DOMESTIC VIOLENCE CASE LAW UPDATE

Family Offenses

March 2021 – July 2021

Validity of family court actions

Matter of Parker v. Parker, 195 AD3d 620 (2d Dept 2021)

Respondent-mother appeals from an order of disposition directing her to comply with a two-year order of protection. The mother was convicted in criminal court for second-degree harassment for an incident involving her child. Two days later, the father filed a family offense petition, on behalf of the child, based upon the same incident. Thereafter, the court granted the father's motion, in effect, for summary judgment on the issue of whether the mother committed a family offense, and then immediately afterwards, conducted a dispositional hearing.

The appellate court concluded that the actions taken by Family Court were proper. Because Family court and criminal court have concurrent jurisdiction with respect to family offenses, petitioner had the right to pursue relief for the same act in both forums. Family Court proceeded to conduct a dispositional hearing after it had rendered a summary judgment regarding the commission of a family offense, and the hearing was deemed adequate because the court reached a disposition after giving the parties an appropriate opportunity to offer evidence.

Corroborating evidence

Existence of aggravated circumstances

Matter of Monique J. v. Keith S., 194 AD3d 611 (1st Dept 2021)

Family court granted a five-year order of protection in favor of petitioner and her children for family offenses of assault in the third degree, menacing in the second-degree, criminal mischief in the fourth degree, reckless endangerment in the second degree, and harassment in the second degree.

On appeal, the First Department concluded that a fair preponderance of evidence supported the court's determinations that respondent had committed those family offenses and the existence of aggravated circumstances. Nonparty witness testimony and photographs taken by police officers corroborated petitioner's testimony describing those actions, and the record demonstrated that respondent engaged in a series of violent and threatening actions directed at petitioner while the children were present.

Sufficiency of evidence for second-degree harassment
Unsuccessful First Amendment protection argument

Matter of Sophia M. v. James M., 195 AD3d 538 (1st Dept 2021)

Petitioner accused respondent of committing the family offense of harassment in the second degree. After a fact-finding determination, Family court granted a two-year order of protection with specialized language directing respondent "to refrain from discussing petitioner or the case with anyone familiar with petitioner." On appeal, the First Department modified the order by deleting the specialized language, and otherwise affirmed.

The appellate court found a fair preponderance of evidence supported the family offense petition. Respondent's testimony established that he was aware that petitioner did not welcome his opinions about her ADHD diagnosis and treatment and that she would be upset to learn that he had been discussing her personal affairs with mutual acquaintances. Nevertheless, respondent blind-copied petitioner on three messages that he emailed to at least 53 people complaining that her mother was manipulating her into alienating him, and he sent at least two more emails directly to petitioner chastising her for taking medication to treat her learning disability. Respondent also admitted that he wanted petitioner to read the messages despite knowing that she would not welcome them and that there had been times in the past when petitioner had stopped talking to him when he discussed his opinions about her or disclosed her personal contact information and photographs to third parties without her permission. Petitioner testified that she suffered panic attacks when she saw respondent's emails discussing her relationship with her parents.

In rejecting respondent's argument that the prohibitive discussion language violated his First Amendment right to freedom of speech, the appellate division concluded that his repeated and unwanted communications serve no legitimate purpose (*see Matter of Gracie C. v Nelson C.*, 118 AD3d 417 [1st Dept 2014]). Because "the harassment was adequately addressed by the provision that respondent stay away from petitioner and not contact her, the Appellate Division deleted the prohibition against his discussing petitioner or the proceeding" (195 AD3d at 540).

Proving intent element
Unsuccessful First Amendment protection argument

Matter of Plissner v. Louie, 194 AD3d 820 (2d Dept 2021)

Respondent appealed from an order of protection issued by Family Court after the court found that she had committed the family offense of second-degree harassment. The Appellate Division held that the intent element "[had been] properly inferred from [the appellant's] conduct and the surrounding circumstances," and it rejected respondent's contention that the First Amendment protected her conduct.

