

# **The Practitioner's Guide to Litigating Family Offense Proceedings**

Civil protection orders are one of the most commonly sought legal remedies available to protect domestic violence victims. In fact, obtaining a final protection has been associated with a significant decrease in future violence.<sup>1</sup> Still many domestic violence victims do not pursue legal relief. One reason may be the lack of available civil legal assistance. A recent study underscores the importance of access to civil legal assistance and found that it is more effective in protecting victims than hotlines, shelters and counseling programs.<sup>2</sup> Still some practitioners may be unnecessarily hesitant to represent domestic violence victims because of their limited trial experience or knowledge of the substantive law.

While mastering the substantive law governing family offense proceedings, the proceeding in New York State by which certain family or household members can obtain civil protection orders, can seem challenging to the new practitioner, it need not be. A good starting point is a thorough review of Article 8 of the Family Court Act, the primary statutory authority governing these proceedings. The statute, which is relatively straightforward and concise, comprehensively addresses many of the legal issues raised in this practice area. After mastering the statute, the more daunting challenge confronting the first time practitioner is the actual practice of litigating a family offense proceeding. What happens on the first court date, when will a case proceed to trial, what if the

opposing party is not served or does not appear are all common questions. Unfortunately, the answers to these questions cannot be gleaned from studying the Family Court Act. Rather, only with frequent practice and first-hand experience is a practitioner able to definitively answer these questions and confidently provide effective legal representation.

To assist with this learning curve, this guide provides a basic introduction to the practice of representing domestic violence victims in family offense proceedings. This guide, together with a comprehensive understanding of the Family Court Act and the needs and concerns of domestic violence victims, should prepare the new practitioner to provide critically needed legal representation, while at the same time gaining practical courtroom experience and trial skills.

## **I. PRELIMINARY CONSIDERATIONS**

### **Deciding Whether to Seek a Family Court Protection Order**

A preliminary consideration when counseling a domestic violence victim is whether she should pursue a family offense case. Too often, victims are encouraged to seek family court relief without an individualized assessment of their safety needs or a comprehensive exploration of the potential risks and benefits of initiating a proceeding. In some instances, pursuing a family offense case provides essential protection, while in others it significantly jeopardizes victim safety. Because victim safety is the foremost consideration, a careful assessment of the safety risks and repercussions is crucial before pursuing any relief in family court.

#### **A. Disclosure of Confidential Location**

Initiating a family offense case may jeopardize the confidentiality of a client's residence. For a victim who has fled an abusive relationship and relocated to a

confidential location, maintaining that confidentiality is often a pressing concern from a safety and psychological standpoint. To alleviate this concern, the Family Court Act specifically authorizes a victim to maintain a confidential address in court papers if disclosing it compromises her safety.<sup>3</sup> For victims residing in domestic violence shelters this protection is mandatory.<sup>4</sup> However, while the statute prohibits disclosure to the adverse party, the victim's confidential address is maintained in the court database for service of process and is sometimes inadvertently revealed.

Even when a victim's exact address is not disclosed, her general whereabouts may be. For example, victims residing in emergency domestic violence shelters are routinely instructed to seek family court protection orders which often results in disclosing the county where the shelter is located and, hence, where the victim is residing.

To prevent disclosure, several steps can be taken that may provide limited protection. For example, a victim who has relocated to another county may elect to file a petition in the county where she initially resided, provided the abuse occurred there, or where the abuser resides.<sup>5</sup> This strategy ensures that a domestic violence victim does not inadvertently reveal the county where she resides by the mere act of filing for relief there. Similarly, a victim may designate another party for service of process to avoid disclosing her address to the court.<sup>6</sup> If she has legal representation, the attorney may be authorized as the agent for service. Alternatively, she may seek to designate a responsible relative or friend for this purpose.

#### B. Ongoing Contact with the Batterer

Family court proceedings also provide a batterer with ample opportunities for ongoing contact with his victim. To obtain a final protection order, a victim must appear

in court with the batterer, oftentimes on multiple occasions. Repeat court appearances afford a batterer significant contact with his victim both inside the court in the waiting area, in the conference room and in the courtroom as well as outside the court before and after the case is heard and during lunch breaks. Because the initial court appearance is on an *ex parte* basis without the batterer present, a victim may not realize this.

