### How do I get an order of protection?

**Orders of Protection - New York Domestic Relations Law ' ' 240 and 252**

**The Domestic Relations Law provides that the Supreme Court must entertain an application for an order of protection or temporary order of protection by either party in an action for divorce, separation or annulment or in an action to declare the nullity of a void marriage in the Supreme Court. The Domestic Relations Law authorizes the Supreme Court to issue orders of protection where a A family offense@ has been committed. The Supreme Court= s authority under Domestic Relations Law ' 252 is limited to actions for divorce, separation or annulment or an action to declare the nullity of a void marriage, which are actions to dissolve an existing relationship. The Supreme Court= s authority under Domestic Relations Law ' 240 extends to actions or proceedings to obtain by writ of habeas corpus or by petition and order to show cause the custody or right to visitation with any child of the marriage, in addition to action for divorce, separation, annulment or to disclosure of nullity of a void marriage. The provisions of sections 240 and 252 of the Domestic Relations Law, which authorize the Supreme Court to issue orders of protection, are almost identical.**

**The Supreme Court may provide in a protective order that the order may be enforced or modified only in the Supreme Court. In such case the Family Court may not entertain an application to enforce or modify such an order of the Supreme Court. Even though the supreme court provides in an order of protection that the order may be enforced or modified only in the supreme court, the Domestic Relations Law permits enforcement of the order pursuant to a criminal prosecution under article 215 of the penal law.**

**\_ An order of protection issued by the Supreme Court may require any party: (a) to stay away from the home, school, business or place of employment of the child, other parent or any other party, and to stay away from any other specific location designated by the court; (b) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods; (c) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of the criminal procedure law, or any criminal offense against such child or against the other parent or against any person to whom custody of the child is awarded or from harassing, intimidating or threatening such persons; (d) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in a proceeding or action under this chapter or the family court act; (e) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child; (f) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced; or (g) to observe such other conditions as are necessary to further the purposes of protection.**

**An order of protection must state in a conspicuous manner, on the front page of the order, the language "Order of protection issued pursuant to section two hundred fifty-two of the domestic relations law.@ However, the absence of such language does not affect the validity of the order. The presentation of a copy of such an order to any peace officer acting pursuant to his or her special duties, or police officer, constitutes authority, for that officer to arrest a person when that person has violated the terms of such an order, and bring such person before the court and, otherwise, so far as lies within the officer= s power, to aid in securing the protection such order was intended to afford.**

**The supreme court is authorized to make an order of protection in the final judgment in any matrimonial action, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order. An order of protection may be entered notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding.**

**No order of protection may direct any party to observe conditions of behavior unless: (i) the party requesting the order of protection has served and filed an action, proceeding, counterclaim or written motion and, (ii) the court has made a finding on the record that such party is entitled to issuance of the order of protection or that the party against whom the order is issued has given knowing, intelligent and voluntary consent to its issuance. This does not preclude the court from issuing a temporary order of protection upon the court= s own motion or where a motion for such relief is made to the court, for good cause shown.**

**The Supreme Court is prohibited from consolidating a matrimonial action with Family Court protective proceedings involving the same parties on its own motion and from making, vacating or modifying orders of protection issued in Family Court on its own motion.**

**In enacting the "Family Protection and Domestic Violence Intervention Act of 1994", the Legislature sought to ensure that victims of domestic violence would have ready access to the justice system in order to obtain needed protection. The Act, as well as subsequent amendments, made it clear that victims would be able to obtain orders of protection, both temporary and final, in criminal, Family Court or matrimonial proceedings and that enhanced felony penalties for violations of orders of protection would apply, regardless of the type of proceeding in which the order had been issued.**

**In order to create uniformity three provisions of the Family Court Act were incorporated into sections 240 and 252 of the Domestic Relations Law.\_**

**Any party moving for a temporary order of protection during hours when the court is open is entitled to file a motion or pleading containing a prayer for emergency relief on the same day that the person first appears at the court. A hearing on the motion or portion of the pleading requesting the emergency relief must be held on the same day or the next day that the court is in session following the filing of the motion or pleading. Upon the issuance of an order of protection or temporary order of protection or upon a violation of such an order, the court may make an order in accordance with section 842-a of the family court act directing the surrender of firearms, revoking or suspending a party= s firearms license, and/or directing that the party be ineligible to receive a firearms license. Upon issuance of an order of protection or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed $10,000 in accordance with section (e) of the family court act. An order of restitution may not be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgement or settlement of the action.**

