his separate property but requiring that 50 percent of the sale proceeds be placed in escrow to secure the wife's possible right to share in any appreciation in value during the marriage. And in *Parker v. Parker*,[7] where the wife had taken possession of approximately $8.6 million in lottery winnings (subject to taxes of $1.3 million still due) and asserted that they were her separate property, but the husband claimed they were marital property, the court protected the husband's interest by enjoining the wife—in her individual capacity and as trustee of the "living trust" for her own benefit into which she had placed most of the money—from "making any disposition of $3,000,000 of the lottery winnings that were on deposit in the Merrill Lynch account as of April 25, 2003 [approximately $8 million]."

The legislation that established the automatic orders was intended both to address the "barn door" problem and to reduce the burden on both the parties and the court of requiring case-by-case adjudications of the need for restraining orders and the terms of such orders. Assemblywoman Helene Weinstein, Chairperson of the Assembly Judiciary Committee and the prime sponsor of the legislation in the Assembly, with a history of protecting the rights of women and children, explained that "[h]aving standardized orders automatically in effect from the commencement of a case would ensure timely prevention of dissipation of assets and would eliminate the expense and delays involved in making applications for temporary restraining orders,"[8] and that "[m]aking these prohibitions automatic upon commencement of the action will also save on legal fees and judicial time."[9]

Although discussion of the automatic orders has tended to focus on the protection of equitable-distribution rights, the orders also preserve the status quo in other significant ways, requiring the maintenance of existing medical, hospital and dental insurance coverage for the other spouse and any children of the marriage, and also the maintenance of any existing life insurance, automobile insurance and homeowners/renters insurance policies. (In light of the fact that prospective "loss of inheritance rights" as the result of divorce is one of the factors to be considered by a court in making equitable distribution,[10] the automatic orders arguably should include a prohibition, or some limitation, on changes to the will of a spouse pending the conclusion of the divorce action. There is an entire body of trusts and estates law that does not permit a spouse's minimum rights to be defeated, but minimum rights may not be the same as equitable rights, particularly in a long-term marriage.)

The automatic orders are broad in scope, prohibiting a wide range of activity by which one spouse might seek to defraud or disadvantage the other with respect to the prospective division of assets and determination of their respective financial responsibilities to one another, to children of the marriage and to creditors. And their prohibitions on disposing of, or impairing the value of, various

types of assets, *are not, by their terms, limited to "marital property."* But the automatic orders contain several safety valves to avoid impractical or unjust results. DRL 236(B)(2)(b)(1) specifies that its prohibitions do not apply to actions taken "in the usual course of business, [to pay] for customary and usual household expenses or [to pay] for reasonable attorney's fees in connection with [the divorce] action." DRL 236(B)(2)(b)(2) specifies that its prohibitions may be relaxed upon "the consent of the other party in writing" or "upon further order of the court[.]" And the first, unnumbered paragraph of DRL 236(B)(2)(b) provides that any of the automatic orders may be "terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged." Thus, where a party wishes to engage in a transaction that is arguably proscribed by the automatic orders, but nonetheless seems reasonable under the circumstances, that party is well advised to seek court permission or the consent of the opposing party *in advance* of entering into the proposed transaction.

Although prenuptial agreements often expand the definition of "separate property," as shown above, "separate property" is not exempted from the scope of the automatic orders. Moreover, either the validity of a prenuptial agreement itself or the applicability of its definition of "separate property" to particular assets may be contested issues. And even assets that are beyond doubt "separate property" may be relevant in setting child support, so that restraints on their transfer are appropriate. As yet untested, so far as we know, is whether a provision of a prenuptial agreement that provided for specified exceptions to the automatic orders, or blanket exemption therefrom, would be enforceable.

In addition to restraints on asset transfers, preservation of the status quo during the pendency of a divorce should also include the preservation of evidence bearing on the various issues to be resolved in a divorce, whether that such evidence is in tangible form or electronic form. In *Voom HD Holdings v. EchoStar Satellite*,[11] the First Department held:

> Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold.… [A] hold must [with respect to a business organization or like entity] direct appropriate employees to preserve all relevant records, electronic or otherwise[.][12]

Toward that end, the court adopted the rule of *Zubulake v. UBS Warburg*,[13] which specifies:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.[14]

As a minimal measure to assure the preservation of the evidentiary status quo in matrimonial litigation, the automatic orders should impose a like litigation "hold" on the parties to a matrimonial action.

Although prenuptial agreements often **expand the definition** of "separate property,""separate property" is **not exempted** from the scope of the automatic orders.