To reduce the extent of contact, some counties have court-based victim service programs that offer separate victim waiting areas and transportation services.

Alternatively, a victim may choose to forgo a family court case entirely and pursue a protection order in criminal court since New York law provides for concurrent jurisdiction.<sup>7</sup> Proceeding in criminal court is often preferable to family court, in part, because it entails considerably less interaction. In a criminal proceeding, the victim serves as the state's witness and is generally only required to appear on trial dates. Also, because the victim does not regularly appear, it is clear that the state, not the victim, is pursuing the case against the batterer. However, a criminal court action generally requires an arrest to commence and since not all family offenses require an arrest,<sup>8</sup> this option may not be readily available.

### C. Potential for Retaliatory and Unwanted Litigation

Another consequence of bringing a family offense cases is the risk of retaliatory or unwanted litigation. Oftentimes the mere filing of a family offense petition incites batterers and encourages them to initiate cases or claims they may not have otherwise pursued. For example, a batterer served with a temporary protection order may retaliate by filing a cross-petition in which he alleges he is the victim and seeks a protection order. While family court policy discourages the issuance of mutual, *ex parte* protection orders,

courts occasionally issue them. In these instances, a victim becomes subject to New York's mandatory arrest law requiring the arrest of a suspect alleged to have violated a protection order.<sup>9</sup> In fact, some batterers intentionally use this statute to have victims arrested on false charges to intimidate them, control them and discourage them from pursuing family court relief.

A batterer may also respond by filing a visitation, custody or paternity petition. Occasionally, as in cases when the batterer has had limited involvement with the children, the primary motivation for filing a visitation or custody petition may be to ensure ongoing contact with the victim. Because visitation is routinely ordered, a victim may wish to avoid such proceedings. A victim may also want to avoid a paternity proceeding that can result in a batterer obtaining legal rights that did not previously exist. Such is the case of a non-marital father who must establish paternity to have standing in a custody or visitation case.<sup>10</sup> While a batterer may initiate any of these proceedings on his own, a pending family court action may increase the likelihood.

#### D. Defining Goals and Realistic Outcomes

Before initiating a family offense case, attorneys should have candid discussions about the available legal remedies and the likelihood of obtaining them. Domestic violence victims have a multitude of pressing needs, the vast majority of which cannot be resolved with litigation. Too often, victims overestimate the family court's remedial power and seek relief in the form of counseling, anger management or batterers' education programs to "cure" the batterer. Clients need to be advised that the likelihood of obtaining court relief that "treats" or "cures" a batterer is extremely remote and that the main goal is to ensure their safety and obtain a final protection order.

Clients should also be advised that while the statute authorizes a broad range of remedies including probation,<sup>11</sup> restitution,<sup>12</sup> and in cases of violations, incarceration,<sup>13</sup> these remedies are generally imposed only after a trial and even then they are not guaranteed. Congested court calendars can delay trials for months, and in some cases, up to a year. Even after a trial is complete and a final order entered, the court has limited resources to monitor and ensure compliance with its terms and conditions. As a result, the burden of monitoring compliance with orders is disproportionately borne by the victim, which may raise significant safety concerns.

## **II. SUBSTANTIVE LAW**

Article 8 of the Family Court Act is the primary statutory authority governing family offense proceedings. Practitioners should also familiarize themselves with Family Court Act Articles 1, 2 & 11 outlining the structure and authority of the family court, procedural issues involving protection orders and rules governing appeals as well as the Penal Law defining the family offense crimes. Additionally, there is a substantial body of family and criminal case law governing family offense proceedings, a significant portion of which is reported solely in the New York Law Journal. Attorneys researching case law on specific issues are well advised to routinely consult the Law Journal in addition to officially reported decisions.

### **Who May Seek Relief in a Family Offense Proceeding?**

To determine whether a client is eligible to seek relief in family court, an inquiry must be made into the nature of her relationship with the abuser. Under the current

statutory scheme, individuals eligible for relief are specifically limited to “family and household members” defined as persons who (1) are related by blood, (2) are legally married to one another, (3) were married to one another or (4) have a child in common regardless of whether the parties have been married or lived together.<sup>14</sup> Victims who do not meet this definition may attempt to pursue relief in criminal court.

