Should Respondents in Family Offense Cases Be Granted Credit for Time Served When Proceedings Are Protracted?

Though Family Court proceedings are deemed civil, fairness, justice and due process cry out for respondents to be granted credit for the time they are “temporarily” subjected to an order of protection pending a final determination. It is time that the Family Courts follow suit and grant such credit to respondents, especially when a temporary order of protection is issued and the hearing is protracted.

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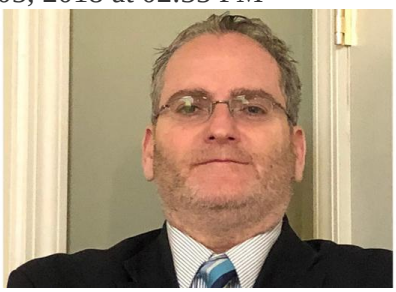

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Family Court Act §812(2)(b) states that a family offense proceeding is for the purpose of attempting to stop the violence, end the family disruption and obtain protection. Family Court Act §§115(e) and 812(1) provide that the family court and the criminal

courts have concurrent jurisdiction "for certain enumerated criminal offenses when committed by one family member against another" (*People v. Wood*, 95 N.Y.2d 509, 512 (2000); see also *Matter of Alfeo v Alfeo*, 306 A.D.2d 471 (2003); *Matter of Richardson v. Richardson*, 80 A.D.3d 32, 36-37 (2010)), and the court is vested with jurisdiction over family offenses occurring "between spouses or former spouses, or between parent and child or between members of the same family or household" (Family Ct. Act §812(1); see *Matter of Hon v. Tin Yat Chin*, 117 A.D.3d 946, 947 (2014); *Matter of Arnold v. Arnold*, 119 A.D.3d 938, 938-39 (2014); *Matter of Johnson v. Carter*, 122 A.D.3d 853, 853-54 (2014).

In New York, the right to assigned counsel for litigants in family law cases is grounded in constitutional principles of due process and equal protection. In fact, in 1975 the New York State Legislature codified the right to assigned counsel, like in criminal actions, in a range of family law proceedings involving "the infringement of fundamental interests and rights," including family offense proceedings. FCA §261, §262a(ii).

In the overwhelming majority of family offense cases, the Family Court issues temporary orders of protection during the pendency of the case (see FCA §828), and upon a finding or on consent the courts usually issue a two-year final order of protection (FCA §842).[1] The orders of protection typically range from a full stay away to a refrain from committing a family offense (FCA §842 (a) and (c)), inter alia. Accordingly, an order of protection, whether temporary or final, sets forth reasonable conditions of behavior often restricting one's liberty. For example, it is not uncommon for a respondent in family offense proceedings to be removed and ordered to stay away from the family home or even be subjected to a radius clause; additionally, it is not uncommon for a respondent's contact with his/her children to be limited and in some occasions suspended.

It is well settled that it is a person's interest in personal freedom that triggers the constitutional right to appointed counsel. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25 (1981). Loss of liberty is not solely confined to incarceration. The U.S. Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) enumerated a number of situations that would include a definition of liberty,

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

While physical liberty may not be at stake in the conventional sense of incarceration, a respondent in a family offense proceeding who is subjected to an order of protection is constrained of certain liberties, freedoms and autonomy as was contemplated by the Supreme Court. Accordingly, there is no doubt that being subjected to an order of protection is a form of loss of liberty.

Though family offense proceedings are meant to be conducted quickly or in summary fashion,[2] as they are deemed to being a "special proceeding," more often than not they linger around for many months on end and even years. With the reality that family offense actions are not dealt with summarily, the question arises as to what happens when a temporary order of protection is issued at the initial appearance and the fact-finding hearing concludes three years later. Under such a scenario, the respondent would be subjected to a temporary order of protection for three years pending a final decision, and once a finding is made, the respondent will be further subjected to another two-year order of protection pursuant to FCA §842. A respondent under this scenario will be subjected to an order of protection for five years or three years more than prescribed by FCA §842. Unfortunately, though fairness, substantial

justice and due process dictate that the respondent get credit for the three years the respondent was subjected to an order of protection while the case was pending, invariably credit is not given. The statute does not provide for a credit nor does it contemplate a scenario where it is within the court's discretion to grant a credit. The statute, however, does not specify that the court cannot grant a credit. Accordingly, it is time for fundamental justice beyond the confines of conventional considerations to prevail.