Appellate review of an expired order of protection
Insufficient evidence of "course of conduct"

Matter of McKenzie v. Berkovitch, 192 AD3d 1413 (3d Dept 2021)

The parties, who had previously been in an intimate relationship, owned a farm as tenants in common; petitioner lived at the farm while respondent lived elsewhere. After petitioner found four cameras inside the farmhouse, including her bedroom and bathroom, she filed a family offense petition alleging that respondent stalked her and committed harassment in the first or second degree. Petitioner alleged that the cameras had been installed when respondent updated the security system, and that she had been recorded without her knowledge. Following a fact-finding hearing, Family Court found that respondent committed harassment in the second degree. The court denied respondent's motion to reopen the hearing and, after learning from the parties that no additional evidence would be presented at a dispositional hearing, the court issued a one-year order of protection in favor of petitioner.

Even the order of protection has expired, the Third Department addressed the merits of the appeal since enduring consequences might flow from the adjudication that respondent has committed a family offense (*see Matter of Veronica P. v Radcliff A*., 24 NY3d 668, 671-672 [2015]; *Matter of Jasna Mina W. v Waheed S*., 170 AD3d 572, 572 [2019]; *Matter of Marianna K. v David K*., 145 AD3d 1361, 1362 [2016]).

On appeal, the Appellate Division reversed the order, explaining that petitioner failed to establish that respondent recorded or surveilled petitioner. The record demonstrated that respondent was not present when the cameras he ordered were installed and that because the cameras were neither connected to the DVRs or the Internet, it would be impossible for respondent to surveil or record images of petitioner. The Third Department also concluded that the mere installation of security cameras that are incapable of surveilling or recording cannot legally or logically constitute harassment in the second degree as there is no "course of conduct" that could reasonably "alarm or seriously annoy such other person.

Violation of Order of Protection
Sufficiency of evidence for Second-degree harassment

Matter of Marvin I. v. Raymond I., 193 AD3d 1279 (3d Dept 2021)

Petitioner filed a family offense petition against the grandfather of his children, alleging that he had committed the offenses of second-degree harassment and reckless endangerment. In a related proceeding, the grandmother filed petitions on the behalf of the children, alleging

that the grandfather had willfully violated an August 2018 order of protection issued in favor of the children.

The Third Department found that a preponderance of the evidence supported the Family Court's determination that the grandfather had committed second-degree harassment and upheld the order of protection in favor of the father. The father's petition detailed a vehicle chase instigated by the grandfather and a subsequent roadblock that the grandfather created with his vehicle to prevent petitioner and his children an exit route. When petitioner approached the stopped vehicle, the grandfather placed his hand on a rifle in plan view. The father took photos documenting these events. Testifying on his own behalf, the grandfather was unable to provide the court with any legitimate purpose for his actions.

The appellate division also found no basis to disturb Family Court's determination that the grandfather willfully violated the August 2018 order of protection on two separate occasions. The grandmother's petition discussed the same vehicle chase and an incident when the grandfather approached the children at a public fair. The mother of the children testified that the grandfather had approached the children three separate times that day in violation of an order of protection. The grandfather conceded that he had been mistaken regarding the dates that he was permitted to be at the fair. The Third Department concluded that the court had not abused its discretion when it credited the testimony of the father and his wife over that of the grandfather. Regarding the vehicle chase, the record established that the children observed the grandfather's conduct, were upset as a result, and his possession of a firearm possession violated the terms of the August 2018 order of protection.

Subject Matter Jurisdiction

Matter of Santana v. Pena, 196 AD3d 638 [2d Dept 2021]

Petitioner-mother appealed an order of Family Court order dismissing her family offense petition and vacating a temporary order of protection. In affirming the order, the Second Department explained that there was no proper subject matter jurisdiction over the petition because "another state had exclusive continuing jurisdiction over the parties' custody and parental access dispute and the order of protection which she was seeking would have necessarily affected the respondent's parental access rights" (196 AD2d at 638). Because Family Court Act § 154-e allows a petitioner to enforce an order of protection entered in another state, there was no need for the court in New York State to enter another temporary order of protection.

Matter of Kane v Tung, 194 AD3d 718 [2d Dept 2021)

Petitioner filed family offense petition against her former roommate. Family Court dismissed the petition for lack of subject matter jurisdiction, holding that the parties were not in an intimate relationship as defined in the Family Court Act § 812(1)(e). On appeal, the Second Department agreed, explaining that the parties were not spouses, former spouses, or parent and child, and they had not been in intimate relationship.