### **What is a Family Offense Proceeding?**

A specific list of enumerated crimes constitute family offenses; they are:

- (1) disorderly conduct;<sup>15</sup>
- (2) harassment in the first<sup>16</sup> and second degree;<sup>17</sup>
- (3) aggravated harassment in the second degree;<sup>18</sup>
- (4) stalking in the first,<sup>19</sup> second,<sup>20</sup> third,<sup>21</sup> and fourth degree;<sup>22</sup>
- (5) menacing in the second<sup>23</sup> and third degree;<sup>24</sup>
- (6) reckless endangerment in the first<sup>25</sup> or second degree;<sup>26</sup>
- (7) assault in the second<sup>27</sup> and third degree;<sup>28</sup> and
- (8) attempted assault.<sup>29</sup>

Practitioners should exercise caution when trying to establish any of the designated family offenses, such as third degree assault, that require proof of physical injury. Physical injury as defined in the Penal Law requires either an impairment of physical condition or substantial pain.<sup>30</sup> While the case law interpreting physical injury clearly states that a victim’s incapacitation is not required,<sup>31</sup> criminal courts have required proof of scarring,<sup>32</sup> substantial injuries<sup>33</sup> or some limitation of a victim’s capacity<sup>34</sup> to satisfy the threshold definition. In contrast, family courts may impose a lower threshold and sustain a finding of physical injury when the victim suffers bruises, swelling or red

marks. Nevertheless, attorneys should be prepared to argue that the injuries sustained satisfy the threshold applied in criminal court.

### **How is a Family Offense Proceeding Commenced in Family Court?**

A family offense case is initiated by the filing of a petition. Victims can and usually do initiate family offense cases on their own. A victim planning on filing a petition should arrive at the courthouse no later than 9:00AM. By arriving early, a victim may avoid the inconvenience of having to appear on repeat court dates to obtain a temporary protection order and increase the likelihood that her wait to have the case heard will be shorter.

### **Where Can a Family Offense Proceeding be Commenced?**

A family offense case can be initiated the county in which (1) the act or acts referred to in the petition occurred, (2) the family or household resides or (3) any party resides.<sup>35</sup> Victims who have fled abuse and relocated to a new county are permitted to seek relief in the county in which the abuse occurred or their batterer resides.

### **What Relief is Available in a Family Offense Proceeding?**

The principal form of relief in a family offense case is a protection order and the family court has broad authority to fashion orders, both temporary and final, that best serve the purpose of protecting the victim. Among other terms, the family court can enter an order that directs a respondent to (1) be excluded from the home,<sup>36</sup> (2) stay away from a party, her school and her job,<sup>37</sup> (3) refrain from committing a family offense or any criminal offense,<sup>38</sup> (4) participate in a batterer's education program,<sup>39</sup> (5) surrender firearms and have a firearm's license suspended,<sup>40</sup> and (6) pay temporary child support.<sup>41</sup>

The court may also award custody of a child to a parent during the term of a protection order.<sup>42</sup>

Orders can last from a couple days, when a temporary exclusionary order is entered, to five years in duration. Generally, a temporary order, entered on the initial court date extends until the return date, sometimes several months away depending upon the relief granted and the county in which the order is issued. Temporary orders are routinely continued at subsequent court dates until a final disposition is reached. At disposition, family courts have the authority to enter final protection orders for up to two years in routine cases and up to five years when aggravating circumstances are found<sup>43</sup> or an order of protection is violated.<sup>44</sup>

Frequently protection orders will be referred to as full or limited. A full protection order is one in which a batterer is excluded from the home or directed to stay away while a limited order is one in which the abuser is prohibited from committing any crimes against his victim.