**The foregoing provisions are similar to those in Family Court Act ' 153-c, which provide that a party in need of emergency relief in the form of a temporary order of protection would be able to file a pleading or motion for that relief on the same day that the party appears in court and that a hearing thereon must be held that same day or the next day that the court is in session. It incorporates into the Domestic Relations Law provisions authorizing courts, in issuing orders of protection and temporary orders of protection, to require the surrender of firearms, to direct the suspension or (in the case of final orders) revocation of firearms licenses, and to preclude a party= s eligibility for a firearms license. \_ This incorporates section 841 (e) of the Family Court Act, by reference, to authorize the Supreme Court, as a condition of an order of protection in a matrimonial case, to direct payment of restitution not exceeding $10,000 so long as the injured party has not already received compensation or the restitution is not already incorporated into a final judgment or settlement of the matrimonial proceeding.**

**We note that section 7(b) of Article 6 of the New York State Constitution provides that the Supreme Court possesses concurrent jurisdiction with the Family Court and courts of criminal jurisdiction in all respects, thus authorizing the Supreme Court to exercise the powers enumerated in the Family Court Act and Criminal Procedure Law. However, the legislature felt the statutory fragmentation of proceedings in New York State, particularly between Family Court and Supreme Court, may create difficulties for domestic violence victims in obtaining full protection and relief, particularly in the context of already-pending matrimonial proceedings, and that explicit articulation of the full range of powers of the Supreme Court with respect to orders of protection in matrimonial proceedings was needed to add clarity to the statutory framework.**

**If a temporary order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court must immediately deliver a copy of the temporary order of protection or order of protection to a peace officer, police officer or, in the city of New York, to a designated representative of the police department of the city of New York for service. Service of the temporary order of protection or order of protection and associated papers must, insofar as practicable, be achieved promptly. A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, is sufficient proof of service of the summons, petition and temporary order of protection or order of protection. When the temporary order of protection or order of protection and other papers, if any, have been served, the officer or designated person must provide the court with an affirmation, certificate or affidavit of service and must provide notification of the date and time of such service to the statewide computer registry.**

**If the court that issued an order of protection or temporary order of protection under Domestic Relations Law section 240, or warrant in connection thereto is not in session when an arrest is made for an alleged violation of the order or upon a warrant issued in connection with such violation, the arrested person must be brought before a local criminal court in the county of arrest or in the county in which the warrant is returnable, pursuant to article 120 of the criminal procedure law and arraigned by such court. The local criminal court must order the commitment of the arrested person to the custody of the sheriff, admit to, fix or accept bail, or release the arrested person on his or her recognizance pending appearance in the court that issued the order of protection, temporary order of protection or warrant. In making the order, the local criminal court must consider the bail recommendation, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant. Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding the alleged family offense or violation allegation, must make the matter returnable in the supreme or family court, as applicable, on the next day the court is in session.**

**The procedure to be followed under New York's domestic violence law is found in Section 812 of the Family Court Act, which protects "members of the same family or household." They are defined in Family Court Act ' 812 as persons related by consanguinity or affinity; persons legally married to one another; persons formerly married to one another; and persons who have a child in common regardless whether such persons have been married or have lived together at any time.**

**The Domestic Relations Law provides that the order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order. In contrast, Family Court Act section 841 provides for the issuance of an order of protection as one of the permissible orders of disposition in a family offense proceeding. Family Court Act ' 842 provides that an order of protection under section 841 of the Family Court Act may set forth reasonable conditions of behavior to be observed for a period not in excess of one year by the petitioner or respondent or for a period not in excess of three years upon a finding by the court on the record of the existence of aggravating circumstances as defined in Family Court Act ' 827 (a) (vii). For the purposes of section 842 aggravating circumstances is defined in Family Court Act ' 827 (a) (vii) to mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.**

**The Supreme Court, as a court of general unlimited jurisdiction, may exercise all of the powers that are conferred upon the Family Court, in addition to its own powers. It would appear that by virtue of the provisions of the Domestic Relations Law the Supreme Court is authorized by statute to make an order of protection during the entire minority of the child, which may be for a period anywhere up to eighteen years.**

**The Domestic Relations Law does not specify the procedure or standards for determining whether an order of protection should be granted by a Supreme Court Judge. The substantive law to be applied is that supplied by Article 8 of the Family Court Act.**

**The scope of an order of protection issued pursuant to ' 240 and ' 252 of the Domestic Relations Law is identical. In addition, Family Court Act ' 842 (g) and (h) authorize the court to make an order of protection which would require the respondent to participate in a batterer's education program designed to help end violent behavior, which may include referral to drug and alcohol counselling, and to pay the costs thereof if the person has the means to do so; and to provide, either directly or by means of medical and health insurance, for expenses incurred for medical care and treatment arising from the incident or incidents forming the basis for the issuance of the order.**

