

## [NY CLS Civ R § 52-b](#)

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***New York Consolidated Laws Service > Civil Rights Law (Arts. 1 — 9) > Article 5 Right of Privacy (§§ 50 — 52-b)***

### **§ 52-b. Private right of action for unlawful dissemination or publication of an intimate image. [Effective September 21, 2019]**

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1. Any person depicted in a still or video image, regardless of whether or not the original still or video image was consensually obtained, shall have a cause of action against an individual who, for the purpose of harassing, annoying or alarming such person, disseminated or published, or threatened to disseminate or publish, such still or video image, where such image:

- a. was taken when such person had a reasonable expectation that the image would remain private; and
- b. depicts (i) an unclothed or exposed intimate part of such person; or (ii) such person engaging in sexual conduct, as defined in subdivision ten of [section 130.00 of the penal law](#), with another person; and
- c. was disseminated or published, or threatened to be disseminated or published, without the consent of such person.

2. In any action commenced pursuant to subdivision one of this section, the finder of fact, in its discretion, may award injunctive relief, punitive damages, compensatory damages and reasonable court costs and attorney's fees.

3. This section shall not apply to the following:

- a. the reporting of unlawful conduct;
- b. dissemination or publication of an intimate still or video image made during lawful and common practices of law enforcement, legal proceedings or medical treatment;
- c. images involving voluntary exposure in a public or commercial setting; or
- d. dissemination or publication of an intimate still or video image made for a legitimate public purpose.

4. Any person depicted in a still or video image that depicts an unclothed or exposed intimate part of such person, or such person engaging in sexual conduct as defined in subdivision ten of [section 130.00 of the penal law](#) with another person, which is disseminated or published without the consent of such person and where such person had a reasonable expectation that the image would remain private, may maintain an action or special proceeding for a court order to require any website that is subject to personal jurisdiction under subdivision five of this section to permanently remove such still or video image; any such court order granted pursuant to this subdivision may direct removal only as to images that are reasonably within such website's control.

5.

a. Any website that hosts or transmits a still or video image, viewable in this state, taken under circumstances where the person depicted had a reasonable expectation that the image would remain private, which depicts:

- (i) an unclothed or exposed intimate part, as defined in [section 245.15 of the penal law](#), of a resident of this state; or

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(ii) a resident of this state engaging in sexual conduct as defined in subdivision ten of [section 130.00 of the penal law](#) with another person; and

b. Such still or video image is hosted or transmitted without the consent of such resident of this state, shall be subject to personal jurisdiction in a civil action in this state to the maximum extent permitted under the United States constitution and federal law.

6. A cause of action or special proceeding under this section shall be commenced the later of either:

a. three years after the dissemination or publication of an image; or

b. one year from the date a person discovers, or reasonably should have discovered, the dissemination or publication of such image.

7. Nothing herein shall be read to require a prior criminal complaint, prosecution or conviction to establish the elements of the cause of action provided for by this section.

8. The provisions of this section are in addition to, but shall not supersede, any other rights or remedies available in law or equity.

9. If any provision of this section or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

10. Nothing in this section shall be construed to limit, or to enlarge, the protections that 47 U.S.C Section 230 confers on an interactive computer service for content provided by another information content provider, as such terms are defined in 47 U.S.C. Section 230.

## History

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L 2019, ch 109, § 4, eff Sept 21, 2019.

Annotations

## Research References & Practice Aids

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### Hierarchy Notes:

[NY CLS Civ R, Art. 5](#)

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## [NY CLS CPL § 530.11](#)

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***New York Consolidated Laws Service > Criminal Procedure Law (Pts. ONE — THREE) > Part THREE Special Proceedings and Miscellaneous Procedures (Titles P — U) > Title P Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court—Recognizance, Bail and Commitment (Arts. 500 — 540) > Article 530 Orders of Recognizance or Bail With Respect to Defendants in Criminal Actions and Proceedings—When and by What Courts Authorized (§§ 530.10 — 530.80)***

### Notice

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 This section has more than one version with varying effective dates.

### **§ 530.11. Procedures for family offense matters [Effective September 21, 2019]**

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1.The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, unlawful dissemination or publication of an intimate image, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of [section 130.60 of the penal law](#), stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, strangulation in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of [section 135.60 of the penal law](#) between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to [section 30.00 of the penal law](#), then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this section, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" with respect to a proceeding in the criminal courts shall mean the following:

- (a) persons related by consanguinity or affinity;
- (b) persons legally married to one another;
- (c) persons formerly married to one another regardless of whether they still reside in the same household;
- (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and

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**(e)** persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”.

**2.** Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate probation officers, warrant officers, sheriffs, police officers, district attorneys or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this section before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

**(a)** That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

**(b)** That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end family disruption and obtain protection. That referrals for counseling, or counseling services, are available through probation for this purpose;

**(c)** That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

**(d)** That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;

**(e)** [Repealed]

**(f)** That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding.

**(g)** [Repealed]

**(h)** At such time as the complainant first appears before the court on a complaint or information, the court shall advise the complainant that the complainant may: continue with the proceeding in criminal court; or have the allegations contained therein heard in a family court proceeding; or proceed concurrently in both criminal and family court. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section;

**(i)** Nothing herein shall be deemed to limit or restrict complainant's rights to proceed directly and without court referral in either a criminal or family court, or both, as provided for in section one hundred fifteen of the family court act and section 100.07 of this chapter;

**(j)** [Repealed]

**2-a.** Upon the filing of an accusatory instrument charging a crime or violation described in subdivision one of this section between members of the same family or household, as such terms are defined in this section, or as soon as the complainant first appears before the court, whichever is sooner, the court shall advise the complainant of the right to proceed in both the criminal and family courts, pursuant to section 100.07 of this chapter.

**3.** Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

**4.** When a person is arrested for an alleged family offense or an alleged violation of an order of protection or temporary order of protection or arrested pursuant to a warrant issued by the supreme or family court, and the supreme or family court, as applicable, is not in session, such person shall be brought before a local criminal

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court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of this chapter. Such local criminal court may issue any order authorized under subdivision eleven of section 530.12 of this article, section one hundred fifty-four-d or one hundred fifty-five of the family court act or subdivision three-b of section two hundred forty or subdivision two-a of section two hundred fifty-two of the domestic relations law, in addition to discharging other arraignment responsibilities as set forth in this chapter. In making such order, the local criminal court shall 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 such alleged family offense or violation allegation, shall make such matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

**5.**Filing and enforcement of out-of-state orders of protection. A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

**(a)**An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

**(i)**the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

**(ii)**the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

**(iii)**in the case of orders of protection or temporary orders of protection issued against both a petitioner, plaintiff or complainant and respondent or defendant, the order or portion thereof sought to be enforced was supported by: (A) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (B) a judicial finding that the requesting party is entitled to the issuance of the order which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had given knowing, intelligent and voluntary consent to its issuance.

**(b)**Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

**6.**Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be prepared in Spanish and English and if necessary, shall be delivered orally, and shall include but not be limited to the following statement:

If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects

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and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer's jurisdiction, including but not limited to a domestic violence program, a family member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime.

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law.

Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the criminal court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

**7.** Rules of court regarding concurrent jurisdiction. The chief administrator of the courts, pursuant to paragraph (e) of subdivision two of section two hundred twelve of the judiciary law, shall promulgate rules to facilitate record sharing and other communication between the criminal and family courts, subject to applicable provisions of this chapter and the family court act pertaining to the confidentiality, expungement and sealing of records, when such courts exercise concurrent jurisdiction over family offense proceedings.

## History

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Add, L 1980, ch 530, § 15; amd, L 1981, ch 416, § 20; L 1983, ch 925, § 2, eff Aug 8, 1983; L 1984, ch 948, § 13, eff Nov 1, 1984 and applicable to any action and proceeding commenced on or after Nov 1, 1984; L 1986, ch 847, § 2; [L 1990, ch 667, § 1](#); [L 1992, ch 345, § 6](#); [L 1994, ch 222, §§ 34–39](#), eff Jan 1, 1995 (see 1994 note below); [L 1994, ch 224, § 7](#), eff Jan 1, 1995; [L 1995, ch 349, § 5](#), eff July 28, 1995; [L 1995, ch 440, § 2](#), eff Nov 1, 1995 (see

1995 note below); [L 1997, ch 186, §§ 7–9](#), eff July 8, 1997; [L 1998, ch 597, § 11](#), eff Dec 22, 1998; [L 1999, ch 125, §§ 1, 2](#), eff June 29, 1999; [L 1999, ch 635, § 3](#), eff Dec 1, 1999 (see 1999 note below); [L 2007, ch 541, § 2](#), eff Nov 13, 2007; [L 2008, ch 326, § 11](#), eff July 21, 2008 (see 2008 note below); [L 2009, ch 476, § 3](#), eff Dec 15, 2009; [L 2010, ch 405, § 11](#), eff Nov 11, 2010; [L 2013, ch 526, § 10](#), eff Dec 18, 2013; [L 2018, ch 55, § 4 \(Part NN\)](#), eff Nov 1, 2018; [L 2019, ch 109, § 2](#), eff Sept 21, 2019.

Annotations

## Notes

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### Prior Law:

Former § 530.11, add, L 1977, ch 449, § 11; amd, L 1978, ch 628, §§ 10, 11, L 1978, ch 629, § 1; renumbered § 530.12, L 1980, ch 530, § 15, eff June 24, 1980.

### Editor's Notes

[Laws 1994, ch 222, §§ 1, 2](#), eff Jan 1, 1995, provide as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath.

Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.

The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.

No age group is immune from domestic violence. Too many of New York's elderly residents have become the victims of their own family or household members, leaving these senior citizens without hope or meaningful legal redress.

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affected family members. Dedicated individuals, shelter programs and advocacy organizations have been working successfully for years in order to provide refuge, counseling, legal relief and protection to victims of family violence. These efforts have also played a key role in bringing this issue into the open by helping individuals to survive domestic violence and work toward its prevention.

Fortunately, with this heightened awareness has come a considerable shift in the public understanding of, and perspective on, domestic violence. In recent years, for example, what was once largely considered a private matter has come to be more correctly regarded as criminal behavior.

The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. The integrity of New York's families from its youngest to its oldest members is undermined by a permissive or casual attitude towards violence between household members. The legislature further finds and declares that in circumstances where domestic violence continues in violation of lawful court orders, action under the criminal law

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must remain in place as a necessary and available option. Notwithstanding the evolution of the law of domestic violence in New York, death and serious physical injury by and between family members continues unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.

Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for New York's families consistent with the interests of fairness and substantial justice.

§ 2. This act shall be known and may be cited as "the family protection and domestic violence intervention act of 1994."

Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.

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The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. The integrity of New York's families from its youngest to its oldest members is undermined by a permissive or casual attitude towards violence between household members. The legislature further finds and declares that in circumstances where domestic violence continues in violation of lawful court orders, action under the criminal law must remain in place as a necessary and available option. Notwithstanding the evolution of the law of domestic violence in New York, death and serious physical injury by and between family members continues unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.

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§ 2. This act shall be known and may be cited as "the family protection and domestic violence intervention act of 1994."

[Laws 1995, ch 440, § 3](#), eff Nov 1, 1995, provides as follows:

3. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, provided, however, that it shall apply solely to family offenses committed on and after such date.

[Laws 1999, ch 635, §§ 1, 2 and 17](#), eff Dec 1, 1999, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the “clinic access and anti-stalking act of 1999.”

§ 2. Legislative intent. The legislature finds and declares that criminal stalking behavior, including threatening, violent or other criminal conduct has become more prevalent in New York state in recent years. The unfortunate reality is that stalking victims have been intolerably forced to live in fear of their stalkers. Stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. Current law does not adequately recognize the damage to public order and individual safety caused by these offenders. Therefore, our laws must be strengthened to provide clear recognition of the dangerousness of stalking.

The high correlation between stalking behavior and the infliction of physical violence or sexual assault is demonstrated by two federal studies. A recent FBI crime report shows that thirty percent of all murdered women are killed by their husbands or boyfriends who stalked them. A November 1997 National Institute of Justice study of stalking found that eighty percent of stalking victims who were stalked by their current or former intimate partner had, at some point in their relationship, been physically assaulted by their partner and thirty-one percent had been sexually assaulted by their partner. In recognition of the real and substantial risk of harm associated with stalking behavior, 49 states have enacted anti-stalking laws.

In 1992, the Legislature took an important step towards recognizing that stalking requires stronger enforcement measures by amending New York’s menacing and harassment sections to include stalking behavior within the definition of these crimes. With this act, New York creates the separate crime of stalking. This act will protect victims by providing real and effective sanctions for stalking conduct even at its earliest stages. It will also provide increased penalties for repeat offenders, for those offenders who stalk children, for those offenders who possess weapons when stalking, and for those offenders who commit stalking in violation of an order of protection.

The legislature also finds that criminal acts involving violence and intolerance at health care facilities and places of religious worship have become more prevalent in recent years. Medical clinics, physicians’ offices and other facilities throughout the state have become targets in a campaign of obstruction and terrorism aimed at closing the facilities and intimidating those who seek to obtain or provide reproductive health services. In addition, places of religious worship have regrettably been targets of vandals thereby threatening these havens of peaceful prayer and meditation. Despite the passage of a 1994 federal law that makes it a federal crime for a person to deny access to or vandalize health care facilities and places of religious worship, state legislation is necessary to supplement federal law by empowering state and local officials to assist in combating violence and acts of vandalism at health care facilities and places of religious worship. It is therefore the intent of the legislature to provide state criminal penalties against anyone who, by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with another person or attempts to injure, intimidate or interfere with another person, because such other person was or is seeking to obtain or provide or assist in the provision of reproductive health services or exercise the right of religious freedom.

§ 17. Nothing contained in this act shall be construed to eliminate, limit or impair any sanction or remedy not provided by the provisions of this act which is otherwise available to punish or prohibit the criminal interference with health care services or religious worship.

[Laws 2008, ch 326, § 16](#), eff July 21, 2008, provides as follows:

§ 16. This act shall take effect immediately and shall apply to orders of protection pending or entered on or after such effective date; provided, that:

(a) section thirteen of this act shall expire and be deemed repealed September 1, 2010; and

(b) the amendments to paragraph (n) of subdivision 2 of [section 212 of the judiciary law](#), made by section thirteen of this act, shall not affect the expiration and repeal of such paragraph and shall be deemed repealed therewith, if section thirteen of this act has not been repealed prior thereto. (Amd, [L 2009, ch 17, § 2](#), eff April 21, 2009.).