### **III. PRACTICE TIPS AND SUGGESTIONS**

#### **Deciding Whether to Amend a Family Offense Petition**

In many instances, domestic violence victims do not have access to advocates or attorneys on the initial court appearance and, as a result, their petitions may be inartfully drafted. Either because victims may not realize the significance of specific incidents of violence or only later recall them, critical information may be missing from the petition. An attorney retained after the initial court date must then decide whether to draft and file an amended petition. In making this decision, a practitioner should consider whether

aggravating circumstances have been pleaded, whether the client is seeking an exclusionary order, whether incidents for which there is corroborating evidence are included and whether a custody or visitation petition has been or might be filed.

This assessment should be made promptly and, ideally, before the time to amend as of right expires. Amendments as of right must be made within twenty days after service of the initial petition, at any time before the period to respond to it expires, or within twenty days after service of a responsive pleading.<sup>45</sup> After this period, permission from the court or stipulation of the parties is required to amend a petition.<sup>46</sup>

### **What to Plead in a Family Offense Petition**

When drafting or amending petitions, a good strategy is to describe the incidents of violence in reverse chronological order, beginning with the most recent allegation. The petition should include the most recent incident, the most severe incident and any incidents in which there has been physical violence or injury or the use of a weapon or dangerous instrument. Practitioners should also include incidents for which there exists physical or documentary evidence such as medical records, photographs, or torn or bloodied clothing that can be used to encourage a favorable settlement or introduced at trial. Incidents involving aggravating circumstances should also be included since they may entitle the victim to a five-year protection order.<sup>47</sup>

Attorneys should also consider making creative arguments to enhance the court's understanding of domestic violence. For example, classic power and control dynamics, including efforts to isolate a victim from family and friends or monitor and control her whereabouts, are behaviors that may not appear to fit squarely into any of the designated

family offenses. Nevertheless, because such behaviors are the hallmark of domestic violence, it can be valuable to include them in the petition. One way to accomplish this is to argue that they constitute the crime of harassment in the second degree, which involves a course of conduct or repeated acts that alarm or seriously annoy and serve no legitimate purpose. Clients will then need to be thoroughly prepared to provide testimonial evidence that counters attempts to show that the acts served a legitimate purpose.

Another tactical decision must be made about older incidents. Oftentimes, a victim will have endured a lengthy history of violence while the incident for which she seeks a protection order may be considerably less serious. It is often critical to include these earlier incidents because they may constitute aggravating circumstances, offer insight into the pattern of abuse throughout the relationship or influence custody or visitation decisions. While some courts may be reluctant to consider older incidents, the Family Court Act does not specify any statute of limitation for family offenses. Even applying the Civil Procedure Law and Rules,<sup>48</sup> which provides for a six-year statute of limitation,<sup>49</sup> would warrant permitting testimony about incidents that occurred as long as six years ago.

Finally petitions should be carefully drafted to ensure that every element of a family offense has been pleaded, and pleaded in non-conclusory language. For example, an assault allegation should might state that the respondent, with the intent to cause physical injury, repeatedly punched petitioner in her face and caused her to sustain physical injury including lacerations to her face, a bloody nose and ruptured blood

vessels. Such specificity will not only ensure that every allegation is fully described but also that the petition is facially sufficient to withstand a motion to dismiss.

### **What Happens on Initial Application Date?**

On the initial court date, the vast majority of domestic violence victims seeking protection orders are unrepresented. After drafting their petitions with the assistance of a court clerk or victim advocate, litigants are directed to the intake part where new cases are heard. The intake judge may ask questions and, if good cause is shown,<sup>50</sup> enter a temporary order. While a well-drafted petition should include the specific relief sought, it is a good idea to ask on the record as well.

The relatively low threshold for issuing temporary protection orders may mistakenly lead advocates to assume that courts will automatically issue them. However, some courts are reluctant to issue orders, especially on an *ex parte* basis or when an exclusionary order is sought, so caution should be taken when advising clients to avoid creating false expectations. Victims seeking exclusionary orders should be prepared to demonstrate that they have suffered physical harm, by displaying injuries or producing medical records, or that they are in imminent danger. If possible, it is advisable to have an attorney or advocate represent a victim seeking an exclusionary order.

When the family court is closed, the statute grants emergency jurisdiction to the criminal court to hear initial applications and issue temporary orders.<sup>51</sup> While in theory this provision provides relief to domestic violence victims, it is rarely used since no formal mechanism exists to navigate the criminal court system. Rather, clients are frequently advised to return to family court the next day it is in session.