**Article 8 of the Family Court Act lists the crimes or violations that constitute a "family offense.@ They are acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree or an attempted assault between spouses or former spouses, or between parent and child or between members of the same family or household except where the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law.**

**There is no such thing in law as a family offense, no matter how offensive the conduct may be to someone= s sensibilities, apart from acts that are specified in the statute, which are defined in the Penal Law.**

**In People v Johnson arrested on an information charging him with assaulting his wife with a knife, the defendant was indicted two months later for assault in the second degree. He moved to dismiss the indictment and to transfer the case to the Family Court. His motion was denied and he pleaded guilty to the misdemeanor of assault in the third degree; he received a suspended sentence. His conviction was affirmed by the Appellate Division and, upon his appeal, the sole question presented to the Court of Appeals was whether a County Court could try an indictment accusing a husband of feloniously assaulting his wife without having first transferred the proceeding to the Family Court for an initial determination whether the assault should be disposed of as a "family offense" or transferred to the County Court for prosecution as a crime.**

**The Court of Appeals pointed out that the statewide Family Court was created in 1962 to replace the Domestic Relations Court of the City of New York and the Children's Courts in the other 57 counties of the State. This was accomplished as part of the general reorganization of our courts and the establishment of a unified court system through amendment of the New York State Constitution (art. VI), effective September 1, 1962. With respect to the Family Court, section 13 (subd. b) of article VI recites that "The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court . . . (7) as may be provided by law: ... crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household." Implementing this constitutional provision, section 811 of article 8 of the Family Court Act B entitled "Family Offenses Proceedings" -- declares that the purpose of the article is to "create a civil proceeding for dealing with" family offenses, since the persons involved are usually seeking "not . . . a criminal conviction and punishment but practical help" and the Family Court is "better equipped to render such help.@ Accordingly, section 812 gives the Family Court "exclusive original jurisdiction over any proceeding concerning acts which would constitute disorderly conduct or an assault between spouses.@ And, in subdivision (a) of section 813, it is further provided that any criminal complaint charging such disorderly conduct or assault between spouses "shall be transferred by the criminal court . . . to the family court.@**

**The Court of Appeals found no merit in the People's contention that the coupling of "assault between spouses" with "disorderly conduct" confined the jurisdiction of the Family Court to "simple" assaults.**

**The Court of Appeals stated that Family Court was not, of course, to retain jurisdiction in every case of an intra familial assault. As the statute makes clear, "If the family court concludes that these processes are inappropriate in a particular case, it is authorized to transfer the proceedings to an appropriate criminal court" (' 811; also ' 816).**

**The Court of Appeals went on to state that it was evident that careful thought was given by the Legislature to the question of the Family Court's jurisdiction over family assaults before the decision was made to include all such assaults and not simply those which were trivial.**

**The district attorney, taking a contrary stand, argued that the Court= s interpretation of the Constitution and the statute undermined the constitutional powers given to the grand jury to "inquire" into crimes and "originate charges against those" believed to have committed them. However, since an act does not become a "crime" until the Legislature defines it as such the Legislature may properly provide, as it did in the present instance, that a "family offense" was not to be prosecuted as a "crime" until the Family Court judge so determined.**

**The court noted that Section 6 of article I of the Constitution recites that "No person shall be held to answer for a capital or other infamous crime ... unless on indictment of a grand jury". This provision was designed not to enhance the prerogatives of the grand jury but, rather, to protect individuals from unfounded accusations of crime. A The Family Court Act simply provides more protection to the individual by removing domestic quarrels from the ambit of the criminal law.@**

**Although the purpose of Article 8 of the family court act is to provide a civil, non-criminal alternative to a criminal prosecution, only the specified criminal conduct authorizes Family Court jurisdiction. If one of the enumerated crimes is alleged, the Family Court has concurrent jurisdiction with the criminal court. If a different crime is alleged, the Family Court does not, and a petition alleging a non-enumerated crime must be dismissed. Often the enumerated crimes are included elements of many other crimes, but the other crimes are not family offenses.**

**The Supreme Court, in deciding whether or not to grant an order of protection, must limit the decision to the enumerated crimes or violations listed in ' 812 of the Family Court Act. A request for a temporary or final order of protection in the Supreme Court that fails to allege any of the above enumerated crimes is defective. \_**

**Where the party requesting an order of protection properly alleges but fails to establish by a fair preponderance of the evidence that the acts constitute a violation of any of the enumerated crimes or violations, the court may not grant an order of protection. However, where the party establishes by a fair preponderance of the evidence that the acts constitute a violation of the enumerated crimes or violations, the court will grant an order of protection.**