**Laws 2018, ch 55, § 10 (Part NN)**, eff November 1, 2018, provides:

§ 10. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

**Laws 2019, ch 59, § 25 (Part JJJ)**, eff January 1, 2020, provides:

§ 25 (Part JJJ). This act shall take effect on January 1, 2020.

### **1998 Legislative Program of the New York State Judiciary:**

As a result of the “Violence Against Women Act”, which was part of the Federal “Violent Crime Control and Law Enforcement Act of 1994”, all state courts are required to honor and enforce orders of protection, both civil and criminal, issued by any other state, tribal or territorial court so long as certain due process requirements are met. While this Federal mandate was self-executing, and pre-emptive of contrary state laws, it nonetheless remains necessary for New York to join the more than 30 states that already have conformed the letter of their statutes to this mandate. This conformity should greatly enhance local awareness of the mandate and, most importantly, increase the likelihood of effective implementation.

We will present the Legislature with the necessary legislation. Our proposal will amend the Criminal Procedure law, the Domestic Relations Law and the Family Court Act to delineate the Federal requirements, clarify the applicability of mandatory arrest, menacing and criminal contempt provisions to cases involving out-of-state orders, and authorize entry of out-of-state orders of protection onto the statewide automated registry of orders of protection and family offense warrants.

### **1997 Recommendations of Family Court Advisory and Rules Committee:**

The powers exercised by local criminal courts when Family or Supreme Courts are not in session have a profound impact upon all concerned in cases of family violence, since the courts initial intervention often significantly influences later stages of these matters. In order to remedy the continuing ambiguity as to the scope of these powers and the procedures that must be followed, the Family Court Advisory and Rules Committee is presenting a revised version of an extremely important proposal that it has submitted for the past two years.

On January 1, 1996, the mandatory arrest provision of the Family Protection and Domestic Violence Intervention Act of 1994 became effective [Laws of 1994, ch. 222, 224]. That law, [Criminal Procedure Law § 140.10\(4\)\(b\)](#), was amended to require arrests for violations of “stay away” orders of protection issued by Supreme and Family Courts, pursuant to [Domestic Relations Law §§ 240, 252](#) and the family offense, child support, paternity and custody articles of the Family Court Act, as well orders of protection issued by criminal courts, pursuant to *Section 530.12 of the Criminal Procedure Law*. Other enactments in 1996 expanded the range of violations constituting felony offenses; accordingly, violations of these orders have also carried significantly greater criminal penalties. [Laws of 1996, ch. 353; [Penal Law §§ 120.14, 215.51](#)].

The combined effect of the mandatory arrest and enhanced penalty provisions contained in the Family Protection and Domestic Violence Intervention Act of 1994 [Laws of 1994, ch. 222, 224] will result in a significant number of arrests of individuals against whom orders of protection have been issued by Supreme and Family Courts. Because many of these arrests occur outside of the normal working hours of these courts, major challenges have been presented to local criminal courts, including the district, city, criminal and approximately 2,300 town and village courts throughout New York State. It is crucial that these courts have clearly delineated authority and responsibilities and that cases flow smoothly between the courts as necessary.

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In many cases, notwithstanding the arrest of respondent or defendant, the petitioner or person protected by the order of protection may wish to pursue the order of protection violation as a civil contempt in the court that issued the original order, either in addition to, or in lieu of, a criminal prosecution. Such concurrent jurisdiction, traditionally permitted in matrimonial cases, has been authorized in Family Court family offense cases since January 1, 1995. [Family Court Act §§ 115\(e\), 846\(b\), 847](#); [Criminal Procedure Law §§ 100.07, 530.11\(2\)\(g\)–\(j\)](#). Local criminal courts, therefore, increasingly have been faced with cases in which an alleged violator, arrested at night or on a weekend, has been brought to the criminal court pending a hearing in Supreme or Family Court.

Additionally, the 1994 domestic violence statute requires law enforcement agents, hospital emergency rooms, district attorneys and courts to provide bilingual form notices to domestic violence victims advising them that, during hours when the Family Court is not in session, they “may seek immediate assistance from the criminal court in obtaining an order of protection.” [Family Court Act § 812\(5\)](#); [Criminal Procedure Law § 530.11\(6\)](#). Both the Family Court Act and Criminal Procedure Law authorize local criminal courts to issue or modify temporary orders of protection when Family Courts are not in session. [FCA § 821\(4\)](#); [CPL §§ 530.11\(2\)\(j\), 530.12\(3\)](#). Thus, local criminal courts are required to respond to requests for issuance or modification of Family Court orders of protection hours when Family Courts are closed.

In meeting these myriad challenges, local criminal courts face a patchwork of confusing statutory provisions, containing many apparent inconsistencies and ambiguities. The Committee, therefore, has developed a legislative proposal to clarify the authority of, and procedures to be followed by, local criminal courts in addressing matrimonial and Family Court cases at times when the Supreme or Family Courts are closed. The proposal sets forth the powers to be exercised by criminal courts with respect to custody, release, issuance of securing orders and scheduling of proceedings for individuals arrested either for violations of orders of protection or upon warrants issued in connection with such orders. Further, it clarifies the circumstances under which local criminal courts are authorized to issue or modify orders of protection in Family Court cases, as well as the procedures to be followed in such cases.

First, the proposal provides uniformity to the provisions regarding issuance and modification of Family Court orders of protection.\* [Family Court Act § 154-b](#) has been split into three sections (§§ 154-b, 154-c and 154-d). The amended sections clarify that a Family Court or, if the Family Court is not in session, a local criminal court, is authorized to modify an order of protection or temporary order of protection, as well as to issue a temporary order of protection, on an *ex parte* basis upon good cause shown and upon the consent of the petitioner. In the absence of a Family Court petition, such issuance or modification can be predicated upon the filing of a simple, generic, sworn affidavit alleging facts in support of the application. A local criminal court issuing or modifying an order must immediately transmit a copy to the Family Court, which may be an order must immediately transmit a copy to the Family Court, which may be accomplished via facsimile, followed by mailing of the original. The court must schedule the proceeding to be heard in Family Court on the next day the latter court is in session, unless good cause justifies a later appearance, but is no event in excess of four days later. Similar amendments are made to [Family Court Act § 821\(4\)](#) and [Criminal Procedure Law §§ 530.11\(2\)\(g\), 530.12\(3\)](#).

Second, the proposal clarifies the authority of local criminal courts to take necessary action with respect to adults arrested as a result of violations of Family Court temporary or final protective orders or warrants issued in connection with such orders — commitment of the arrested person to a sheriff’s custody and determination of bail or parole pending a hearing in Family Court. [Family Court Act § 155\(1\)](#). Since Family Court documents are often not available to local criminal courts, the proposal permits admission of a record of the warrant or protective order in the statewide computerized order of protection and warrant registry as evidence of the filing of an accusatory instrument or petition. In addition to scheduling further criminal proceedings, if any, the criminal courts are directed to schedule the proceeding in Family Court on the next day the court is in session. Similar provisions are added to

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\* The proposal does not alter the local criminal courts’ lack of authority to issue or modify orders of protection in matrimonial cases, but does add a reference regarding the possibility of criminal enforcement of such orders to [Domestic Relations Law § 252\(1\)](#).

[Domestic Relations Law §§ 240\(3\)](#) and [252](#) with respect to arrests in connection with protective orders and warrants matrimonial proceedings. Corresponding amendments to *Criminal Procedure Law § 530.11(2)(g)* are also made.

The scheduling directions described above are vitally important for family offense proceedings arising under Article 8 of the Family Court Act, since a respondent in custody under that article has a right to a preliminary hearing to determine whether “sufficient cause exists to keep respondent in custody” no later than 120 hours after arrest or, if a weekend or holiday intervenes, no later than 144 hours after the arrest. If “sufficient cause” is not found, or if a hearing is not held on a timely basis, the respondent must be “immediately released” on his or her own recognizance. [Family Court Act § 821-a\(4\)](#).

Implementation of the Family Protection and Domestic Violence Intervention Act of 1994 has presented significant challenges to the several thousand local criminal court judges statewide, who are often the first point of contact with the judicial system for both domestic violence victims and offenders. Enactment of this measure will add clarity and uniformity to the provisions governing the roles and powers of these courts, thus better equipping them to fulfill these important functions.

### **1995 Recommendations of Family Court Advisory and Rules Committee:**

#### **sub 1: .**

The Family Protection and Domestic Violence Intervention Act of 1994 [Laws of 1994, ch. 222] amended the definition of “family offense” contained in both *Family Court Act § 812(1)* and *Criminal Procedure Law § 530.11(1)* to include the “stalking” crimes, harassment in the first and second degrees and menacing in the second degree, which had been created by the Legislature in 1992. However, the legislation, perhaps inadvertently, omitted telephone and mail harassment, among the most common forms of stalking in the context of family violence. The Family Court Advisory and Rules Committee is submitting a legislative proposal to remedy that omission.

These forms of harassment, together with physical harassment motivated by ethnic or religious bias, are included in the definition of aggravated harassment in the second degree, a Class A misdemeanor. *Penal Law § 240.30* provides that a person is guilty of the crime “when, with intent to harass, annoy, threaten or alarm another person,” he or she.

1. Communicates, or causes a communication to be initiated by mechanical or electronics means or otherwise, with a person, anonymously or otherwise, by telephone, mail or other written form of communication, in a manner likely to cause annoyance or alarm; or.
2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or.
3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of the person.

In the absence of inclusion in the Family Court Act and Criminal Procedure Law definitions of “family offenses,” aggravated harassment can be addressed solely as a criminal offense and is not subject to the concurrent jurisdiction afforded other forms of harassment by family members or the more serious consequences contained in the new domestic violence statute. In contrast, other family offenses committed by adult family members, including harassment in the first and second degrees, menacing in the second and third degrees, reckless endangerment, assault in the second or third degree or an attempted assault, may be heard in either or both family and criminal courts, in accordance with [Family Court Act § 115\(e\)](#) and [Criminal Procedure Law § 100.07](#), and subject the offender to mandatory arrest and enhanced penalties.

Characterization of aggravated harassment as a family offense would have significant implications for the breadth of relief available to victims, the likelihood of arrest and prosecution, the gravity of the penalties to which offenders are subjected and the enforceability of orders of protection issued. Family offenses, if prosecuted criminally, are subject to one-year, rather than six-month, adjournments in contemplation of dismissal [[CPL § 170.55\(2\)](#)].

Violations of “stay away” provisions of orders of protection in family offense proceedings subject offenders to prosecution for criminal contempt in the first degree, an E felony, even if no injury to person or damage to property is caused [[Penal Law § 215.51\(c\)](#)].<sup>1</sup> Effective July 1, 1995 violations of orders of protection issued in family offense proceedings subject offenders to mandatory arrest; misdemeanor family offenses subject offenders to mandatory arrest “unless the victim requests otherwise.” [[Criminal Procedure Law § 140.10\(4\)](#)]. Moreover, orders of protection and temporary orders of protection with respect to cases charging these crimes may be issued pursuant to [Family Court Act §§ 828, 842](#) and [Criminal Procedure Law § 530.12](#), which permit a broader range of conditions than non-family offense orders issued pursuant to [CPL § 530.13](#). Significantly, temporary and final orders of protection issued in family offense proceedings are also subject to the “full faith and credit” provisions of the Violence Against Women Act, a component of the federal crime bill [[28 U.S.C. § 2265\(c\)](#); Public Law 103-322], thus permitting enforcement out of state of orders issued by New York State courts and vice versa.

Additionally, inclusion of aggravated harassment as a family offense would permit a more integrated response in that such forms of harassment are often points in a progressively more serious cycle of family violence. Following ejection from the home by virtue of a temporary order of protection, separation or divorce, offenders often resort to threats communicated by mail, telephone or other electronic means; if not addressed rigorously, these forms of behavior may quickly escalate into actual violence. If abuse in other forms is already the subject of a Family Court proceeding between the parties, moreover, it may be appropriate to allow the victim the option of continuing to address the offender’s behavior in the Family Court, rather than limiting the choice to criminal court.

For these reasons, the Family Court Advisory and Rules Committee proposes that aggravated harassment in the second degree be added to the definition of “family offense” contained in both [Family Court Act § 812\(1\)](#) and [Criminal Procedure Law § 530.11\(1\)](#). The Committee’s bill also cures an omission in [Criminal Procedure Law § 530.11\(1\)](#) by adding “former spouses” to the parties subject to a family offense proceeding involving attempted assault. “Former spouses” are included in the definition contained in [Family Court Act § 812\(1\)](#) and, with respect to all other family offenses, [Criminal Procedure Law § 530.11\(1\)](#). Since the definitions contained in the two statutes are otherwise identical – and, indeed, must be identical for the concept of concurrent jurisdiction to have meaning – the disparity should be eliminated.

**sub 5: .**

In preparing for the effective date of the Family Protection and Domestic Violence Intervention Act of 1994 [Laws of 1994, ch. 222, 224], the Family Court Advisory and rules Committee and Family Protection Legislation Implementation Group have identified several provisions in the Act requiring amendments of a technical nature. The Committee, in collaboration with the Implementation Group, has prepared a legislative proposal clarifying ambiguous terms in the Act and renumbering various provisions of the act to reflect a better logical sequence and to fulfill the legislative intent regarding the scope of the Act’s provisions.

First, the proposal amends the Act to ensure full applicability of the Act to matrimonial proceedings in light of the clear legislative intent to invoke heightened consequences in such cases and to include such cases in the statewide automated order of protection and warrant registry. Under the terms of the Act, violations of orders of protection issued in matrimonial proceedings trigger mandatory arrest in accordance with [Criminal Procedure Law § 140.10\(4\)\(b\)](#), as well as potential criminal prosecutions for criminal contempt in the first degree, a Class E felony, and menacing in the second degree, a Class A misdemeanor, pursuant to [Penal Law § 120.14\(3\)](#), 250.51. Yet, while clearly authorizing concurrent jurisdiction for prosecution of violations in both criminal and matrimonial courts, the statute does not direct the Chief Administrator of the Courts to promulgate rules regarding record-sharing involving matrimonial records and, concomitantly, does not include the Domestic Relations Law among those laws controlling the rules. Nor does the Act require the Chief Administrator to promulgate uniform matrimonial orders of protection forms, notwithstanding the fact that such orders must be entered into, and thus must be compatible with,

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<sup>1</sup> Violations of orders of protection issued in non-family offense cases, pursuant to [Criminal Procedure Law § 530.13](#), can be prosecuted as criminal contempt in the first degree only if the offender intentionally or recklessly caused injury to the victim or damage to the victim’s property in excess of \$250 [[Penal Law §§ 215.51\(b\), \(d\)](#)].

the statewide automated order of protection and warrant registry established in accordance with [Executive Law § 221-a](#). The proposal, therefore, prescribes the promulgation of record-sharing rules and the development of uniform forms with respect to orders of protection in matrimonial proceedings.