Insufficient evidence of Harassment/Disorderly Conduct in Public Places

Matter of Smith v Morrison, 196 AD3d 772 [3d Dept 2021]

On appeal from an order of Family Court granting an order of protection, respondent argues that the court erroneously concluded that he had committed the family offenses of second-degree harassment and disorderly conduct against his former intimate partner. The Third Department agreed with respondent, reversed the order, and dismissed the petition.

The Appellate Court concluded that petitioner's testimony established "at no point in time did respondent ever approach her, attempt to speak with her or otherwise engage in any conduct that caused her to be scared or alarmed, [and] there was no evidence presented from which it can reasonably inferred that respondent was, in fact, following her around these public places." The evidence at the hearing also demonstrated that respondent had legitimate reasons for being at the locations described, as opposed to having any intent to harass, annoy or alarm petitioner (*see* Penal Law § 240.26 [2]). Lastly, with respect to the offense of disorderly conduct alleged to have occurred during a roadside altercation, the record established that the occupant of petitioner's vehicle was the initial aggressor, and this occupant had used a racial epithet and threatened respondent when respondent approached petitioner's vehicle to retrieve his personal property, even though the parties had mutually agreed to meet for that purpose. The Third Department further concluded that the record did not otherwise contain sufficient evidence to support the conclusion that respondent had the requisite "intent to cause public inconvenience, annoyance or alarm, or recklessly creat[ed] a risk thereof [internal citations omitted]" (196 AD3d at 774).

Appellate review of expired order of protection

Sufficiency of evidence for second degree harassment and disorderly conduct

Matter of Olsen v. Statile, 193 AD3d 741 [2d Dept 2021]

Petitioner filed a family offense petition against her granddaughter. After a combined fact-finding and dispositional hearing, Family Court found that respondent had committed family offenses of second-degree harassment and disorderly conduct and issued an order of protection.

Although the order of protection has expired by its own terms, the Second Department ruled that the appeal had not been rendered academic "given the totality of the enduring legal and reputational consequences" of orders of protection (*Matter of Veronica P. v Radcliff A*., 24 NY3d 668, 673 [2015]).

On appeal, the Second Department concluded that the court's credibility determinations "were not clearly unsupported by the record" and that the evidence of granddaughter's actions satisfied the elements of second-degree harassment in that she repeatedly engaged in threatening behavior toward the petitioner with the "intent to harass,

annoy or alarm" petitioner; the behavior "alarm[ed] or seriously annoy[ed]" the petitioner, and the behavior serve[d] no legitimate purpose" (Penal Law § 240.26 [3]; *see Matter of Kalyan v Trasybule*, 189 AD3d 1046, 1047-1048). In vacating the court's disorderly conduct finding, the Appellate Division held that the record did not contain evidence that the granddaughter's threatening behavior was intended to "cause public inconvenience, annoyance or alarm," or that her conduct recklessly created a risk thereof (Penal Law § 240.20).

COVID-19 and Good Cause for Extending Final Order of Protection

Matter of R.C. v. A.C., 72 Misc3d 1014 [Sup Ct. Kings County, June 28, 2021)

The mother pursued matters against respondent, the father of her four children, in family and criminal court. In May 2018, she received a temporary order of protection when she filed family offense and custody petitions. A few weeks later, the father was arrested for criminal charges, and criminal court issued a temporary order of protection. All pending matters were transferred to the Integrated Domestic Violence part (IDV); the temporary orders of protection were extended, and a temporary custodial order was given to the mother. During the next four months, the father was rearrested on new charges, the mother commenced a matrimonial action in Supreme Court, and those matters were transferred to IDV. Two months later, the father consented to a two-year final order of protection in favor of the mother and the children, and IDV consolidated the custodial petition into the matrimonial action. About a year later, the court dismissed and sealed father's criminal cases for failure to timely prosecute when the People announced that they were not ready for trial.