Our research has revealed a limited number of cases to date that have determined the applicability of the automatic orders in specific factual contexts. Those cases have determined that a wife who unilaterally gave the family dog up for adoption violated the automatic orders;[15] that making court-ordered child-support payments for the children of a prior marriage is not a violation of the automatic orders;[16] that the automatic orders do not prohibit a third-party creditor—and certainly not the Internal Revenue Service—from seizing funds of the parties by legal process;[17] that a husband's use of $3.8 million in marital funds to purchase a new residence for himself was a violation of the automatic orders;[18] and that a wife's removal of $6,000 from a joint account and subsequent depositing of those funds into an account in her name alone was not a violation of the automatic orders, where the wife returned the $6,000 to the joint account after about three weeks, she told the court that she had acted to preserve the funds and prevent her husband from dissipating them, and the husband did not show "that she intended to or did spend them for any purpose prohibited by the automatic orders."[19]

In three of those early cases, the spouse charged with violating the automatic orders argued that the automatic orders established by the legislature are not enforceable by a court's contempt powers because they do not constitute the "lawful mandate" of the court (see Judiciary Law §§750, 753). In the earliest of those, *Buoniello v. Buoniello*,[20] the court agreed and refused to find the husband in contempt, despite finding that his conduct had violated the automatic orders, concluding that the automatic orders are "statutory mandates" and do not constitute "a clear and unequivocal order" subject to enforcement by the courts' contempt powers. The court in *P.S. v. R.O.*[21] disagreed, holding that violation of the automatic orders is punishable as contempt. Judge Ellen Gesmer articulated two bases for that conclusion: First, the court reasoned that, since Rule 202.16-a of the Uniform Rules for Trial Courts (22 N.Y.C.R.R. §202.16-a), which requires service of a copy of the automatic orders along with the summons and specifies the same language for those orders as DRL §236(B)(2)(b), was "promulgated by the Chief Administrator of the Courts on behalf of the Chief Judge of the Court of Appeals," the rule "constitutes [a] lawful mandate[] of the court."[22] Second, the court reasoned that "the legislative history of [DRL §236(B)(2)(b)] makes clear that the legislature intended that a violation of the automatic orders would be redressed by the same remedies available for violations of any order signed by a judge.[23] That reasoning was expressly followed in *Sykes v. Sykes*.[24] In December 2012, the chief judge acted to resolve any doubt about the applicability of the courts' contempt powers to violations of the automatic orders, promulgating a new Rule 202.16-a(7) (22 N.Y.C.R.R. §202.16-a[7]), which specifies: "The failure to obey these automatic orders may be deemed a contempt of court."

In *Sykes*, although the husband had committed a spectacular violation of the automatic orders by spending $3.8 million to buy himself a new home, the court denied the wife's motion asking that the husband be held in civil contempt. Citing the decision of the Court of Appeals in *McCormick v. Axelrod*,[25] Judge Matthew Cooper explained that, in order to adjudge a person guilty of civil contempt, "a court must conclusively determine three things: 1) the existence of a lawful order expressing an unequivocal mandate of which the party had notice; 2) the disobedience of such order; and 3) that the rights and remedies of a party to the action were prejudiced by the violation of the order."[26] On the facts of the case, Cooper held that the third requirement had not been satisfied:

> [P]laintiff's purchase of the house in which

he now resides—albeit with title not being in his name but instead being held in trust with plaintiff as the sole equitable owner—bears little of the indicia of a transaction undertaken so as to undermine equitable distribution. The $3,795,000 in marital funds used to purchase the residence, though no longer in the form of a liquid asset, remain part of the marital estate subject to equitable distribution in the form of the Connecticut house….

[T]he key issue is whether defendant's rights and remedies were prejudiced by the violation of the automatic orders…. Defendant can readily be made whole…in that she will be entitled to a credit for the purchase price of the house or its value at the commencement of trial, whichever is greater…. In light of the parties' significant liquidity—there being $12 million available to offset plaintiff's expenditures that total [including payments to or on behalf of the plaintiff's "fiancee"] at most $4 million—it can safely be said that neither defendant's rights under equitable distribution nor the remedies available to her to satisfy those rights have been prejudiced in any measurable way. Accordingly, plaintiff cannot be held in contempt of court as a result of his purchase of the Connecticut house or the expenditures he made on behalf of his fiancee.[27]

Lest that finding be misinterpreted, however, as a finding that the husband was blameless, Cooper went on to condemn the husband's conduct as "unacceptable irrespective of the fact that to this point he has had the resources available to him with which to mitigate the adverse effect of that conduct on [the wife's] rights under equitable distribution."[28] Accordingly, he expressly enjoined the husband from making any further asset transfers "except for basic living necessities, attorney's fees or other court-approved expenditures until the conclusion of this action," warned that, in the event of any violation of that injunction by the husband, "the very least of the consequences he would face would be having to deposit money in escrow" and awarded the wife $15,000 pursuant to DRL §238 for her "reasonable and necessary attorney's fees as a result of her having to bring this motion in response to the requirements of the automatic orders."[29]

In light of the "prejudice" requirement, when invoking the court's contempt powers for violation of the automatic orders, it is probably advisable to seek punishment for *criminal* contempt, in which a showing of "prejudice" is not required,[30] as well as for civil contempt. The distinctions between civil and criminal contempt, often poorly understood, are important in this context. Both may be punished by fine and/or by imprisonment. See Judiciary Law §§751(criminal contempt) and 753 (civil contempt). But they serve different purposes and are subject to different proofs. As the Court of Appeals explained in *Department of Environmental Protection of the City of New York v. Department of Environmental Conservation of the State of New York*[31]:

Although the same act may be punishable as both a civil and a criminal contempt, the two types of contempt serve separate and distinct purposes. A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both. A criminal contempt, on the other hand, involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates. Unlike civil contempt, the aim in a criminal contempt proceeding is solely to punish the contemnor for disobeying a court order, the penalty imposed being punitive rather than compensatory.[32]

When the elements of civil contempt have been established, and the contempt has caused actual damages, the court may levy a fine, to be paid to the aggrieved party, in an amount sufficient to compensate the aggrieved party for his or her loss; where the contempt has not caused actual damages, the court may impose a fine, to be paid to the aggrieved party, of not more than $250 *plus* the aggrieved party's "costs and expenses,"[33] which include the aggrieved party's reasonable counsel fees incurred in connection with the contempt.[34] With certain exceptions not relevant in matrimonial law, criminal contempt is punishable by the imposition of a fine of up to $1,000 and/or up to 30 days in jail, except that, when the contempt involves violation of an order of protection issued under CPL §530.12 or §530.13, the contemnor may be sentenced to up to three months in jail.[35] Proving criminal contempt requires proving that the violation of the court's order was *willful*.[36]

As enacted, the automatic orders offer substantial protections to the parties to a matrimonial action, and especially to non-monied parties—who still tend to be women—from the inception of the action. They have doubtless already had a salutary prophylactic effect, as their very existence requires the prudent matrimonial practitioner to discuss carefully with the client their scope and the possible consequences of violations. In the long term, however, their effectiveness will depend on the power and determination of the courts to enforce them.

1. 93 A.D.2d 535 (2d Dept. 1983).
2. Id. at 537-538.
3. 129 A.D.2d 537, 539 (1st Dept. 1987) (citations omitted).
4. Id.
5. 278 A.D.2d 214 (2d Dept. 2000) (citations omitted).
6. 139 A.D.2d 635 (2d Dept. 1988).
7. 196 Misc.2d 672, 677 (Sup. Ct. Nassau Co. 2003).
8. N.Y. Bill Jacket, 2009 A.B. 2574, Ch. 72.
9. N.Y. Spons. Memo., 2009 A.B. 2574.
10. DRL §236(B)(5)(d).
11. 93 A.D.3d 33 (1st Dept. 2012).
12. Id. at 41 (citation and footnote omitted).
13. 220 FRD 212 (S.D.N.Y. 2003).
14. Id. at 218
15. *Walash v. Kilgour*, 2011 WL 4346793, at *3 (Sup. Ct. Orange Co. 2011).
16. *Tawil v. Tawil*, 34 Misc.3d 812, 821 (Sup. Ct. Kings Co. 2011) (Sunshine, J.)
17. *Taylor v. Taylor*, 2013 WL 1183290, at *2 (N.D.N.Y. 2013).
18. 35 Misc.3d 591, 593 (Sup. Ct. N.Y. Co. 2012) (Cooper, J.).
19. *P.S. v. R.O.*, 31 Misc.3d 373, 377-378 (Sup. Ct. N.Y.Co. 2011) (Gesmer, J.).
20. NYLJ, 5/7/10, p. 28 (Sup. Ct. Suffolk Co. 2010) (Bivona, J.).
21. 31 Misc.3d 373, 376 (Sup. Ct. N.Y. Co. 2011).
22. Id. at 376.
23. Id. at 376-77 (quoting from and citing N.Y. Spons. Memo, 2009 A.B. 2574 and N.Y. Spons. Memo., 2009 S.B. 2970).
24. 35 Misc.3d 591, 595 (Sup. Ct. N.Y. Co. 2012).
25. 59 N.Y.2d 574, 583 (1983).
26. 35 Misc. 2d at 595.
27. Id. at 598.
28. Id. at 599.
29. Id. at 599-600.
30. *Dalessio v. Kressler*, 6 A.D.3d 57, 65-66 (2d Dept. 2004) ("No showing of prejudice to the rights of a party to the litigation is needed 'since the right of the private parties to the litigation is not the controlling factor" [citing *Department of Environmental Protection of the City of New York v. Department of Environmental Conservation of the State of New York*, 70 N.Y.2d 233, 240 (1987)]; compare Judiciary Law §751 with Judiciary Law §753.
31. 70 N.Y.2d 233 (1987).
32. Id. at 239 (citations omitted).
33. Judiciary Law §773.
34. *Rose v. Levine*, 84 A.D.3d 1206, 1208 (2d Dept. 2011); *Bennett Brothers v. Floyd Bennett Farmers Markett* [sic], 16 A.D.2d 897 (1st Dept. 1962).
35. Judiciary Law §751(1).
36. *Dalessio*, 6 A.D.3d at 66 ("An essential element of criminal contempt is wilful disobedience. Knowingly failing to comply with a court order gives rise to an inference to willfulness which may be rebutted with evidence of good cause for noncompliance" [citations omitted]); compare Judiciary Law §750(A)(3) with Judiciary Law §753.