Second, the proposal clarifies the terminology utilized with respect to warrants in order to further the clear legislative intent to include all criminal court and Family Court warrants issued in connection with family offense orders of protection in the statewide automated registry. The proposal amends [Executive Law § 221-a](#) to require inclusion of all warrants, not simply arrest warrants issued pursuant to [Family Court Act §§ 153, 827](#), and to require inclusion of all criminal arrest and bench warrants, as defined in [Criminal Procedure Law §§ 1.20\(28\)](#), (29) and (30), in the statewide automated registry, insofar as all such criminal and family court warrants are issued in connection with orders of protection or violations thereof.

Finally, the proposed bill repeals *Criminal Procedure Law § 530.11(5)*, which has been rendered obsolete by virtue of the enactment of the new law. That provision required the Chief Administrator of the Courts to promulgate uniform forms to provide notice to victims of domestic violence, a provision superseded by the requirement for the Division of Criminal Justice Services to promulgate the notice form, as well as notice of the filing of an accusatory instrument, a provision repealed as part of the Family Protection and Domestic Violence Intervention Act of 1994. Concomitantly, the bill renumbers newly-enacted sections of the Act, *Criminal Procedure Law §§ 530.11(2)(g)-(j)*, as §§ 530.11(3)-(6), since these provisions do not pertain to notice, which is the subject of § 530.11(2); *Criminal Procedure Law §§ 530.11(3) and (6)* are renumbered §§ 530.11(7) and (8), respectively.

#### **1998 Recommendations of the Family Court Advisory and Rules Committee:**

In August, 1994, President Clinton signed the “Violent Crime Control and Law Enforcement Act of 1994” [Public Law 103-322], which included the comprehensive “Violence Against Women Act.” See Public Law 103-322, Title IV. Significant among its provisions, the Violence Against Women Act contains a “full faith and credit” requirement designed to promote rigorous interstate enforcement of orders of protection in domestic violence cases. See [18 U.S.C. §§ 2265, 2266](#). All courts within the United States, including state, tribal and territorial courts, must honor and enforce orders of protection, both civil and criminal, issued by all other courts so long as certain due process requirements have been met.

In order to meet the significant challenges posed in implementing the federal mandate on the state level, the Family Court Advisory and Rules Committee is submitting legislation incorporating the federal requirements into New York State law. While the federal provision is self-executing and indeed preempts State law, it has generally been recognized that incorporation of the federal requirements into State law would greatly enhance local awareness and the likelihood of effective enforcement. In fact, over thirty states have already enacted enabling legislation in order to promote implementation of the “full faith and credit” mandate. The Committee’s proposal delineates the federal requirements, clarifies the applicability of mandatory arrest, menacing and criminal contempt provisions to cases involving out-of-state orders and specifically authorizes the entry of out-of-state orders of protection onto the statewide automated registry of orders of protection and related warrants. <sup>1</sup> Perhaps most importantly, the proposal contains the clear statement that out-of-state orders of protection that conform to the federal due process requirements must be afforded “full faith and credit” and enforced as if they had been issued by a court of competent jurisdiction within New York State. The federal due process requirements include the following:

—The court that issued the order of protection must have had jurisdiction over the person and over the subject matter of the case.

—Reasonable notice and an opportunity to be heard must have been provided to the person against whom the order was issued “sufficient to protect that person’s right to due process.”

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<sup>1</sup> While out-of-state orders have been entered onto the registry even in the absence of explicit authorization, only a small number of such orders thus far have been presented for entry. A specific authorization would be to encourage entry a greater number of such orders, and would facilitate their enforcement.

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—In the case of an *ex parte* order of protection, reasonable notice and an opportunity to be heard must be scheduled to be provided within the time frame required by the law of the issuing court's jurisdiction, "and in any event within a reasonable time after the order is issued sufficient to protect the person's due process rights." A violation of an out-of-state order issued *ex parte* thus is entitled to enforcement even if the return date for the hearing on the order has not yet occurred so long as the order has been served and the return date has been scheduled within the state's time frame or within a "reasonable" period.

—In the case of "mutual orders of protection," the order sought to be enforced must itself be supported by a petition, cross-petition, complaint or other written pleading, as well as specific judicial findings that the person seeking the order was entitled to the order.

The Committee's proposal sets forth each of these federally-required provisions in the Criminal Procedure Law, Domestic Relations Law and Family Court Act, and underscores the obligation of courts with jurisdiction over criminal, matrimonial and Family Court proceedings to implement the federal mandates in appropriate circumstances. Further, in order to promote entry of the orders into the statewide automated registry of orders of protection and related warrants, the proposal permits individuals to file out-of-state orders with the clerk of a court without fee.<sup>2</sup> The clerk of court would be required to transmit the order to the registry, with the important caveat that such filing and entry would not be a prerequisite to enforcement of an out-of-state order.

Significantly, the proposal makes clear that the mandatory arrest provisions [ [Criminal Procedure Law § 140.10](#)] contained in the "Family Protection and Domestic Violence Intervention Act of 1994," would apply to violations of out-of-state orders of protection meeting the federal requirements. Similarly, the enhanced penalty provisions for the offenses of criminal contempt and menacing involving violation of orders of protection would be amended to include violations of out-of-state orders of protection. See Laws of 1996, Chapter 353; Laws of 1994, ch. 222, 224.

### **2007 Recommendations of the Family Court Advisory and Rules Committee:**

Experience with the concurrent jurisdiction provisions of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch 222] has revealed a significant gap in the enumerated family offenses. With regularity, the courts handling family offense cases are faced with situations in which an offender is alleged to have vandalized or destroyed property that is either owned by the victim or jointly owned by both parties. Yet criminal mischief is not enumerated as a family offense that may be prosecuted in Family Court, and courts are sharply divided regarding whether it may be prosecuted as a crime if the property is jointly owned or owned in the offender's name. The Family Court Advisory and Rules Committee, therefore, proposes that criminal mischief involving property either owned by the victim (the petitioner in Family Court or complainant in criminal proceedings) or owned by both parties be added to the concurrent jurisdiction provisions in *section 812 of the Family Court Act* and *sections 530.11 of the Criminal Procedure Law*.

In permitting an offender to be prosecuted for a family offense for destroying property, notwithstanding the fact that he or she may have an ownership interest, this measure would bring New York State in line with the law nationally. In the only appellate holding in New York on the issue to date, in *1997, the Appellate Division, Second Department, in People v. Person*, 239 A.D.2d 612, 658 N.Y.S.2d 372 (2d Dept., 1977), a.p. denied 91 N.Y.2d 878 (1997), reversed a criminal mischief conviction on the ground that the defendant had an equitable interest in the damaged property. While following the holding in *Person*, the Supreme Court, Kings County, in *People v. Khyfcts*, 174 Misc. 2d 516, 522, 665 N.Y.S. 2d 802, 806 (Sup. Ct., Kings Co., 1997), cited contrary cases in Arizona, Illinois, California, Iowa and Washington. The Court called upon the Legislature to bring New York law "in tune with the spirit of the recent federal and state domestic violence legislation" by permitting criminal mischief to be charged regarding "marital or jointly owned property." Further, also citing contrary cases nationally, the *Criminal Court, Bronx County, in People v. Brown*, 185 Misc. 2d 326, 334, 711 N.Y.S.2d 707, 714 (Crim. Ct., Bronx Co., 2000), criticized *Person* as wrongly decided" on the ground that the proscription against charging a person with

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<sup>2</sup> The proposal makes clear that the registration requirements contained in the "Uniform Enforcement Foreign Judgments Act," Article 54 of the Civil Practice Law and Rules, would not be applicable to orders of protection.

larceny for stealing jointly owned property [ [Penal Law § 155.00\(5\)](#)] was improperly applied to the criminal mischief statute. The holding in *Brown* was recently bolstered by the statement by the [Court of Appeals, in \*People v. Hernandez\*, 98 N.Y.2d 175, 181 \(2002\)](#), that:

In instances where a word is not defined in a Penal Law provision under review, we have cautioned against reliance upon a definition of that term found in another Penal law statute absent legislative authority for doing so.

That the prohibition against prosecuting offenders for vandalism of jointly owned property in *Person* is a minority rule that fails to consider the unique circumstances present in domestic violence cases is clear from reference to authorities nationally. See “Malicious Mischief,” 52 Am Jur 2d § [1 \(May 2006\)](#). In [People v. Wallace](#), [123 Cal. App.4th 144, 19 Cal.Rptr.3d 790 \(Ct.App., 5th Dist., Cal., 2004\)](#), the California Court of Appeals, Fifth District, “embrace[d] the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest . . . .” The Court in *Wallace*, citing case from Wisconsin, Iowa, Illinois, Arizona, Washington, Alaska, Georgia and the District of Columbia, specifically rejected the holding in [Person](#). Similarly, the [District of Columbia Court of Appeals, in \*Jackson v. United States\*, 819 A.2d 963 \(D.C.App., 2003\)](#), noted that *Person* “appears to be an anomaly and has been widely criticized, even in New York [citing [Brown](#), *supra*]”. Commentators in New York have likewise advocated for the law in New York to be changed to permit such prosecutions. See, e.g., V. Lutz & C. Bonomolo, My Husband Just Trashed Our Home: What Do You Mean That’s Not a Crime?, [48 S.C. Law Rev 641 \(Spring, 1997\)](#); J Leventhal, Spousal Rights or Spousal Crimes: Where and When are the Line to be Drawn?, 2006 [Utha Law Rev 351 \(2006\)](#).

Including criminal mischief involving damage to property owned or jointly owned by the petitioner or complainant in the list of crimes for which courts of family and criminal jurisdiction may exercise concurrent jurisdiction, the Committee’s measure will enhance the effectiveness of New York’s domestic violence statutes. Recognizing that damage to property is often a means that an abuser uses to exercise power and control over his or her victim, \* the addition of criminal mischief to the enumerated family offenses will further fulfillment of the Legislature’s finding, in enacting the *Family Protection Domestic Violence Intervention Act*, that “[t]he victims of family offenses must be entitled to the fullest protections of the civil and criminal laws.” Laws of 1994, ch 222, § 1.

#### **Amendment Notes:**

**2013.** Chapter 526, § 10 amended:

Sub 1, opening par by deleting at fig 1 “or” and adding the matter in italics.

**2008.** Chapter 326, § 11 amended:

Sub 1, par (c) by deleting at fig 1 “and” and adding the matter in italics.

Sub 1, par (d) by deleting at fig 1 a period.

By adding sub 1, par (e).

**1999.** Chapter 125, § 2 amended:

Sub 2, par (h) by adding the matter in italics.

**1998.** Chapter 597, § 11 amended:

By adding sub 5.

**1997.** Chapter 186, § 7 amended:

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\* See, e.g., C. Klein & L. Orinff, “Providing Legal Protection for battered Women: An Analysis of State Statutes and Case Law,” [21 Hofstra L. Rev. 801, 873 \(1993\)](#); Leventhal, *supra*; Lutz & Bonomolo, *supra*,

By repealing sub 2, par (g).

**1997.** Chapter 186, § 8 amended:

By adding sub 4.

**1997.** Chapter 186, § 9 amended:

By repealing sub 2, par (j).

**The 2018 amendment by ch 55, § 4 (Part NN)**, added “or coercion in the third degree” in the first sentence of the undesignated paragraph of 1; and made a related change.

**The 2019 amendment by ch 59, § 12 (Part JJJ)**, substituted “consider de novo the recommendation and securing order” for “consider the bail recommendation” in the second to the last sentence of 4.

## Commentary

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### EXPERT ANALYSES:

Spiros A. Tsimbinos, Esq.

For many years, the legal system has been torn between whether offenses occurring between family members should be treated in the regular criminal courts or in the Family Court where efforts at family counseling and other supportive measures could be utilized to preserve the family structure.

Effective in June of 1980, the Legislature passed § 530.11, specifically outlining the procedures to be followed for family offenses. Over the last sixteen years, the original statute has undergone various amendments and modifications with the most recent amendment being effective November 1, 1995.

With respect to the question of which court has jurisdiction of family offense matters, subdivision one states that an action based on a family related offense with respect to certain designated crimes enumerated in the statute may be brought in criminal court, Family Court or both and may be adjudicated in either or both as long as the appropriate procedures are followed. Where the defendant is an infant, such adjudication is prohibited in the criminal courts by [Penal Law § 30.00](#) in which case the Family Court would have exclusive jurisdiction over the proceeding. See *CPL § 530.11(2)(h) & (i)*; [Family Court Act § 821-a](#); [People v Jhon \(1991, City Crim Ct\) 150 Misc 2d 842, 570 NYS2d 427](#).

As a means of continually updating the list of enumerated family offenses, one of the 1995 amendments added aggravated harassment in the second degree, a class A misdemeanor, to the list of family offenses found in subdivision one of this section. This amendment also expanded the definition of ‘disorderly conduct’ by including conduct which occurs “not in a public place.” Traditionally, a person could not be charged with disorderly conduct unless the conduct of the accused was public in nature. [People v Munafo \(1980\) 50 NY2d 326, 428 NYS2d 924, 406 NE2d 780](#), later proceeding [\(1987, 3d Dept\) 133 App Div 2d 909, 520 NYS2d 461](#).

One of the main purposes of § 530.11 is to inform complainants of their right to choose in which court to bring the action. [People v Mack \(1981\) 53 NY2d 803, 439 NYS2d 912, 422 NE2d 572](#). Subdivision two, specifically paragraphs (a)–(f), set forth the responsibilities imposed on either the Criminal Court or Family Court to inform both the petitioner and complainant of the available procedures prior to the arraignment on a family offense.

Paragraph (h) explains what information a complainant must receive from the court during his or her initial appearance before the court on a family offense including the choice of courts to hear the matter. However, when a complainant is given insufficient information with regard to making an informed decision between Family Court or

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criminal courts as required, the Appellate Division, Third Department has held that such a failure is not a jurisdictional defect and reversal of a defendant's conviction is not mandatory. [People v Munck \(1993, 3d Dept\) 190 App Div 2d 963, 594 NYS2d 77](#), app den (1993) 81 NY2d 974, 598 NYS2d 775, 615 NE2d 232.