The remaining matrimonial action was adjourned because of the COVID pandemic and the consent of the parties, resulting in an April 2021 calendar date. In March 2021, the mother filed an order to show cause to extend the final order of protection for an additional two years. because the final order would expire that month. The mother asserted that matrimonial matter had been stalled because of the father's behavior and the pandemic; that she feared for the safety of her children and herself because the father continuously disregarded the court's directions and orders as evidenced by his rearrest; and that the procedural dismissal of the criminal charges had prevented her from testifying about the many episodes of the father's domestic abuse. The father opposed, arguing that the mother's filing did not establish good cause because it was devoid of any factual showing that he had committed or threatened to commit any family offenses against the mother; that there was no prior record of any domestic violence between the parties until he had voiced a desire for a divorce; and that the mother's alleged fear of him was based upon criminal cases that were dismissed and sealed. The mother filed a supplemental affidavit detailing two 2018 incidents of domestic violence, one of which resulted in the mother and children fleeing the marital residence to shelter with a relative. The father replied that the mother's filing contained unsubstantiated allegations, and her credibility was suspect.

Supreme Court noted that Section 842 of the Family Court Act established that the standard for an extension was good cause, but the section did not define the term. The court noted the analysis factors set forth in *Matter of Molloy v Molloy* (137 AD3d 47, 53 [2d Dept 2016]), which included but were not limited to

> "the nature of the relationship between the parties, taking into account their former relationship, the circumstances leading up to the entry of the initial order of protection, and the state of the relationship at the time of the request for an extension; the frequency of interaction between the parties; any subsequent instances of domestic violence or violations of the existing order of protection; and whether the current circumstances are such that concern for the safety and well-being of the petitioner is reasonable."

Ultimately, Supreme Court granted the mother an extension until the trial on the matrimonial action. The court advised that it had observed the demeanor and behavior of the parties during the three years the case had been pending; that the mother's contentions and fear related to the father were facially sufficient and credible; that the father failed to take advantage of the various opportunities afforded to him to rehabilitate his relationship with the children; and that the father has "stalled at every opportunity to move the matrimonial case forward" (72 Misc3d at 1023-1024).

Evidentiary review of second-degree harassment
Telephonic testimony during covid pandemic

Matter of Stephanie E. v. Efrain G., 192 AD3d 404 [1st Dept 2021], lv denied 37 NY3d 902 [2021]

On appeal, First Department affirmed the issuance of an order of protection because a fair preponderance of evidence supported Family Court's finding of second-degree harassment. Petitioner's testimony described respondent's threats to knock her out and his yelling and cursing at her as the police escorted him from the residence. Petitioner also testified that respondent's behavior was not an isolated occurrence; that she was frightened for her own safety and that the parties' adult son had witnesses these outbursts. Of note, the appellate division held that just because the parties' testimony took place over the phone due to the COVID-19 pandemic, did not mean there was reason to disturb Family Court's credibility determinations.

Article 6 Custody and Article 8 Family Offense Cases

Matter of Carin R. v. Seth R., 196 AD3d 776 [3d Dept 2021]

The mother filed custody and family offense petitions against the father. Ultimately, Family Court granted the mother sole custody of the child with the father having at least one weekly supervised parenting time. With respect to the mother's family offense petition, the

court found that the father had committed second-degree harassment and issued a stay away order of protection subject to the supervised parenting time.

On appeal, the father presented the limited argument that he should have been granted more expansive supervised parenting time. The Third Department held that there was a sound and substantial basis in the record to support the court's visitation allotment. The evidence established that the father had a history of acting in a manner that exhibited a lack of concern for the child's safety and placed the child's physical, mental, and emotional well-being through his domestic violence against the mother in the presence of the child, driving with the child without a valid driver's license, attempting to evade the police in a car chase while the child was in the vehicle and being intoxicated while the child was in his care.

Credibility Assessment

Procedural requirements necessary for implementing cost sharing provision

Matter of Livesey v Gulick, 194 AD3d 1045 (2d Dept 2021)

Mother filed family offense and custody petitions against the father of her children. The mother described the father's behavior and action (i.e., repeated accusations of infidelity; demands for photographic proof that she was at work; questioning their children about the presence of men, occasionally holding knives to her throat "while asking if she wanted him to kill her." Both parties provided conflicting accounts of an incident in which the mother testified that the father punched her on the side of the head and that she had feared for her life, whereas the father denied the allegations and claimed that the mother had started swinging at him, and he had put his hands up to block her. Family Court found that the father had committed second-degree harassment. The court issued an order of protection for the mother and children and an order of custody directed the father to have supervised therapeutic parental access with the parties splitting the cost for that type of access.