## **How is Service Made?**

At the conclusion of the initial hearing, a client will be issued a summons, petition and protection order, if one has been issued, that must be served on the respondent.

Because the protection order is enforceable only after it has been served, it is important to complete service as soon as possible. Service must be made personally (hand delivered to the respondent) and can be made on any day of the week including Sundays at any hour of the day.<sup>52</sup> To be valid, service must be made 24 hours before the return court date.<sup>53</sup>

In no instance should a victim attempt to personally serve a batterer. Not only is this method of service improper, it exposes the victim to potential harm. Instead, the statute specifically directs the police to effectuate service.<sup>54</sup> This is accomplished by delivering copies of the papers to the precinct where the opposing party can be located. The client can either accompany the police to serve the respondent or provide them with a photograph to identify him. In either circumstance, the client must obtain a signed statement of personal service from the police to verify that service was completed.

If, after reasonable efforts, the summons, the papers cannot be served, an application for substituted service can be made.<sup>55</sup> The request should document all the attempts that were made to try and obtain service. Alternatively, an attorney can request a warrant. Warrants directing a respondent to be brought before the court are authorized in certain limited circumstances when, for example, aggravating circumstances are present, the summons cannot be served or is deemed to be ineffective.<sup>56</sup>

Litigants unfamiliar with the court process can sometimes be confused by the rules governing service. They may not understand that they cannot serve the batterer

themselves or that they must return a signed and, in some cases, notarized affidavit of service to the court. Because defects in service can result in unnecessary delays and repeat court appearances, it is worthwhile to explain service fully.

### **What Happens At an Inquest?**

If, after service of the papers, the respondent fails to appear, the court may issue a default judgment or proceed to an inquest, an uncontested fact-finding hearing. It is preferable to request an inquest because the client will not be subject to cross-examination and the court will make a finding about whether a family offense was committed. On occasion, a court may not immediately proceed to inquest but adjourn the case to allow the respondent another opportunity to appear. Because of its advantages, it is important to be proactive and request an inquest in the respondent's absence. Before making the application, it is important to ensure that service has been proper and that affidavit of service verifying it is completely and accurately filled out since the court cannot proceed if it is been defective.

Because it is impossible to predict whether a respondent will appear, attorneys should routinely prepare clients to testify at an inquest. At an inquest, a client will be required to offer direct testimony in support of her case and occasionally answer questions from the court. Attorneys should also exercise discretion and appropriately limit the extent of their client's testimony, possibly reducing the number of incidents testified to, if the case has been conclusively established and additional testimony would only serve to further traumatize the client.

## **Court Conferencing, Negotiation and Settlement**

When an opposing party appears on the return court date, the case will often be conferenced. This entails the judge or the judge's court attorney meeting with the parties to ascertain their positions and assess the likelihood of a settlement. In a typical settlement a respondent consents to a protection order being issued against him without any admission or finding of wrongdoing. Alternatively, a respondent can make an admission of wrongdoing and consent to the entry of an order, a preferable but relatively uncommon settlement. Still another possible resolution may be that the petitioner withdraws her case because she obtained a criminal court order providing similar relief or she wishes to reconcile with the batterer. Rather than agree to an outright withdrawal, it is advisable to counsel a client to pursue a limited protection. Limited protection orders allow parties to live together but triggers New York's mandatory arrest law if violated.<sup>57</sup>

In cases involving cross-petitions, mutual protection orders or mutual withdrawals are often proposed. Because victims often wish to avoid contact with their batterers, they may readily agree to mutual protection orders. However, clients should be strongly cautioned against this option as it exposes them to severe penalties including arrest and jail for any alleged violation. In most cases, it is preferable to proceed to trial or withdraw a petition rather than consent to an order being issued against a victim.

An advantage to settling is that it often results in a speedier disposition of the case. Congested court calendars severely limit available trial time. Cases that do proceed to trial often require numerous adjourn dates over a period of months and sometimes up to a year. On each court date, the petitioner may have to take time off from work,

possibly jeopardizing her employment. Repeated court dates also present ample opportunities for a batterer to have continued contact with a victim.