Paragraph (g) authorizes a criminal court to arraign a defendant upon an alleged violation of an order of protection or temporary order of protection or a warrant issued by the Family Court when the Family Court is not in session. Provided that the complaining party consents, the criminal court can make the alleged violation returnable in the Family Court on the next day that the Family Court is in session. Paragraph (j) thereafter codifies that provision of the Family Court Act of 1962 allowing for the use of criminal courts for arraignment and to issue a Family Court order of protection when the Family Court is unavailable.

Subdivision six deals with the question of notice and states that a police officer, peace officer or district attorney, investigating a family offense which falls under this section, shall give advice to the victims of such offenses as to the available legal rights and remedies as well as the availability of community services and shelters. Additionally, subdivision six provides a form statement which can be given by the police officer or district attorney.

Subdivision seven requires the chief administrator of the courts to provide rules governing and facilitating communications and record sharing between the criminal courts and the Family Courts in family offense matters. As can be seen from the above provisions, the statute makes a concerted effort to keep open the appropriate lines of communication between the criminal courts and Family Courts. This is particularly important in today's times when the legal system is subject to immediate attack when an unfortunate incident of a family offense occurs and there has been an inadvertent "falling between the cracks" and a failure of one agency or court to be aware of what another agency is doing.

No longer in effect, as part of § 530.11, is subdivision five which required the Chief Administrator of the Court to proscribe appropriate forms to implement subdivision two and four of the section. This requirement was repealed as part of the 1995 amendments to the statute.

Spiros A. Tsimbinos has been a leading criminal law appellate practitioner in this State for many years. He graduated from New York University School of Law and has been practicing for 28 years during which time he has handled over 500 appeals. He has handled numerous leading criminal law cases in the New York Court of Appeals and prior to resuming his private practice in 1992, served as Legal Counsel and Chief of Appeals of the Queens County District Attorney's Office in 1990 and 1991. He is currently also serving as editor of New York Criminal Law News, a statewide publication dealing with criminal law issues and recently completed a term as President of the Queens County Bar Association. A frequent lecturer on criminal law and appellate practice, Mr. Tsimbinos has authored many articles which have appeared in the New York Law Journal and the New York State Bar Journal.

## Notes to Decisions

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Any defect in compliance with CLS *Family Ct Act* § 812 does not constitute nonwaivable jurisdictional infirmity. [People v Holdip, 150 A.D.2d 726, 541 N.Y.S.2d 595, 1989 N.Y. App. Div. LEXIS 7080 \(N.Y. App. Div. 2d Dep't 1989\)](#), aff'd, [People v Hults, 76 N.Y.2d 190, 557 N.Y.S.2d 270, 556 N.E.2d 1077, 1990 N.Y. LEXIS 1089 \(N.Y. 1990\)](#).

Fact that victim in domestic assault case was not provided with sufficient information to make informed choice of forum, as required by CLS *CPL* § 530.11(2), did not constitute defect depriving County Court of jurisdiction. [People v Munck, 190 A.D.2d 963, 594 N.Y.S.2d 77, 1993 N.Y. App. Div. LEXIS 1721 \(N.Y. App. Div. 3d Dep't\)](#), app. denied, 81 N.Y.2d 974, 598 N.Y.S.2d 775, 615 N.E.2d 232, 1993 N.Y. LEXIS 2057 (N.Y. 1993).

Family Court lacked subject matter jurisdiction to grant order of protection in family offense proceeding brought by petitioner in 1995 against her former stepfather, who had been convicted of raping her in 1985, as parties were not "members of the same family or household" under CLS *Family Ct Act* § 812(1) where petitioner's mother divorced

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respondent in 1985, thereby terminating relation of affinity between petitioner and her former stepfather. [Orellana v Escalante, 228 A.D.2d 63, 653 N.Y.S.2d 992, 1997 N.Y. App. Div. LEXIS 1712 \(N.Y. App. Div. 4th Dep't 1997\)](#).

In defendant's prosecution for attempted murder in the second degree, [N.Y. Penal Law §§ 110.00, 125.25\(1\)](#), the trial court properly refused to sentence defendant under [N.Y. Penal Law § 60.12](#) because defendant and the victim were not members of the same family or household, [N.Y. Crim. Proc. Law § 530.11\(1\)](#). [People v Johnson, 38 A.D.3d 1327, 833 N.Y.S.2d 338, 2007 N.Y. App. Div. LEXIS 3263 \(N.Y. App. Div. 4th Dep't\)](#), app. denied, [9 N.Y.3d 866, 840 N.Y.S.2d 895, 872 N.E.2d 1201, 2007 N.Y. LEXIS 2458 \(N.Y. 2007\)](#).

A defendant charged with assaulting his four-year-old son with whom he holds visitation rights under a divorce decree may be prohibited from any and all visitation with his son under a temporary order of protection issued pursuant to [CPL 530.11](#), which empowers the court to issue a temporary order of protection as a condition of a pretrial release where a criminal action is pending involving a complaint charging assault between parent and child; the class "parent and child" is enumerated without reference to the marital status of the parents, and to deny the child the protections intended by the statute simply because, as part of a divorce decree, the defendant parent had been granted visitation rights, would be clearly contrary to legislative intent. [People v Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291, 1980 N.Y. Misc. LEXIS 2278 \(N.Y. City Crim. Ct. 1980\)](#).

County Criminal Court had jurisdiction over charge of second degree criminal contempt for defendant's alleged violation of Family Court order of protection, notwithstanding that defendant's wife had already filed violation of protection order petition in Family Court based on defendant's alleged harassment of her, for although Family Court and Criminal Court have concurrent jurisdiction over designated family offense proceedings under [CLS CPL § 530.11](#) and [CLS Family Ct Act § 812](#), and final choice of forum bars any subsequent proceeding in alternative court based on same offense, second degree criminal contempt is not "family offense," and thus statutes' election provisions were not applicable to that crime. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\)](#).

Trial of defendant on charge of second degree criminal contempt for violation of Family Court protection order would not constitute double jeopardy merely because defendant's wife had already brought petition in Family Court for violation of protective order based on harassment, since Family Court proceedings were civil in nature, did not amount to prosecution or place defendant in jeopardy for same act or offense, and did not result in hearing, adjudication or penalty on allegations in petition. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\)](#).

Court would dismiss, in interests of justice, count charging defendant with second degree criminal contempt for violating Family Court protection order since defendant's wife had already brought petition for violation of order in Family Court, which effectively resolved matter on parties' consent and opted to forgo holding defendant in contempt. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\)](#).

Complainant, who filed petition in Family Court for her husband's alleged violation of protective order based on same acts for which she subsequently swore out criminal complaint against him, made binding election to proceed in Family Court with respect to those counts of information charging husband with third degree attempted assault, harassment, and second degree harassment, thus requiring dismissal of those charges in Criminal Court with leave to restore in Family Court, since (1) attempted assault and harassment are "family offenses" enumerated in [CLS Family Ct Act § 812](#), which confers jurisdiction on Family Court concurrent with Criminal Court, and second degree aggravated harassment is "inextricably" linked with harassment, and (2) proceedings in Criminal Court were not commenced within 72 hours after still-pending Family Court proceeding was instituted as required by [CLS Family Ct Act § 821](#) and [CLS CPL § 100.07](#); however, Criminal Court retained jurisdiction over those counts charging husband with second degree criminal trespass, endangering welfare of child, and second degree criminal contempt since those charges were either not technically congruent with enumerated "family offenses" or did not share any elements thereof. [People v Singleton, 140 Misc. 2d 960, 532 N.Y.S.2d 208, 1988 N.Y. Misc. LEXIS 509 \(N.Y. City Crim. Ct. 1988\)](#).

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Complainant's election to proceed in Family Court was not rendered invalid by fact that she was not informed of her right to initiate prosecution in Criminal Court, even if her election was not product of informed decision or was not appropriate to her needs, since such information at most consists of threshold, statutory directive with respect to procedures to be followed for access to Family Court or to criminal courts, unrelated to judicial competence of those courts. [People v Singleton, 140 Misc. 2d 960, 532 N.Y.S.2d 208, 1988 N.Y. Misc. LEXIS 509 \(N.Y. City Crim. Ct. 1988\).](#)

Hearing was not required to determine whether victim was advised of her right of election to proceed either in Criminal Court or Family Court under CLS CPL § 530.11 where Family Court petition filed and signed by victim stated "I certify I have been given an explanation with respect to Section 812 of the Family Court Act and 216 of the Judiciary Law with respect to Family Offense and same has been explained to me and I understand my rights thereunder" since CLS Family Ct Act § 812 and CLS Jud § 216 mirror CLS CPL § 530.11 in setting forth both options available to victim as to how to proceed, and their ramifications; to permit victim to testify that she was not advised of her rights would undermine statutory procedures and create uncertainty as to court in which proceeding should be adjudicated. [People v Falzone, 142 Misc. 2d 337, 537 N.Y.S.2d 773, 1989 N.Y. Misc. LEXIS 37 \(N.Y. Crim. Ct. 1989\).](#)

Offense of criminal mischief is not within Family Court jurisdiction as delineated in CLS Family Ct Act § 812 and CLS CPL § 530.11, and thus exclusion provision of CLS [CPL § 100.07](#) does not apply to such offense. [People v Bulin, 142 Misc. 2d 776, 538 N.Y.S.2d 436, 1989 N.Y. Misc. LEXIS 115 \(N.Y. Dist. Ct. 1989\).](#)

Defendant can be subject to both Family Court proceeding involving charge of disorderly conduct and criminal proceeding involving charge of criminal mischief, even though both arise from same transaction, since family offense proceedings are civil in nature and there is no constitutional prohibition against concurrent criminal and civil remedies for same acts or transactions. [People v Bulin, 142 Misc. 2d 776, 538 N.Y.S.2d 436, 1989 N.Y. Misc. LEXIS 115 \(N.Y. Dist. Ct. 1989\).](#)

Charge of second degree aggravated harassment was "family offense" within meaning of CLS CPL § 530.11(1), even though not listed therein, where alleged actions of defendant, consisting of repeated annoying and abusive telephone calls to his wife, endangered only his wife and posed no threat to society at large. [People v Baumann, 144 Misc. 2d 789, 545 N.Y.S.2d 519, 1989 N.Y. Misc. LEXIS 528 \(N.Y. Dist. Ct. 1989\).](#)

Indictment charging defendant with second degree assault for stabbing her husband would be dismissed under CLS [CPL § 210.20\(1\)\(h\)](#) where neither police nor prosecutor complied with CLS CPL § 530.11 by advising complainant of right to decide whether matter should be pursued as criminal proceeding or in Family Court as family offense proceeding, especially since complainant had joined in defendant's application to dismiss indictment and had filed family offense petition to obtain counseling and end family disruption. [People v Warner, 146 Misc. 2d 1062, 554 N.Y.S.2d 794, 1990 N.Y. Misc. LEXIS 189 \(N.Y. Sup. Ct. 1990\).](#)

Criminal Court had jurisdiction over "family offenses" of third degree assault and harassment since (1) criminal courts, pursuant to CLS CPL § 530.11(1), and Family Courts, pursuant to CLS Family Ct Act § 812(1), were vested with concurrent jurisdiction over family offenses, and (2) fact that victim originally chose Family Court as forum for proceeding which led to order of protection did not mean that Criminal Court did not have jurisdiction over proceeding arising from violation of protection order. [People v Jhon, 150 Misc. 2d 842, 570 N.Y.S.2d 427 \(N.Y. City Crim. Ct. 1991\).](#)

Local criminal court had exclusive jurisdiction over charge of second degree criminal contempt under CLS [Penal § 215.50\(3\)](#) although it was based on violation of Family Court order of protection since (1) crime was not designated "family offense" within CLS Family Ct Act § 812(1) and CLS CPL § 530.11(1), and (2) language of CLS [Penal § 215.50\(3\)](#), which referred to disobedience of "mandate of a court," meant mandate of any court, including Family Court. [People v Jhon, 150 Misc. 2d 842, 570 N.Y.S.2d 427 \(N.Y. City Crim. Ct. 1991\).](#)

Victim's filing of family offense petition against her former husband in Family Court, within 72 hours of commencement of criminal assault proceeding which she initiated against him based on same incident, constituted "final choice of forum" to proceed in Family Court under applicable election of forum statutes, and thus misdemeanor information would be dismissed. [People v Fisher, 153 Misc. 2d 86, 580 N.Y.S.2d 625, 1991 N.Y. Misc. LEXIS 781 \(N.Y. J. Ct. 1991\).](#)

As the geographic limitation on the criminal court's jurisdiction did not also limit the family court's jurisdiction over family offense proceedings, the family court properly exercised jurisdiction over the parties' petitions under *N.Y. Fam. Ct. Act § 812*, even though the acts allegedly occurred on the island territory of Anguilla. [Matter of Richardson v Richardson, 80 A.D.3d 32, 910 N.Y.S.2d 149, 2010 N.Y. App. Div. LEXIS 8053 \(N.Y. App. Div. 2d Dep't 2010\).](#)

Judge could indicate suggested bail on arrest warrant or bench warrant, provided it was noted that suggestion was recommendation only. Ops Adv Comm Jud Ethics No. 98-78.

Consideration of bail suggested by another judge on arrest warrant or bench warrant did not diminish judge's independent duty to consider relevant bail factors, as required by law, Ops Adv Comm Jud Ethics No. 98-78.

There is no legal requirement to contact absent complainant concerning his or her rights under CLS *CPL § 530.11(2)(h)*, inasmuch as such rights must first be told to complainant at his/her "first appearance before the court"; if, however, complainant is present at time of initial appearance, judge must advise him/her of those rights in presence of all parties. Ops Adv Comm Jud Ethics No. 05-81.

Non-lawyer, part-time town justice may appear in Family Court as advocate for not-for-profit organization's client and may accept employment with Court Appointed Special Advocate program to train and supervise program volunteers, but is disqualified from presiding over any matter involving not-for-profit organization or special advocate program and in any matter heard in his/her court under CLS *CPL § 530.11(4)*, *§ 530.12(3-a)* or *§ 530.12(3-b)* that involves client of not-for profit organization or member of client's family. Ops Adv Comm Jud Ethics No. 08-58.

## Research References & Practice Aids

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### Cross References:

This section referred to in §§ 30.30, 100.07, 140.10, 170.55, 530.12; CLS [Exec § 841](#); Jud § 216.

Functions, powers and duties of the commissioner with respect to the council, CLS [Exec § 841](#).

Infancy, CLS [Penal § 30.00](#).

Transfer to family court, CLS [Family Ct Act § 813](#).

Transfer to criminal court, CLS [Family Ct Act § 813](#).