It is time for the family courts to start thinking outside of the box on this issue and look specifically at what is done in other proceedings where temporary orders are issued pending final resolution. Most notably these issues come up in criminal law. Often a defendant is remanded during the pendency of his case. As such, prior to disposition of the matter the defendant is in custody until the defendant is convicted. Pursuant to Penal Law §70.30 (3) a defendant is entitled to have all time spent in custody on a criminal charge credited to the sentence that the defendant receives upon conviction of that charge. This rule requires that a defendant's sentence of imprisonment be credited with all time spent in custody prior to the commencement of the sentence. Thus for example, if a defendant is arrested and jailed on May 1st and is convicted and sentenced to 90 days on June 15th, the defendant is entitled to credit for time served from May 1st through June 14th as jail time credit against his sentence.

Moreover, specifically in situations involving criminal orders of protection the Fourth Department routinely reverses the lower court where the lower court sets the expiration date of the order of protection without "taking into account [the] jail time credit to which [a] defendant is entitled." See *People v. Viehdeffer*, 288 A.D.2d 860 (4th Dep't 2001); *People v Mingo*, 38 A.D.3d 1270, 1271 (4th Dep't 2007); *People v. Lopez*, 151 A.D.3d 1649 (4th Dep't 2017); see also *People v. Cameron*, 87 A.D.3d 1366 (4th Dep't 2011) (county court erred in setting the expiration date of the order of protection from the date of sentencing rather than the date of conviction).

Accordingly, we see that the Appellate Division is very sensitive to correctly computing the timeframe of the order of protection and bestows significant consideration when it comes to setting the correct date on orders of protection. From these decisions it may be inferred that setting the correct date on orders of protection, even post conviction, is not only a matter of fairness but also a matter of fundamental interest in liberty.

Another analogy, in the civil realm, can be drawn to attorney disciplinary proceedings. In disciplinary actions, like in family offense proceedings, the respondent is subject to a temporary order pending a hearing and determination of the facts. Accordingly, in disciplinary actions the attorney is suspended from the practice of law pending a hearing and final decision. Once a final determination is made to suspend the attorney, the disciplinary period is computed from the date of the temporary suspension, not from the date of the final order. In *Matter of Jacoby*, 86 A.D.3d 330 (1st Dep't 2011), a final determination was made to suspend the attorney from the practice of law for 36 months on June 28, 2011 due to a domestic violence conviction. The court declared, however, that the suspension will be effective as of Oct. 6, 2009, the date the court issued the temporary suspension order.

Though Family Court proceedings are deemed civil, fairness, justice and due process cry out for respondents to be granted credit for the time they are "temporarily" subjected to an order of protection pending a final determination. It is time that the Family Courts follow suit and grant such credit to respondents, especially when a temporary order of protection is issued and the hearing is protracted. The practice of not granting respondents credit is not only unfair but potential a violation of due process. The only way to effectuate this change is by persistently requesting of the Family Courts to grant respondents such credit and when the application is denied to appeal the issue over and over.

Endnotes:

[1] There circumstances where the Family Court can issue a five-year order of protection where aggravating circumstances are found or where there is a violation of an existing order of protection.

[2] In *Matter of K.Z. v. P.M.*, 29 Misc.3d 572, 573 (2010), the Family Court deemed family offense proceedings to be special proceedings. Special proceedings are civil proceedings that are "a hybrid between an action and a motion" (3 Weinstein-Korn-Miller NY Civ. Prac. ¶401.03 at 4-8 (2d ed. 2005)), "in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment, but the procedure is similar to that on a motion." *Cruz v. T.D. Bank, N.A.*, 2014 WL 1569491 (S.D.N.Y. 2014).

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