On appeal, the Second Department noted that a court's determination to credit the testimony of one party over that of the other would not be disturbed unless clearly unsupported by the record. The Appellate Division upheld that the court's determination of a family offense, explaining that it had been based upon its assessment of the credibility of the parties; that it was supported by the record; and that the mother's lack of medical treatment after the father allegedly punched her "did not discredit her testimony [internal citation omitted]" (194 AD3d at 1048). With respect to the custodial order, the Appellate Division deleted cost sharing provision and otherwise, affirmed. The Second Department explained that Family Court should not have directed equal sharing without evaluating the parties' " 'economic realities,' including the father's ability to pay and the actual cost of each visit [internal citation omitted]" (194 AD3d at 1048).

Standard of review for failure to state a cause of action

Matter of Cole v Benjamin, 192 AD 3d 889 (2d Dept 2021)

Petitioner appealed the dismissal, without a hearing, of his family offense petition for failure to state a cause of action. When reviewing a dismissal motion for failure to state a cause of action, the Second Department advised that the petition must be liberally construed, the facts alleged must be accepted as true, and the petitioner must be granted the benefit of every favorable inference. Upon its review of the petition, the Second Department concluded that Family Court's determination was erroneous and reversed the order because the petition adequately alleged that the respondent had committed second-degree harassment when liberally construing the allegations of the petition and giving the petitioner the benefit of every possible favorable inference.

Standard of review for failure to establish prima facie case

Matter of Prince v Ford, **195 AD3d 724 (2d Dept 2021)**

On appeal, the Second Department held that Family Court had erroneously dismissed the family offense petition for failure to establish a prima facie case. The Second Department explained that when a court reviews a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom and that the question of credibility is irrelevant and should not be considered [internal citation omitted]" (195 AD3d at 724). Because Family Court failed to apply that standard properly, the Appellate Division reversed the order and remitted the matter for a new fact-finding hearing and determination on the petition.

Standard of review for motion to vacate an order of protection entered by default

Matter of Shannon NN. v. Tarrin OO., **194 AD3d 1138 (3d Dept 2021)**

Respondent appeals from an order of Family Court denying his motion to vacate an order of protection issued on default. The Third Department concluded that family court had not abused its discretion when it denied the motion. To be successful, a motion to vacate is "required to demonstrate both that there was a reasonable excuse for his or her failure to appear and that [he or she] had a meritorious defense against the allegations addressed at the hearing" (*Matter of King v King*, 167 AD3d 1272, 1272 [2018]; *see* CPLR 5015 [a] [1]; *Matter of Hannah MM. v Elizabeth NN*., 151 AD3d 1193, 1195 [2017]).

Although the affirmation filed by respondent's counsel indicated that respondent had started a new job and was unable to miss work because of a probationary period, the appellate division agreed with family court that the motion papers did not provide a reasonable excuse for his default. The record established that respondent made no request for an adjournment of the trial date on that basis, or for any other reason and that he offered no documentary proof to support his assertion that he had obtained new employment precluding his appearance at

trial. Also, there was ample proof that respondent was aware of the trial date, i.e., his statement "I'm not going to be there, dude" when the court announced the trial date, several pre-trial reminder letters from his attorney, and a telephonic conversation between counsel and respondent the day before the trial. Because respondent failed to proffer a reasonable excuse for his default, Family Court did not have to consider whether he had a meritorious defense.

Lastly, the Third Department rejected respondent's argument that he was denied due process because his counsel sought to withdraw from representation without providing him prior notice of her intent to do so. The record established that Family Court had denied both of counsel's requests to be relieved and that respondent was not prejudiced by counsel's non-participation at the inquest because she wanted to preserve respondent's vacatur arguments.

Matter of Desiree P. v. Michael L., 194 AD3d 494 (1st Dept 2021)

Respondent-father appeals from an order of Family Court denying his motion to vacate the five-year order of protection issued on default. The appellate court upheld the denial of the motion because respondent failed to present a reasonable excuse for his absence at the inquest on the mother's family offense petition, nor did he offer a meritorious defense. Respondent's argument that the court was biased against him was unpreserved and unsubstantiated by the record. Lastly, the record established that respondent "knowingly, intelligently, and voluntarily" waived his right to counsel because he failed to retain an attorney despite several opportunities by the court, and he declined assigned counsel after the court repeatedly informing him that he would be at a disadvantage and that he could receive representation at no cost.