### Jurisprudences:

Information Concerning Proceedings Involving Family-Related Offenses, FCA Art. 8, Form No. 8-1.

Spanish Translation of Form 8-1, FCA Art. 8, Form No. 8-1a.

8 Am Jur 2d, Bail and Recognizance §§ 9, 11, 42, 49.

18 Am Jur Proof of Facts 2d 149, Excessive Bail.

### Law Reviews:

Symposium on reconceptualizing violence against women by intimate partners: critical issues. [58 Alb. L. Rev. 957](#).

Symposium, Domestic violence and the law. [16 Pace L. Rev. 1](#).

**Matthew Bender's New York Civil Practice:**

1 Lansner, Reichler, [New York Civil Practice: Matrimonial Actions § 6.04](#); 4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 66.06.

**Annotations:**

Right of bail in proceedings in juvenile courts. [53 ALR3d 848](#).

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts. [33 ALR5th 1](#).

Applicability of rules of evidence to juvenile transfer, waiver, or certification hearings. [37 ALR5th 703](#).

**Matthew Bender's New York Practice Guides:**

3 New York Practice Guide: Domestic Relations §§ 36.02, 36.03, 36.06—36.08.

**Texts:**

[New York Criminal Practice Ch. 9](#).

[New York Criminal Practice Ch. 13](#).

**Hierarchy Notes:**

[NY CLS CPL](#)

[NY CLS CPL, Pt. THREE, Title P](#)

[NY CLS CPL, Pt. THREE, Title P, Art. 530](#)

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## [NY CLS Family Ct Act § 812](#)

Current through 2019 released Chapters 1-105

***New York Consolidated Laws Service > Family Court Act (§ 111) > Article 8 Family Offenses Proceedings (Pts. 1 — 4) > Part 1 Jurisdiction (§§ 811 — 818)***

### Notice

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 This section has more than one version with varying effective dates.

### **§ 812. Procedures for family offense proceedings [Effective September 21, 2019]**

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1.

Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, unlawful dissemination or publication of an intimate image, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of [section 130.60 of the penal law](#), stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of [section 135.60 of the penal law](#) between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to [section 30.00 of the penal law](#), then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss a petition, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition, the conclusion of the fact-finding or the conclusion of the dispositional hearing. For purposes of this article, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this article, "members of the same family or household" shall mean the following:

(a) persons related by consanguinity or affinity;

(b) persons legally married to one another;

(c) persons formerly married to one another regardless of whether they still reside in the same household;

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**(d)** persons who have a child in common regardless of whether such persons have been married or have lived together at any time; and

**(e)** persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”.

**2.** Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate persons, including, but not limited to district attorneys, criminal and family court clerks, corporation counsels, county attorneys, victims assistance unit staff, probation officers, warrant officers, sheriffs, police officers or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this article, before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

**(a)** That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

**(b)** That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection. Referrals for counseling, or counseling services, are available through probation for this purpose;

**(c)** That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

**(d)** That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;

**(e)** [Repealed]

**(f)** That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding; provided, however, that the arrest of an alleged offender shall be made under the circumstances described in subdivision four of [section 140.10 of the criminal procedure law](#);

**(g)** That notwithstanding a complainant’s election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section.

**3.** Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

**4.** Official forms. The chief administrator of the courts shall prescribe an appropriate form to implement subdivision two of this section.

**5.** Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of the criminal procedure law, the family court act and the domestic relations law. Such notice shall be available in English and Spanish and, if necessary, shall be delivered orally and shall include but not be limited to the following statement:

If you are the victim of domestic violence, you may request that the officer assist in providing for your safety and that of your children, including providing information on how to obtain a temporary order of protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you, or assist in making arrangements to take you, and your children to a safe place within such officer’s jurisdiction, including but not limited to a domestic violence program, a family

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member's or a friend's residence, or a similar place of safety. When the officer's jurisdiction is more than a single county, you may ask the officer to take you or make arrangements to take you and your children to a place of safety in the county where the incident occurred. If you or your children are in need of medical treatment, you have the right to request that the officer assist you in obtaining such medical treatment. You may request a copy of any incident reports at no cost from the law enforcement agency. You have the right to seek legal counsel of your own choosing and if you proceed in family court and if it is determined that you cannot afford an attorney, one must be appointed to represent you without cost to you.

You may ask the district attorney or a law enforcement officer to file a criminal complaint. You also have the right to file a petition in the family court when a family offense has been committed against you. You have the right to have your petition and request for an order of protection filed on the same day you appear in court, and such request must be heard that same day or the next day court is in session. Either court may issue an order of protection from conduct constituting a family offense which could include, among other provisions, an order for the respondent or defendant to stay away from you and your children. The family court may also order the payment of temporary child support and award temporary custody of your children. If the family court is not in session, you may seek immediate assistance from the criminal court in obtaining an order of protection.

The forms you need to obtain an order of protection are available from the family court and the local criminal court (the addresses and telephone numbers shall be listed). The resources available in this community for information relating to domestic violence, treatment of injuries, and places of safety and shelters can be accessed by calling the following 800 numbers (the statewide English and Spanish language 800 numbers shall be listed and space shall be provided for local domestic violence hotline telephone numbers).

Filing a criminal complaint or a family court petition containing allegations that are knowingly false is a crime.

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with the provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of [section eight hundred forty-one of the executive law](#). Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the family court at such time as such persons first come before the court and to the state department of health for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

## History

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Add, L 1962, ch 686; amd, L 1964, ch 156, § 1; L 1969, ch 736, § 2; L 1977, ch 449, § 1; L 1978, ch 628, § 3; L 1978, ch 629, § 2, eff July 24, 1978; L 1980, ch 530, §§ 5, 6; L 1981, ch 416, § 14; L 1983, ch 925, § 1, eff Aug 8, 1983; L 1984, ch 948, §§ 7, 8; L 1986, ch 847, § 1; [L 1990, ch 577, § 1](#); [L 1990, ch 667, § 2](#); [L 1992, ch 345, § 7](#); [L 1994, ch 222, §§ 6–9](#); [L 1994, ch 224, § 1](#), eff Jan 1, 1995; [L 1995, ch 440, § 1](#); [L 1999, ch 125, §§ 3, 4](#), eff June 29, 1999; [L 1999, ch 635, § 7](#), eff Dec 1, 1999; [L 2007, ch 541, § 1](#), eff Nov 13, 2007; [L 2008, ch 326, § 7](#), eff July 21, 2008; [L 2009, ch 476, § 4](#), eff Dec 15, 2009; [L 2010, ch 341, § 5](#), eff Aug 13, 2010; [L 2010, ch 405, § 9](#), eff Nov 11, 2010; [L 2013, ch 526, § 1](#), eff Dec 18, 2013; [L 2018, ch 55, § 5 \(Part NN\)](#), eff Nov 1, 2018; [L 2019, ch 109, § 3](#), eff Sept 21, 2019.

Annotations

## Notes

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**Editor's Notes**

[Laws 1994, ch 222, §§ 1, 2](#), eff Jan 1, 1995, provide as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath.

Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.

The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.

No age group is immune from domestic violence. Too many of New York's elderly residents have become the victims of their own family or household members, leaving these senior citizens without hope or meaningful legal redress.

A great deal of progress has been achieved in the effort to heighten public awareness about domestic violence and to provide services for affected family members. Dedicated individuals, shelter programs and advocacy organizations have been working successfully for years in order to provide refuge, counseling, legal relief and protection to victims of family violence. These efforts have also played a key role in bringing this issue into the open by helping individuals to survive domestic violence and work toward its prevention.

Fortunately, with this heightened awareness has come a considerable shift in the public understanding of, and perspective on, domestic violence. In recent years, for example, what was once largely considered a private matter has come to be more correctly regarded as criminal behavior.

The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. The integrity of New York's families from its youngest to its oldest members is undermined by a permissive or casual attitude towards violence between household members. The legislature further finds and declares that in circumstances where domestic violence continues in violation of lawful court orders, action under the criminal law must remain in place as a necessary and available option. Notwithstanding the evolution of the law of domestic violence in New York, death and serious physical injury by and between family members continues unabated. The victims of family offenses must be entitled to the fullest protections of our civil and criminal laws.

Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for New York's families consistent with the interests of fairness and substantial justice.

§ 2. This act shall be known and may be cited as "the family protection and domestic violence intervention act of 1994."

## NY CLS Family Ct Act § 812

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[Laws 1995, ch 440, § 3](#), eff Nov 1, 1995, provides as follows:

§ 3. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, provided, however, that it shall apply solely to family offenses committed on and after such date.

[Laws 1999, ch 635, §§ 1, 2 and 17](#), eff Dec 1, 1999, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "clinic access and anti-stalking act of 1999."

§ 2. Legislative intent. The legislature finds and declares that criminal stalking behavior, including threatening, violent or other criminal conduct has become more prevalent in New York state in recent years. The unfortunate reality is that stalking victims have been intolerably forced to live in fear of their stalkers. Stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. Current law does not adequately recognize the damage to

## NY CLS Family Ct Act § 812

public order and individual safety caused by these offenders. Therefore, our laws must be strengthened to provide clear recognition of the dangerousness of stalking.

The high correlation between stalking behavior and the infliction of physical violence or sexual assault is demonstrated by two federal studies. A recent FBI crime report shows that thirty percent of all murdered women are killed by their husbands or boyfriends who stalked them. A November 1997 National Institute of Justice study of stalking found that eighty percent of stalking victims who were stalked by their current or former intimate partner had, at some point in their relationship, been physically assaulted by their partner and thirty-one percent had been sexually assaulted by their partner. In recognition of the real and substantial risk of harm associated with stalking behavior, 49 states have enacted anti-stalking laws.

In 1992, the Legislature took an important step towards recognizing that stalking requires stronger enforcement measures by amending New York's menacing and harassment sections to include stalking behavior within the definition of these crimes. With this act, New York creates the separate crime of stalking. This act will protect victims by providing real and effective sanctions for stalking conduct even at its earliest stages. It will also provide increased penalties for repeat offenders, for those offenders who stalk children, for those offenders who possess weapons when stalking, and for those offenders who commit stalking in violation of an order of protection.

The legislature also finds that criminal acts involving violence and intolerance at health care facilities and places of religious worship have become more prevalent in recent years. Medical clinics, physicians' offices and other facilities throughout the state have become targets in a campaign of obstruction and terrorism aimed at closing the facilities and intimidating those who seek to obtain or provide reproductive health services. In addition, places of religious worship have regrettably been targets of vandals thereby threatening these havens of peaceful prayer and meditation. Despite the passage of a 1994 federal law that makes it a federal crime for a person to deny access to or vandalize health care facilities and places of religious worship, state legislation is necessary to supplement federal law by empowering state and local officials to assist in combating violence and acts of vandalism at health care facilities and places of religious worship. It is therefore the intent of the legislature to provide state criminal penalties against anyone who, by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with another person or attempts to injure, intimidate or interfere with another person, because such other person was or is seeking to obtain or provide or assist in the provision of reproductive health services or exercise the right of religious freedom.

§ 17. Nothing contained in this act shall be construed to eliminate, limit or impair any sanction or remedy not provided by the provisions of this act which is otherwise available to punish or prohibit the criminal interference with health care services or religious worship.

[Laws 2008, ch 326, § 16](#), eff July 21, 2008, provides as follows:

§ 16. This act shall take effect immediately and shall apply to orders of protection pending or entered on or after such effective date; provided, that:

(a) section thirteen of this act shall expire and be deemed repealed September 1, 2010; and

(b) the amendments to paragraph (n) of subdivision 2 of [section 212 of the judiciary law](#), made by section thirteen of this act, shall not affect the expiration and repeal of such paragraph and shall be deemed repealed therewith, if section thirteen of this act has not been repealed prior thereto. (Amd, [L 2009, ch 17, § 1](#), eff April 21, 2009.)

[Laws 2010, ch 341, § 9](#), eff August 13, 2010, provides as follows:

§ 9. This act shall take effect immediately and shall apply to all orders of protection pending or entered on or after such effective date.

**Laws 2018, ch 55, § 10 (Part NN)**, eff November 1, 2018, provides:

§ 10. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

### 1995 Recommendations of Family Court Advisory and Rules Committee:

The Family Protection and Domestic Violence Intervention Act of 1994 [Laws of 1994, ch. 222] amended the definition of “family offense” contained in both *Family Court Act § 812(1)* and *Criminal Procedure Law § 530.11(1)* to include the “stalking” crimes, harassment in the first and second degrees and menacing in the second degree, which had been created by the Legislature in 1992. However, the legislation, perhaps inadvertently, omitted telephone and mail harassment, among the most common forms of stalking in the context of family violence. The Family Court Advisory and Rules Committee is submitting a legislative proposal to remedy that omission.

These forms of harassment, together with physical harassment motivated by ethnic or religious bias, are included in the definition of aggravated harassment in the second degree, a Class A misdemeanor. *Penal Law § 240.30* provides that a person is guilty of the crime “when, with intent to harass, annoy, threaten or alarm another person,” he or she.

1. Communicates, or causes a communication to be initiated by mechanical or electronics means or otherwise, with a person, anonymously or otherwise, by telephone, mail or other written form of communication, in a manner likely to cause annoyance or alarm; or.
2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or.
3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of the person.

In the absence of inclusion in the Family Court Act and Criminal Procedure Law definitions of “family offenses,” aggravated harassment can be addressed solely as a criminal offense and is not subject to the concurrent jurisdiction afforded other forms of harassment by family members or the more serious consequences contained in the new domestic violence statute. In contrast, other family offenses committed by adult family members, including harassment in the first and second degrees, menacing in the second and third degrees, reckless endangerment, assault in the second or third degree or an attempted assault, may be heard in either or both family and criminal courts, in accordance with [Family Court Act § 115\(e\)](#) and [Criminal Procedure Law § 100.07](#), and subject the offender to mandatory arrest and enhanced penalties.

Characterization of aggravated harassment as a family offense would have significant implications for the breadth of relief available to victims, the likelihood of arrest and prosecution, the gravity of the penalties to which offenders are subjected and the enforceability of orders of protection issued. Family offenses, if prosecuted criminally, are subject to one-year, rather than six- month, adjournments in contemplation of dismissal [[CPL § 170.55\(2\)](#)].