A settlement also relieves a victim of having to testify. Oftentimes, victims are extremely reluctant to testify. They are fearful of publicly confronting their batterers and ashamed of the abuse they have endured. These fears are exacerbated in cases in which a batterer is representing himself and entitled to cross-examine the victim.

On the other hand, a settlement rarely results in a finding of wrongdoing, which may be important in a custody or visitation proceeding. A 1996 amendment to the Domestic Relations Law requires courts to consider the effect of domestic violence on a child in a custody or visitation order provided the violence is in a sworn pleading and proven by a preponderance of the evidence.<sup>58</sup> While domestic violence allegations can be separately litigated in a custody or visitation case, a better strategy is to establish the violence at the earliest point in the proceeding. In fact, establishing violence earlier may avoid unfavorable visitation decisions or forestall a custody battle.

Settling may also preclude a victim from obtaining a protection order in excess of two years. The Family Court Act clearly authorizes protection order for up to five years if this is a finding of aggravating circumstances or that a protection order has been violated. The statute also permits a batterer may consent to a protection order provided the consent is knowingly, intelligently and voluntarily given.<sup>59</sup> Thus, a batterer should clearly be able to consent to protection orders in excess of two years; however, some courts may not permit it.

Finally, settling may preclude a victim from obtaining certain forms of relief such as probation, restitution or a batterer's education program. Because a family offense

petition is civil in nature and not punishable by jail time, batterers are less inclined to consent to these terms and would rather risk proceeding to trial.

### **When Will a Case Proceed to Trial?**

Courts routinely encourage settlements and it is often only after repeated attempts fail that a case will be scheduled for trial. On the first return date, commonly called the return of process date, a court will generally address preliminary matters such as ensuring that service was made, scheduling adjournments to obtain counsel or assigning court-appointed counsel if eligible. That being said, practice varies widely by county and even within a county, so attorneys should be prepared for trial on the first return date, although in most instances at least one adjournment will be permitted.

### **What Happens at a Trial?**

The Family Court Act provides that family offense petitions be heard in two phases, a fact-finding<sup>60</sup> and a dispositional phase,<sup>61</sup> although it is not uncommon for courts to combine them. During the fact-finding stage, the court hears evidence to determine whether a family offense has been committed. To sustain a finding of wrongdoing, the allegations must be proven by a fair preponderance of the evidence.<sup>62</sup>

Evidence commonly introduced at the fact-finding stage includes hospital records and photographs. Photographs are fairly easily admitted through a witness who can testify to what is depicted in the photographs, to the approximate date the photographs were taken and that what is depicted in the photographs is a fair and accurate representation of the subject at the time it was taken.

Hospital records can be admitted provided they are properly certified or authenticated.<sup>63</sup> Practitioners should note that while hospital records are admissible, only

statements that are relevant to the diagnosis, prognosis or treatment of the patient fall within the business records exception to the general rule prohibiting hearsay.<sup>64</sup> Thus, statements contained in hospital records that identify the abuser as the perpetrator have been deemed admissible within the business record exception.<sup>65</sup>

A practitioner may also seek to introduce physical evidence such as torn or bloodied clothing, weapons, broken or destroyed household or personal items or photographs depicting them. For example, if the batterer damaged or destroyed property in the house, photographs of the damaged items may be admissible into evidence.

Attorneys should not be discouraged if no physical or documentary evidence exists. In most domestic violence cases, the only available evidence is the victim's testimony. As such, clients must be thoroughly prepared to testify. This often requires several meetings with a client because the history may be lengthy and recounting the abuse painful.

To prepare for trial, attorneys should develop a trial brief that sets forth the theory of the case; the family offenses to be established and the elements of each; the direct testimony; and any anticipated cross-examination or objections. It is also a good practice to prepare a straightforward and succinct opening statement. While opening statements are infrequently used in family offense cases, there is a tremendous advantage to delivering a brief statement on the theory of the case and the offenses to be established. Because trials often occur over a series of court dates with lengthy adjournments in between, delivering an opening statement provides a unique opportunity to present the entire history of abuse to the court in narrative form. Since some courts do not require an opening statement, an attorney may request to make one.