Violations of “stay away” provisions of orders of protection in family offense proceedings subject offenders to prosecution for criminal contempt in the first degree, an E felony, even if no injury to person or damage to property is caused [[Penal Law § 215.51\(c\)](#)].<sup>1</sup> Effective July 1, 1995 violations of orders of protection issued in family offense proceedings subject offenders to mandatory arrest; misdemeanor family offenses subject offenders to mandatory arrest “unless the victim requests otherwise.” [[Criminal Procedure Law § 140.10\(4\)](#)]. Moreover, orders of protection and temporary orders of protection with respect to cases charging these crimes may be issued pursuant to [Family Court Act §§ 828, 842](#) and *Criminal Procedure Law § 530.12*, which permit a broader range of conditions than non-family offense orders issued pursuant to *CPL § 530.13*. Significantly, temporary and final orders of protection issued in family offense proceedings are also subject to the “full faith and credit” provisions of the Violence Against Women

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<sup>1</sup> Violations of orders of protection issued in non-family offense cases, pursuant to *Criminal Procedure Law § 530.13*, can be prosecuted as criminal contempt in the first degree only if the offender intentionally or recklessly caused injury to the victim or damage to the victim’s property in excess of \$250 [[Penal Law §§ 215.51\(b\), \(d\)](#)].

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Act, a component of the federal crime bill [[28 U.S.C. § 2265\(c\)](#); Public Law 103-322], thus permitting enforcement out of state of orders issued by New York State courts and vice versa.

Additionally, inclusion of aggravated harassment as a family offense would permit a more integrated response in that such forms of harassment are often points in a progressively more serious cycle of family violence. Following ejection from the home by virtue of a temporary order of protection, separation or divorce, offenders often resort to threats communicated by mail, telephone or other electronic means; if not addressed rigorously, these forms of behavior may quickly escalate into actual violence. If abuse in other forms is already the subject of a Family Court proceeding between the parties, moreover, it may be appropriate to allow the victim the option of continuing to address the offender's behavior in the Family Court, rather than limiting the choice to criminal court.

For these reasons, the Family Court Advisory and Rules Committee proposes that aggravated harassment in the second degree be added to the definition of "family offense" contained in both *Family Court Act § 812(1)* and *Criminal Procedure Law § 530.11(1)*. The Committee's bill also cures an omission in *Criminal Procedure Law § 530.11(1)* by adding "former spouses" to the parties subject to a family offense proceeding involving attempted assault. "Former spouses" are included in the definition contained in *Family Court Act § 812(1)* and, with respect to all other family offenses, *Criminal Procedure Law § 530.11(1)*. Since the definitions contained in the two statutes are otherwise identical – and, indeed, must be identical for the concept of concurrent jurisdiction to have meaning – the disparity should be eliminated.

### Amendment Notes

**2013.** Chapter 526, § 1 amended:

Sub 1, opening par by deleting at fig 1 "or", at fig 2 "criminal obstruction of breathing or blood circulation or strangulation" and adding the matter in italics.

**2008.** Chapter 326, § 7 amended:

Sub 1, par (c) by deleting at fig 1 "and" and adding the matter in italics.

Sub 1, par (d) by deleting at fig 1 a period and adding the matter in italics.

By adding sub 1, par (e).

**The 2018 amendment by ch 55, § 5 (Part NN)**, added "or coercion in the third degree" in the first sentence of the undesignated paragraph of 1; and made a related change.

### 2007 Recommendations of the Family Court Advisory and Rules Committee:

Experience with the concurrent jurisdiction provisions of the *Family Protection and Domestic Violence Intervention Act of 1994* [Laws of 1994, ch 222] has revealed a significant gap in the enumerated family offenses. With regularity, the courts handling family offense cases are faced with situations in which an offender is alleged to have vandalized or destroyed property that is either owned by the victim or jointly owned by both parties. Yet criminal mischief is not enumerated as a family offense that may be prosecuted in Family Court, and courts are sharply divided regarding whether it may be prosecuted as a crime if the property is jointly owned or owned in the offender's name. The Family Court Advisory and Rules Committee, therefore, proposes that criminal mischief involving property either owned by the victim (the petitioner in Family Court or complainant in criminal proceedings) or owned by both parties be added to the concurrent jurisdiction provisions in *section 812 of the Family Court Act* and *sections 530.11 of the Criminal Procedure Law*.

In permitting an offender to be prosecuted for a family offense for destroying property, notwithstanding the fact that he or she may have an ownership interest, this measure would bring New York State in line with the law nationally. In the only appellate holding in New York on the issue to date, in 1997, *the Appellate Division, Second Department, in People v. Person*, 239 A.D.2d 612, 658 N.Y.S.2d 372 (2d Dept., 1997), aap. denied 91 N.Y.2d 878 (1997),

reversed a criminal mischief conviction on the ground that the defendant had an equitable interest in the damaged property. While following the holding in *Person*, the Supreme Court, Kings County, in *People v. Khyfcts*, 174 Misc.2d 516, 522, 665 N.Y.S. 2d 802, 806 (Sup. Ct., Kings Co., 1997), cited contrary cases in Arizona, Illinois, California, Iowa and Washington. The Court called upon the Legislature to bring New York law “in tune with the spirit of the recent federal and state domestic violence legislation” by permitting criminal mischief to be charged regarding “marital or jointly owned property.” Further, also citing contrary cases nationally, the *Criminal Court, Bronx County, in People v. Brown*, 185 Misc. 2d 326, 334, 711 N.Y.S.2d 707, 714 (Crim. Ct., Bronx Co., 2000), criticized *Person* as wrongly decided on the ground that the proscription against charging a person with larceny for stealing jointly owned property [*Penal Law § 155.00(5)*] was improperly applied to the criminal mischief statute. The holding in *Brown* was recently bolstered by the statement by the *Court of Appeals, in People v. Hernandez*, 98 N.Y.2d 175, 181 (2002), that:

In instances where a word is not defined in a Penal Law provision under review, we have cautioned against reliance upon a definition of that term found in another Penal law statute absent legislative authority for doing so

That the prohibition against prosecuting offenders for vandalism of jointly owned property in *Person* is a minority rule that fails to consider the unique circumstances present in domestic violence cases is clear from reference to authorities nationally. See “Malicious Mischief,” 52 Am Jur 2d § 1 (May 2006). In *People v. Wallace*, 123 Cal. App.4th 144, 19 Cal.Rptr.3d 790 (Ct.App., 5th Dist., Cal., 2004), the California Court of Appeals, Fifth District, “embrace[d] the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest . . . .” The Court in *Wallace*, citing case from Wisconsin, Iowa, Illinois, Arizona, Washington, Alaska, Georgia and the District of Columbia, specifically rejected the holding in *Person*. Similarly, the District of Columbia Court of Appeals, in *Jackson v. United States*, 819 A.2d 963 (D.C.App., 2003), noted that *Person* “appears to be an anomaly and has been widely criticized, even in New York [citing *Brown*, supra]”. Commentators in New York have likewise advocated for the law in New York to be changed to permit such prosecutions. See, e.g., V. Lutz & C. Bonomolo, My Husband Just Trashed Our Home: What Do You Mean That’s Not a Crime?, 48 S.C. Law Rev 641 (Spring, 1997); J Leventhatl, Spousal Rights or Spousal Crimes: Where and When are the Line to be Drawn?, 2006 *Utha Law Rev* 351 (2006).

Including criminal mischief involving damage to property owned or jointly owned by the petitioner or complainant in the list of crimes for which courts of family and criminal jurisdiction may exercise concurrent jurisdiction, the Committee’s measure will enhance the effectiveness of New York’s domestic violence statutes. Recognizing that damage to property is often a means that an abuser uses to exercise power and control over his or her victim, \* the addition of criminal mischief to the enumerated family offenses will further fulfillment of the Legislature’s finding, in enacting the *Family Protection Domestic Violence Intervention Act*, that “[t]he victims of family offenses must be entitled to the fullest protections of the civil and criminal laws.” Laws of 1994, ch 222, § 1.

## Commentary

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### PRACTICE INSIGHTS:

#### CONCURRENT FAMILY AND CRIMINAL COURT PROCEEDINGS.

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\* See, e.g., C.Klein & L. Orinff, “Providing Legal Protection for battered Women: An Analysis of State Statutes and Case Law,” 21 *Hofstra L. Rev.* 801, 873 (1993); Leventhal, supra; Lutz & Bonomolo, supra,

## INSIGHT

It is frequently in a domestic violence victim's interest to file a family offense petition, even if there is a pending criminal prosecution against the alleged abuser based upon the same event or events. The proceedings employ different burdens of proof and offer different remedies. Strategically, one proceeding may be used to bolster the other. The petitioner may also proceed in both forums in order to bring the issue of domestic violence squarely before the family court if there is custody or visitation litigation pending between the parties.

## ANALYSIS

### Consider Benefits of Concurrent Proceedings.

A petitioner in a family offense proceeding may also be the complaining witness in a criminal prosecution based on the same event or events. *FCA § 812*. So, why proceed in both forums? The most practical reason for proceeding concurrently in family court and criminal court is that the burden of proof in a family offense case, which is civil in nature, is "a fair preponderance of the evidence," while a criminal prosecution operates under the more onerous burden of "beyond a reasonable doubt." Therefore, if the criminal prosecution goes forward prior to the family court case and the higher burden of proof is not met in the criminal court, the petitioner has a second bite at the apple under a lower burden of proof. See *Bodouva v. Bodouva*, 263 A.D.2d 506, 692 N.Y.S.2d 698 (2d Dep't 1999).

If the criminal prosecution is resolved prior to the family offense case, it still may be in the victim's interest to proceed in the family court because he or she may be able to secure additional relief including an order of protection effective beyond the effective date of the criminal court order. Conversely, some courts will proceed to trial on the family offense petition prior to the resolution of the criminal prosecution. If the family offense trial is held first, the respondent will have little choice but to assert his or her Fifth Amendment right against self-incrimination, thereby leaving the petitioner's allegations unchallenged. If the respondent does testify in the family court case, the testimony may aid in the criminal prosecution.

In a family court case, the victim is the petitioner and the practitioner has control of the case as well as the relief sought and any settled disposition. In a criminal prosecution, the government is the plaintiff, and although a prosecutor typically considers the victim's wishes, the victim does not decide what relief will be sought or what plea will be accepted. The victim's attorney may be frustrated by the inability to guide the criminal court case in a manner which secures the relief sought by the client; the family court case offers more flexibility.

By proceeding in both forums the petitioner also expands the menu of available relief. For example, the family court may address issues of child support, visitation, and custody while incarceration is only available through the criminal court. It also may be in the victim's interest to proceed in both forums if the victim and the alleged abuser have a pending custody or visitation case. If domestic violence has been established by a preponderance of the evidence, the court must consider its effects on the best interests of the children in decisions about custody and visitation. [DRL § 240](#). A plea or a conviction in the criminal court triggers this statutory mandate, but it may not establish the particulars of the domestic violence as they impact the parties' children or domestic violence beyond the scope of that which formed the basis for the plea or conviction. The practitioner should note, however, that if there is no custody or visitation case pending, it may not be in the victim's interest affirmatively to bring the respondent to family court where these issues may be raised. Rather, the matter may be best left solely in criminal court, which has no power to order custody or visitation.

Respondent's counsel must be similarly cognizant of the differences in proof and should attempt to coordinate the defense of simultaneous proceedings. Bearing in mind the seriousness of a criminal conviction, particularly if the charge is a felony, respondent's counsel may look to settle the family court petition by consenting to an order of protection without admitting or denying the allegations. There will then be no testimony to be used in criminal court, and the order's existence will not be available for use in any Supreme Court divorce action.

### Seek Summary Judgment Based on Criminal Conviction.

If a criminal case results in a plea or a conviction, the attorney may make a motion for summary judgment in the family court on grounds of collateral estoppel. [Suffolk County Dep't of Social Servs. ex rel. Michael V. v. James M., 83 N.Y.2d 178, 608 N.Y.S.2d 940, 630 N.E.2d 636 \(1994\)](#). Collateral estoppel is available where there is an identity of issues and where the defendant had a full and fair opportunity to contest those issues in the criminal court proceeding. A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action. [Grayes v. DiStasio, 166 A.D.2d 261, 560 N.Y.S.2d 636 \(1st Dep't 1990\)](#); [Colby v. Crocitto, 207 A.D.2d 764, 616 N.Y.S.2d 399 \(2d Dep't 1994\)](#). If a practitioner representing a domestic violence victim secures a finding of summary judgment as to one or more family offenses, the practitioner may either ask to proceed to fact-finding with any remaining allegations or may seek to move directly to disposition. [FCA § 841](#).

### **Challenge Issue of Double Jeopardy.**

Despite the explicit statutory authorization for concurrent proceedings, lower courts continue to cite the issue of double jeopardy as grounds for denial of relief under Article 8. For example, [Alfeo v. Alfeo, 306 A.D.2d 471, 761 N.Y.S.2d 505 \(2d Dep't 2003\)](#); [Kampa v. Kampa, 268 A.D.2d 432, 703 N.Y.S.2d 486 \(2d Dep't 2000\)](#). The concept of double jeopardy does not apply unless the civil proceedings are penal in nature and may result in a criminal sanction, primarily incarceration. See [People v. Wood, 95 N.Y.2d 509, 719 N.Y.S.2d 639, 742 N.E.2d 114 \(2000\)](#). A family court may impose criminal penalties only in a proceeding in which the petitioner alleges a violation of an order of protection. [FCA § 846-a](#). A family court considering an initial application for an order of protection may not do so and, thus, double jeopardy does not apply to an initial application for protection. See [FCA § 841](#).

## **Notes to Decisions**

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### **I.In General**

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This section of the Family Court Act must, of necessity, be construed with §§ 7(c) and 13 of Art. VI of the State Constitution. [\*People v De Jesus\*, 21 A.D.2d 236, 250 N.Y.S.2d 317, 1964 N.Y. App. Div. LEXIS 3680 \(N.Y. App. Div. 4th Dep't 1964\)](#).

Family court jurisdiction over crimes and offense between parent and child is not to be retained in every family controversy. [\*People v Kenyon\*, 46 A.D.2d 409, 362 N.Y.S.2d 644, 1975 N.Y. App. Div. LEXIS 8505 \(N.Y. App. Div. 4th Dep't 1975\)](#).

The “child protective proceedings” article of the Family Court Act is designed to protect children from abuse and neglect and, when necessary, to remove an abused child from the parent during the pendency of a prosecution of a

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parent either in family court or an appropriate criminal court. [People v Webb, 52 A.D.2d 8, 382 N.Y.S.2d 369, 1976 N.Y. App. Div. LEXIS 11521 \(N.Y. App. Div. 3d Dep't 1976\)](#).

Any defect in compliance with CLS *Family Ct Act* § 812 does not constitute nonwaivable jurisdictional infirmity. [People v Holdip, 150 A.D.2d 726, 541 N.Y.S.2d 595, 1989 N.Y. App. Div. LEXIS 7080 \(N.Y. App. Div. 2d Dep't 1989\)](#), aff'd, [People v Hults, 76 N.Y.2d 190, 557 N.Y.S.2d 270, 556 N.E.2d 1077, 1990 N.Y. LEXIS 1089 \(N.Y. 1990\)](#).

[Family Court Act § 813](#) must be read together with §§ 811 and 812 thereof. [People v Diggs, 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 \(N.Y. Dist. Ct. 1973\)](#).

Section 812 of the Family Court Act (as amd by L 1977, ch 449, § 1), which gives to the criminal courts concurrent jurisdiction with the Family Court over certain acts between spouses that have come to be known as family offenses, requires that a complainant be advised of certain procedures, but does not require that a document be filed indicating that such advice has been given. [People v Revell, 93 Misc. 2d 159, 402 N.Y.S.2d 522, 1978 N.Y. Misc. LEXIS 2030 \(N.Y. Dist. Ct. 1978\)](#).

In divorce action, husband was not entitled to protective order against wife prohibiting her from smoking cigarettes in presence of himself and their children since cigarette smoking is not crime or violation of any enumerated crime or violation listed in CLS *Family Ct Act* § 812, which limits protective orders to circumstances involving disorderly conduct, harassment, menacing, reckless endangerment, assault or attempted assault between family members; however, since wife agreed that cigarette smoking is detrimental to smoker's health and those who passively inhale cigarette smoke, and that she had been limiting her smoking to one room of marital residence, court would issue temporary order prohibiting wife from smoking in presence of husband or children, requiring that she confine her smoking to one room in which she allegedly did all her smoking, and directing that presentation of copy of order to any peace officer would not constitute authority for officer to take wife into custody or detain her for any alleged violation of order. [Roofeh v Roofeh, 138 Misc. 2d 889, 525 N.Y.S.2d 765, 1988 N.Y. Misc. LEXIS 113 \(N.Y. Sup. Ct. 1988\)](#).

Family Court lacked jurisdiction to consider petition by adult daughter seeking visitation with her natural mother since Family Court's jurisdiction is limited to determining visitation of minors pursuant to CLS *Family Ct Act* Art 6, Part 3; moreover, Family Court's jurisdiction over family offenses could not be exercised to consider petition since petition was clearly denominated as visitation petition and contained no allegation of family offense. [Harp v Waterman, 148 Misc. 2d 814, 562 N.Y.S.2d 604, 1990 N.Y. Misc. LEXIS 562 \(N.Y. Fam. Ct. 1990\)](#).

Action may be commenced under CLS *Family Ct Act* Art 8 by parent against child under age of 16 who commits any offense specified in CLS *Family Ct Act* § 812(1). [Paula S. v Steven S., 154 Misc. 2d 567, 585 N.Y.S.2d 964, 1992 N.Y. Misc. LEXIS 291 \(N.Y. Fam. Ct. 1992\)](#).

Although the proof at a fact finding hearing at a N.Y. Fam. Ct. Act art. 8 proceeding was insufficient to establish that a wife's conduct in striking her husband in the eye caused the requisite "serious physical injury" to support a finding that the wife had committed second degree assault, [N.Y. Penal Law §§ 10.00\(10\), 120.05\(1\)](#), the husband's testimony sufficiently established that the wife had committed acts constituting attempted assault in the third degree and harassment, and that aggravating circumstances were present; a three year order of protection was modified to reflect the aggravating circumstances of "physical injury," and, as so modified, was affirmed. [Wright v Wright, 4 A.D.3d 683, 772 N.Y.S.2d 740, 2004 N.Y. App. Div. LEXIS 2037 \(N.Y. App. Div. 3d Dep't 2004\)](#).

The legislative scheme contemplates criminal prosecution of family offenses constituting assault or disorderly conduct only if a Family Court judge first determines that the dispute cannot be resolved in the less severe remedies at the Family Court's disposal. [United States ex rel. Herrington v Mancusi, 415 F.2d 205, 1969 U.S. App. LEXIS 11003 \(2d Cir. N.Y. 1969\)](#).

## 2. Purpose

The purpose of [Article VI, § 13 of the New York Constitution](#) and *Family Court Act § 812* is to remove from the criminal courts a limited class of offenses arising from family conflict, which although technically taking the character of a criminal offense are lacking in the elements that justify the use of criminal procedures and sanctions. A critical element in the jurisdictional provision is that the criminal offense charged must be either disorderly conduct or assault, without regard to the degree of the assault. [People v Williams, 24 N.Y.2d 274, 300 N.Y.S.2d 89, 248 N.E.2d 8, 1969 N.Y. LEXIS 1416 \(N.Y. 1969\)](#).

The dominant purpose of the Family Court Act is to get all problems of a family into one forum. [People v Keller, 37 Misc. 2d 122, 234 N.Y.S.2d 469, 1962 N.Y. Misc. LEXIS 2205 \(N.Y. Dist. Ct. 1962\)](#).

Article 8 of the Family Court Act is remedial in nature and was apparently intended to preserve the family unit under certain conditions of stress; the thrust thereof is that when certain acts which are defined as crimes are committed between or among members of a family or household, the Family Court should examine the matter first to determine if the family unit will be better served by civil disposition rather than by allowing criminal charges. [People v Kenyon, 72 Misc. 2d 82, 338 N.Y.S.2d 496, 1972 N.Y. Misc. LEXIS 1290 \(N.Y. County Ct. 1972\)](#).

## 3. Constitutional issues

Adjudication for contempt under CLS Family Ct Act Art 8 is properly characterized as punitive because it does not seek to coerce compliance with any pending court mandate, but rather imposes definite term of imprisonment and punishes contemnor for disobeying prior court order. [People v Wood, 95 N.Y.2d 509, 719 N.Y.S.2d 639, 742 N.E.2d 114, 2000 N.Y. LEXIS 3893 \(N.Y. 2000\)](#).

In mother's family offense proceeding against father under CLS *Family Ct Act § 812*, mother was not deprived of fair trial by court's refusal to appoint new assigned counsel where mother failed to show good cause for release of her original assigned counsel. [Petkovsek v Snyder, 251 A.D.2d 1086, 674 N.Y.S.2d 208, 1998 N.Y. App. Div. LEXIS 7214 \(N.Y. App. Div. 4th Dep't 1998\)](#).

In mother's family offense proceeding against father under CLS *Family Ct Act § 812*, mother was not deprived of fair trial by court's refusal to grant adjournment to enable her to subpoena witnesses where her request for adjournment was made on day of scheduled hearing. [Petkovsek v Snyder, 251 A.D.2d 1086, 674 N.Y.S.2d 208, 1998 N.Y. App. Div. LEXIS 7214 \(N.Y. App. Div. 4th Dep't 1998\)](#).

Order granting petitioner an order of protection was affirmed as respondent was not denied the assistance of counsel when his attorney refused to question him on direct examination and presented respondent's testimony in a narrative fashion because his attorney properly informed the court, without elaboration, that they had an ethical dilemma of respondent insisting on testifying despite a criminal proceeding pending against him. [Matter of Yanique S. v Frederick T., 151 A.D.3d 1222, 56 N.Y.S.3d 603, 2017 N.Y. App. Div. LEXIS 4434 \(N.Y. App. Div. 3d Dep't 2017\)](#).

A defendant facing criminal liability because his wife, whom he allegedly harassed, threatened and endangered, has elected to proceed in a criminal court rather than the Family Court, as she may elect to do under *section 812 of the Family Court Act* (as amd by L 1977, ch 449, § 1), which gives criminal courts concurrent jurisdiction with the Family Court over family offenses, who alleges that section 812 is violative of due process and equal protection and is unconstitutionally vague, has not proven beyond a reasonable doubt that the section is unconstitutional. [People v Revell, 93 Misc. 2d 159, 402 N.Y.S.2d 522, 1978 N.Y. Misc. LEXIS 2030 \(N.Y. Dist. Ct. 1978\)](#).

Section 812 of the Family Court Act (as amd by L 1977, ch 449, § 1), divesting the Family Court of exclusive original jurisdiction over certain acts between spouses that have come to be known as family offenses, and giving the criminal courts concurrent jurisdiction with the Family Court over those offenses, does not violate section 13

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(subd b) of article VI of the State Constitution, which vests the Family Court with exclusive original jurisdiction over certain categories of proceedings, but, with respect to that category relating to family offenses, gives it such jurisdiction “as may be provided by law” (par [7]). [People v Revell, 93 Misc. 2d 159, 402 N.Y.S.2d 522, 1978 N.Y. Misc. LEXIS 2030 \(N.Y. Dist. Ct. 1978\).](#)

Trial of defendant on charge of second degree criminal contempt for violation of Family Court protection order would not constitute double jeopardy merely because defendant's wife had already brought petition in Family Court for violation of protective order based on harassment, since Family Court proceedings were civil in nature, did not amount to prosecution or place defendant in jeopardy for same act or offense, and did not result in hearing, adjudication or penalty on allegations in petition. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\).](#)

#### 4. Concurrent nature of family court and criminal court jurisdiction

Petitioner in family offense proceeding who alleges that temporary order of protection issued by Family Court has been violated has statutory right to seek prosecution of offender in criminal court, and Family Court erred when it dismissed pending family offense petition based solely on petitioner's decision to file criminal complaint against respondent for violating Family Court's temporary order of protection. [Kampa v Kampa, 268 A.D.2d 432, 703 N.Y.S.2d 486, 2000 N.Y. App. Div. LEXIS 184 \(N.Y. App. Div. 2d Dep't 2000\).](#)

As to a family offense proceeding, jurisdiction of family court and Supreme Court is concurrent. [People v Coady, 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 \(N.Y. Sup. Ct. 1974\).](#)

A criminal court has jurisdiction regarding a defendant charged with the attempted murder of her husband inasmuch as a simple reading of *section 812 of the Family Court Act* makes it clear that concurrent jurisdiction exists between the Family Court and criminal courts. [People v Vaughn, 99 Misc. 2d 991, 417 N.Y.S.2d 621, 1979 N.Y. Misc. LEXIS 2375 \(N.Y. Dist. Ct. 1979\).](#)

Criminal Court had jurisdiction over “family offenses” of third degree assault and harassment since (1) criminal courts, pursuant to CLS CPL § 530.11(1), and Family Courts, pursuant to CLS *Family Ct Act* § 812(1), were vested with concurrent jurisdiction over family offenses, and (2) fact that victim originally chose Family Court as forum for proceeding which led to order of protection did not mean that Criminal Court did not have jurisdiction over proceeding arising from violation of protection order. [People v Jhon, 150 Misc. 2d 842, 570 N.Y.S.2d 427 \(N.Y. City Crim. Ct. 1991\).](#)

Considering concurrent jurisdiction of courts under CLS CPL § 530.12(11), (12), and (13), CLS *Dom Rel* §§ 240 and 252, and CLS *Family Ct Act* § 812, similarity of treatment of litigants in different courts is required in addressing societal problem of domestic violence. [People v Koertge, 182 Misc. 2d 183, 701 N.Y.S.2d 588, 1998 N.Y. Misc. LEXIS 708 \(N.Y. Dist. Ct. 1998\).](#)

As the geographic limitation on the criminal court's jurisdiction did not also limit the family court's jurisdiction over family offense proceedings, the family court properly exercised jurisdiction over the parties' petitions under *N.Y. Fam. Ct. Act* § 812, even though the acts allegedly occurred on the island territory of Anguilla. [Matter of Richardson v Richardson, 80 A.D.3d 32, 910 N.Y.S.2d 149, 2010 N.Y. App. Div. LEXIS 8053 \(N.Y. App. Div. 2d Dep't 2010\).](#)

#### 5. Election to proceed in family court or criminal court

Fact that victim in domestic assault case was not provided with sufficient information to make informed choice of forum, as required by CLS CPL § 530.11(2), did not constitute defect depriving County Court of jurisdiction. [People v Munck, 190 A.D.2d 963, 594 N.Y.S.2d 77, 1993 N.Y. App. Div. LEXIS 1721 \(N.Y. App. Div. 3d Dep't\), app. denied, 81 N.Y.2d 974, 598 N.Y.S.2d 775, 615 N.E.2d 232, 1993 N.Y. LEXIS 2057 \(N.Y. 1993\).](#)

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While apparent intent of exclusionary language contained in *FCA § 812* (as amended by L 1977, ch 449), giving criminal courts concurrent jurisdiction with Family Court over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment, assault or attempted assault between spouses or between parent and child or between members of same family or household “except that if such act involves a child who is below the age of eighteen, the family court shall have exclusive original jurisdiction”, was to exclude child neglect and abuse proceedings, viz., where target of act was under 18, language is, apparently through legislative oversight, broad enough to include situation where child accused by member of his own household is under 18; accordingly, mother of child over 16 and under 18, who has charged him in Criminal Court with assaulting her, and whose sole objective in bringing proceeding is to help him, has clearly chosen wrong forum, and her election of remedies is not binding; proceeding is dismissed without prejudice to any remedy available in Family Court, which, it is noted, is still prohibited from placing child, since [FCA § 842](#), containing prohibition against court-ordered placement, has not been amended as suggested in [M v M, 71 Misc. 2d 396, 336 N.Y.S.2d 304, 1972 N.Y. Misc. LEXIS 1688 \(N.Y. Fam. Ct. 1972\)](#), [People v T., 95 Misc. 2d 639, 408 N.Y.S.2d 214, 1978 N.Y. Misc. LEXIS 2489 \(N.Y. City Crim. Ct. 1978\)](#).

A criminal proceeding wherein the complaint alleged that defendant threw a bottle at complainant, his wife, is dismissed without prejudice, since the complainant was not interested in prosecuting criminally but rather in obtaining help for her husband's alcoholism and testified that she was never officially advised of the different functions of the Criminal Court and the Family Court and that had she been so advised she would have elected to proceed in Family Court; the admonitions required to be given to every complainant concerning the different reasons for and consequences of proceeding in either the Family Court or Criminal Court (*Family Ct Act, § 812*; [Judiciary Law, § 216](#)) are, as a matter of law, crucial and constitute a condition precedent which must be met before a binding election of remedies is imposed. [People v Garcia, 98 Misc. 2d 907, 415 N.Y.S.2d 175, 1979 N.Y. Misc. LEXIS 2165 \(N.Y. City Crim. Ct. 1979\)](#).