Similarly, attorneys should prepare a closing statement that concisely and comprehensively summarizes the case. The closing statement should list the family offenses committed and highlight the testimony and evidence offered in support. Often, a court will hear the closing statement only after the dispositional hearing. On rare occasions, a court may request a written summation in which case it is necessary to obtain the court transcripts to adequately prepare.

#### B. Dispositional Hearing

At the conclusion of a fact-finding hearing, the court should proceed to a dispositional hearing the purpose of which is to fashion an appropriate remedy. Because evidence admissible at disposition need only be material and relevant,<sup>66</sup> hearsay is admissible. Commonly introduced evidence can include statements to friends or witnesses or uncertified medical and police records.

Attorneys should prepare a client to testify explicitly about the terms she is seeking and why they are necessary for her safety. Frequently victims want children included on final protection orders. While the practice varies, some courts are reluctant to enter a final order prohibiting contact between a batterer and his children. Rather, courts are more receptive to a provision that prohibits the batterer from committing any crimes against the children. When a court agrees to order the batterer to stay away from the children, there is often an exception providing for any court-ordered visitation.

#### **What Happens After a Protection Orders Has Expired?**

As the expiration date of a final protection order approaches, a victim may seek to have it extended. A relatively unknown and infrequently used provision of the Family Court Act states that a protection order may be extended for a reasonable time if special

circumstances exist.<sup>67</sup> The limited case law interpreting this provision deals exclusively with the issue of whether a hearing is necessary and fails to expound on the definition of special circumstances,<sup>68</sup> so practitioners are free to make creative and persuasive arguments to warrant extending an order.

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<sup>1</sup> Victoria L. Holdt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 588-594 (2002).

<sup>2</sup> Amy Farmer and Jill Tiefenthaler, *Explaining the Decline in Domestic Violence*, 21 Contemp. Econ. Policy 158-172 (2003).

<sup>3</sup> N.Y. FAM. CT. ACT §154-b(2)(a).

<sup>4</sup> N.Y. FAM. CT. ACT §154-b(2)(b).

<sup>5</sup> FCA §818 provides that a family offense proceeding may be commenced in the county in which the act or acts occurred, the family or household member resides or any party resides.

<sup>6</sup> N.Y. FAM. CT. ACT §154-b(2)(c).

<sup>7</sup> N.Y. FAM. CT. ACT §812(1), N.Y. CRIM. PROC. LAW §530.11(1).

<sup>8</sup> N.Y. CRIM. PROC. LAW §140.10(4).

<sup>9</sup> N.Y. CRIM. PROC. LAW §140.10(4)(b).

<sup>10</sup> N.Y. DOM. REL. LAW §70.

<sup>11</sup> N.Y. FAM. CT. ACT §841(c).

<sup>12</sup> N.Y. FAM. CT. ACT §841(e).

<sup>13</sup> N.Y. FAM. CT. ACT §846-a.

<sup>14</sup> N.Y. FAM. CT. ACT §812(1).

<sup>15</sup> N.Y. PENAL LAW §240.20.

<sup>16</sup> N.Y. PENAL LAW §240.25.

<sup>17</sup> N.Y. PENAL LAW §240.26.

<sup>18</sup> N.Y. PENAL LAW §240.30.

<sup>19</sup> N.Y. PENAL LAW §120.60.

<sup>20</sup> N.Y. PENAL LAW §120.55.

<sup>21</sup> N.Y. PENAL LAW §120.50.

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<sup>22</sup> N.Y. PENAL LAW §120.45.

<sup>23</sup> N.Y. PENAL LAW §120.14.

<sup>24</sup> N.Y. PENAL LAW §120.15.

<sup>25</sup> N.Y. PENAL LAW §120.25.

<sup>26</sup> N.Y. PENAL LAW §120.20.

<sup>27</sup> N.Y. PENAL LAW §120.05.

<sup>28</sup> N.Y. PENAL LAW §120.00.

<sup>29</sup> N.Y. PENAL LAW §110.00/120.00 or 120.05.

<sup>30</sup> N.Y. PENAL LAW §10.00(9).

<sup>31</sup> *People vs. Tejada*, 78 N.Y.2d 936, 578 N.E.2d 431, 573 N.Y.S.2d 633 (1991).

<sup>32</sup> *People vs. Fallen*, 194 A.D.2d 928, 599 N.Y.S.2d 182 (3<sup>rd</sup> Dept. 1993)(victim who was struck with candlestick suffered laceration to finger that bled profusely, required stitches and resulted in scarring that was visible at the trial).

<sup>33</sup> *People vs. Brodus*, 307 A.D.2d 643, 763 N.Y.S.2d 363 (3<sup>rd</sup> Dept. 2003)(after being repeatedly punched in the face, victim suffered swollen eye, ruptured eye vessel, scrapes, welts and bruising that lasted three weeks); *People vs. Azadian*, 195 A.D.2d 565, 600 N.Y.S.2d 279 (2<sup>nd</sup> Dept. 1993)(victim was punched in the face, stomach and head; and bitten on the face and suffered a bruised throat, abrasions to the nose and tenderness in the jaw and neck).

<sup>34</sup> *People vs. Moise*, 199 A.D.2d 423, 605 N.Y.S.2d 345 (2<sup>nd</sup> Dept. 1993)(victim's thumb was in a splint and could not return to work for four days on treating doctor's advice).

<sup>35</sup> N.Y. FAM. CT. ACT §818.

<sup>36</sup> N.Y. FAM. CT. ACT §842(a).

<sup>37</sup> *Id.*

<sup>38</sup> N.Y. FAM. CT. ACT §842(c).

<sup>39</sup> N.Y. FAM. CT. ACT §842(g).

<sup>40</sup> N.Y. FAM. CT. ACT §842-a.

<sup>41</sup> N.Y. FAM. CT. ACT §842(i).

<sup>42</sup> *Id.*

<sup>43</sup> N.Y. FAM. CT. ACT §842.

<sup>44</sup> *Id.*

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- <sup>45</sup> N.Y. CIV. PRAC. L & R §3025(a).
- <sup>46</sup> N.Y. CIV. PRAC. L & R §3025(b).
- <sup>47</sup> N.Y. FAM. CT. ACT §842.
- <sup>48</sup> N.Y. FAM. CT ACT §165(a) provides that where a method of procedure is not prescribed in the family court act, the provisions of the civil practice law and rules shall apply to the extent they are appropriate.
- <sup>49</sup> N.Y. CIV. PRAC. L & R §213(1).
- <sup>50</sup> N.Y. FAM. CT. ACT §828(1)(a).
- <sup>51</sup> N.Y. FAM. CT. ACT §154-d(1).
- <sup>52</sup> N.Y. FAM. CT. ACT §153-b(a).
- <sup>53</sup> N.Y. FAM. CT. ACT §826(a).
- <sup>54</sup> N.Y. FAM. CT. ACT §153-b(c).
- <sup>55</sup> N.Y. FAM. CT. ACT §826(b).
- <sup>56</sup> N.Y. FAM. CT. ACT §827(a).
- <sup>57</sup> N.Y. CRIM. PROC. LAW §140.10(4)(b).
- <sup>58</sup> N.Y. DOM. REL. LAW §240(1)(a).
- <sup>59</sup> N.Y. FAM. CT. ACT §154-c(3).
- <sup>60</sup> N.Y. FAM. CT. ACT §832.
- <sup>61</sup> N.Y. FAM. CT. ACT §833.
- <sup>62</sup> N.Y. FAM. CT. ACT §832.
- <sup>63</sup> N.Y. CIV. PRAC. L & R §4518(c).
- <sup>64</sup> *Williams v. Alexander*, 309 N.Y. 283; 129 N.E.2d 417 (1955).
- <sup>65</sup> *People v. Swinger*, 180 Misc.2d 344; 689 N.Y.S.2d 336 (N.Y.Crim. Ct. 1988).
- <sup>66</sup> N.Y. FAM. CT. ACT §834.
- <sup>67</sup> N.Y. FAM. CT. ACT §842(i).
- <sup>68</sup> *Matter of J.G. v. B.G.*, NYLJ, 11/18/99, p. 25.