Fact that respondent's family wishes to pursue community resources to rehabilitate respondent, 15-year-old charged with rape, sodomy and sexual abuse of his younger sisters, is insufficient to warrant dismissal of delinquency petition in interest of justice since Family Court must consider “need for protection of the community” as well as “needs and best interests of the respondent” ([FCA § 711](#)); since no in-depth investigation or studies of respondent have been made by auxiliary services of Family Court, it would be premature to dismiss petition on ground that any further supervision, treatment or confinement is unnecessary nor is substitution of neglect petition appropriate since there is no manifestation of parental neglect; although Family Court possesses wide discretion to deal “with the complexities of family life so that its actions may fit the particular needs of those before it” ([FCA § 141](#)) and court's approach to intrafamily discord is rehabilitative in scope and design ([FCA § 811](#)), court has no power to commence family offense proceeding in place of delinquency petition since acts allegedly committed by respondent are not within ambit of designated family offenses ([FCA § 812](#)); however, respondent is granted hearing to determine if substitution of person in need of supervision petition ([FCA § 716](#)) would be more appropriate to assure delivery of treatment needed by respondent. [In re P., 103 Misc. 2d 1102, 427 N.Y.S.2d 694, 1980 N.Y. Misc. LEXIS 2263 \(N.Y. Fam. Ct. 1980\)](#).

A wife who filed an accusatory instrument in a local criminal court charging her husband with third-degree assault effectively commenced an action within the meaning of the election provisions of [Family Ct Act § 821](#) where the instrument had been verified and in existence for more than 72 hours; a subsequent family court proceeding by the wife to obtain an order of protection should have been barred because it was commenced after the expiration of 72 hours but, given the fact that the family court nevertheless assumed jurisdiction and issued a final order of protection on the merits, all prior proceedings merged into that order and the criminal proceeding would be dismissed without prejudice to renewal at such time as the wife appeared in and actually vacated the family court proceedings. [People v Perez, 109 Misc. 2d 291, 440 N.Y.S.2d 166, 1981 N.Y. Misc. LEXIS 2393 \(N.Y. City Crim. Ct. 1981\)](#).

County Criminal Court had jurisdiction over charge of second degree criminal contempt for defendant's alleged violation of Family Court order of protection, notwithstanding that defendant's wife had already filed violation of protection order petition in Family Court based on defendant's alleged harassment of her, for although Family Court

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and Criminal Court have concurrent jurisdiction over designated family offense proceedings under CLS *CPL* § 530.11 and CLS *Family Ct Act* § 812, and final choice of forum bars any subsequent proceeding in alternative court based on same offense, second degree criminal contempt is not “family offense,” and thus statutes’ election provisions were not applicable to that crime. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\).](#)

Complainant, who filed petition in Family Court for her husband’s alleged violation of protective order based on same acts for which she subsequently swore out criminal complaint against him, made binding election to proceed in Family Court with respect to those counts of information charging husband with third degree attempted assault, harassment, and second degree harassment, thus requiring dismissal of those charges in Criminal Court with leave to restore in Family Court, since (1) attempted assault and harassment are “family offenses” enumerated in CLS *Family Ct Act* § 812, which confers jurisdiction on Family Court concurrent with Criminal Court, and second degree aggravated harassment is “inextricably” linked with harassment, and (2) proceedings in Criminal Court were not commenced within 72 hours after still-pending Family Court proceeding was instituted as required by CLS [Family Ct Act § 821](#) and CLS [CPL § 100.07](#); however, Criminal Court retained jurisdiction over those counts charging husband with second degree criminal trespass, endangering welfare of child, and second degree criminal contempt since those charges were either not technically congruent with enumerated “family offenses” or did not share any elements thereof. [People v Singleton, 140 Misc. 2d 960, 532 N.Y.S.2d 208, 1988 N.Y. Misc. LEXIS 509 \(N.Y. City Crim. Ct. 1988\).](#)

Hearing was not required to determine whether victim was advised of her right of election to proceed either in Criminal Court or Family Court under CLS *CPL* § 530.11 where Family Court petition filed and signed by victim stated “I certify I have been given an explanation with respect to *Section 812 of the Family Court Act* and 216 of the Judiciary Law with respect to Family Offense and same has been explained to me and I understand my rights thereunder” since CLS *Family Ct Act* § 812 and CLS Jud § 216 mirror CLS *CPL* § 530.11 in setting forth both options available to victim as to how to proceed, and their ramifications; to permit victim to testify that she was not advised of her rights would undermine statutory procedures and create uncertainty as to court in which proceeding should be adjudicated. [People v Falzone, 142 Misc. 2d 337, 537 N.Y.S.2d 773, 1989 N.Y. Misc. LEXIS 37 \(N.Y. Crim. Ct. 1989\).](#)

Defendant was entitled to dismissal of information charging him with aggravated harassment pursuant to CLS [CPL § 170.30\(1\)\(f\)](#) since (1) charge was based on defendant’s repeated annoying and abusive telephone calls to his wife, which led to Family Court proceeding for violation of order of protection, (2) charge was inextricably linked to charges brought in Family Court, and (3) complainant did not make valid election pursuant to CLS *Family Ct Act* § 812(2)(e) to proceed in District Court, choosing instead to attempt to proceed on both fronts. [People v Baumann, 144 Misc. 2d 789, 545 N.Y.S.2d 519, 1989 N.Y. Misc. LEXIS 528 \(N.Y. Dist. Ct. 1989\).](#)

Victim’s filing of family offense petition against her former husband in Family Court, within 72 hours of commencement of criminal assault proceeding which she initiated against him based on same incident, constituted “final choice of forum” to proceed in Family Court under applicable election of forum statutes, and thus misdemeanor information would be dismissed. [People v Fisher, 153 Misc. 2d 86, 580 N.Y.S.2d 625, 1991 N.Y. Misc. LEXIS 781 \(N.Y. J. Ct. 1991\).](#)

## 6. Exclusive original jurisdiction under § 812 prior to amendment

Even though family court had not considered and transferred to county court charge of assault arising from claimant’s alleged incest with his daughter, county court had at least the initial power to adjudicate whether the fact complex required transfer to the family court, and county court was not without some power to adjudicate and State was protected against claim for false imprisonment when its administrative officials acted upon commitment papers issued by county court. [Nuernberger v State, 41 N.Y.2d 111, 390 N.Y.S.2d 904, 359 N.E.2d 412, 1976 N.Y. LEXIS 3137 \(N.Y. 1976\).](#)

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The Family Court has priority of examination into family offenses and the legislature has provided a procedure both for the enforcement of that priority and for surrender of the court's jurisdiction where appropriate. [People v Gemmill, 34 A.D.2d 177, 310 N.Y.S.2d 244, 1970 N.Y. App. Div. LEXIS 4885 \(N.Y. App. Div. 3d Dep't 1970\)](#).

The exclusive original jurisdiction of the Family Court of a "family offense" proceeding therein between spouses, vests in that court by Article 8 of the Family Court Act, and is in no way affected by the subsequent commencement of a divorce action in the Supreme Court by one of the spouses. [Hrab v Hrab, 39 A.D.2d 745, 332 N.Y.S.2d 91, 1972 N.Y. App. Div. LEXIS 4611 \(N.Y. App. Div. 2d Dep't 1972\)](#).

Family Court has exclusive jurisdiction over family matters and should not be influenced by action of grand jury prior to transfer of case. [People v Berger, 40 A.D.2d 192, 338 N.Y.S.2d 762, 1972 N.Y. App. Div. LEXIS 3037 \(N.Y. App. Div. 3d Dep't 1972\)](#).

Even though family court is authorized to entertain family offense proceedings, the act or acts must come within meaning of Family Court Act. [People v Coady, 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 \(N.Y. Sup. Ct. 1974\)](#).

Supreme Court order in matrimonial action purporting to "stay" Family Court from proceeding in connection with order of protection, which had been sought by wife, was a nullity since not only does Family Court have exclusive original jurisdiction of family offenses but the Family Court was not a litigant before Supreme Court and no writ of prohibition was sought or granted. [S. v S., 88 Misc. 2d 724, 389 N.Y.S.2d 529, 1976 N.Y. Misc. LEXIS 2734 \(N.Y. Fam. Ct. 1976\)](#).

#### **7. —Effect on jurisdiction of other courts**

The fact that this section purports to give the Family Court exclusive jurisdiction over assaults between spouses does not warrant the conclusion that the Legislature intended to supersede Supreme Court and County Court jurisdiction of first-degree criminal assault charges merely because the parties involved were spouses. [Ricapito v People, 38 Misc. 2d 710, 238 N.Y.S.2d 864, 1963 N.Y. Misc. LEXIS 2207 \(N.Y. Sup. Ct.\)](#), aff'd, [20 A.D.2d 567, 245 N.Y.S.2d 846, 1963 N.Y. App. Div. LEXIS 2631 \(N.Y. App. Div. 2d Dep't 1963\)](#).

This section, in providing that the Family Court has exclusive jurisdiction over any proceeding concerning acts which would constitute an assault between spouses or between parent and child, was not intended to, and did not, divest the Supreme Court of exclusive jurisdiction over crimes prosecuted by indictment. [People v Radison, 40 Misc. 2d 1063, 244 N.Y.S.2d 941, 1963 N.Y. Misc. LEXIS 1500 \(N.Y. Sup. Ct. 1963\)](#).

The statutory language of Art 8 of the Family Court Act grants the Family Court exclusive original jurisdiction of offenses arising thereunder, but the language of Art 10, when §§ 1011 through 1014 are examined, does not preclude a criminal court from having jurisdiction of offenses committed thereunder. [People v Abrams, 73 Misc. 2d 534, 341 N.Y.S.2d 515, 1973 N.Y. Misc. LEXIS 2130 \(N.Y. County Ct. 1973\)](#).

Where New York law does not establish asserted lack of jurisdiction of the Supreme Court over attempted murder, sodomy, and incest charges, with the clarity necessary to make appropriate federal adjudication of a due process claim, the federal court will not rule on the argument that the Family Court rather than the Supreme Court had jurisdiction. [United States ex rel. Herrington v Mancusi, 415 F.2d 205, 1969 U.S. App. LEXIS 11003 \(2d Cir. N.Y. 1969\)](#).

#### **8. —Requirement of initial determination in family court prior to criminal proceedings**

The county court may not try an indictment accusing a husband of feloniously assaulting his wife without first having transferred the proceeding to the family court for an initial determination of whether the assault should be disposed

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of there as a “family offense” or transferred to county court for prosecution as a crime. [People v Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481, 229 N.E.2d 180, 1967 N.Y. LEXIS 1268 \(N.Y. 1967\)](#).

So far as family offenses are concerned, they are not treated as crimes until the family court judge has so determined. [People v Berger, 40 A.D.2d 192, 338 N.Y.S.2d 762, 1972 N.Y. App. Div. LEXIS 3037 \(N.Y. App. Div. 3d Dep't 1972\)](#).

An intrafamilial offense of assault committed by a husband on his wife is not to be treated in a criminal way until a family court judge has so decreed. [People v Brady, 54 Misc. 2d 638, 283 N.Y.S.2d 175, 1967 N.Y. Misc. LEXIS 1258 \(N.Y. Dist. Ct. 1967\)](#).

Where allegations contained in indictments concern acts which would constitute an assault between members of same family within meaning of § 812 and proceedings are transferred to Family Court, Family Court may order a transfer back to County Court if it concludes that its processes are inappropriate. If Family Court retains jurisdiction, the indictments will be dismissed upon proper motion. [People v Rood, 55 Misc. 2d 114, 284 N.Y.S.2d 364, 1967 N.Y. Misc. LEXIS 1097 \(N.Y. County Ct. 1967\)](#).

Family Court has “exclusive original jurisdiction” (*Family Ct Act*, § 812, subd 1) with respect to intra-family child abuse, but such does not prevent subsequent removal of these cases from Family Court to the criminal courts when the Family Court deems this appropriate, provided that the initial child abuse proceeding originates in Family Court. [People v Tatro, 95 Misc. 2d 178, 407 N.Y.S.2d 135, 1978 N.Y. Misc. LEXIS 2421 \(N.Y. County Ct. 1978\)](#).

#### **9. —Effect of failure to proceed first in family court**

Dismissal of pending indictment in county court of husband for assault on his wife was required as failure to transfer such matter to the Family Court was jurisdictional and all proceedings thereafter in the criminal court were null and void. [People v Berger, 40 A.D.2d 192, 338 N.Y.S.2d 762, 1972 N.Y. App. Div. LEXIS 3037 \(N.Y. App. Div. 3d Dep't 1972\)](#).

Where family court’s exclusive original jurisdiction was improperly waived, district court never acquired jurisdiction, and plea of guilty in district court was complete nullity, as well as judgment of conviction rendered thereon; inasmuch as judgment of conviction was not properly before the Supreme Court, Appellate Division, for review, judgment would not be reversed, but defendant could move in district court to vacate plea and conviction. [Librizzi v Chisholm, 55 A.D.2d 954, 391 N.Y.S.2d 154, 1977 N.Y. App. Div. LEXIS 10251 \(N.Y. App. Div. 2d Dep't 1977\)](#).

Indictment returned by grand jury charging husband with assault upon wife was a nullity and dismissed where it was returned before Family Court acted and at a time when that court had exclusive jurisdiction over the subject matter. [People v Boyce, 55 Misc. 2d 53, 284 N.Y.S.2d 358, 1967 N.Y. Misc. LEXIS 1133 \(N.Y. Sup. Ct. 1967\)](#).

Action of clerk of family court, in returning case, which involved offenses allegedly committed against accused’s wife, to district court without court authorization and without having had a judicial determination, was a nullity; the resultant defect in indictment, in which accused was subsequently charged with second-degree burglary and third-degree assault, was a jurisdictional defect requiring that indictment be dismissed, though accused and his wife were divorced after he was indicted. [People v Reuscher, 89 Misc. 2d 160, 390 N.Y.S.2d 568, 1976 N.Y. Misc. LEXIS 2838 \(N.Y. Sup. Ct. 1976\)](#).

Pursuant to [CPL 210.20](#) (subd 1, par [a]) and 210.25 (subd 2), an indictment charging intra-family child abuse, brought in County Court, should be dismissed for lack of jurisdiction as a proceeding of this nature must originate in Family Court (*Family Ct Act*, § 812, subd 1); however, the matter should be transferred to Family Court for proceedings consistent with [section 1014 of the Family Court Act](#). [People v Tatro, 95 Misc. 2d 178, 407 N.Y.S.2d 135, 1978 N.Y. Misc. LEXIS 2421 \(N.Y. County Ct. 1978\)](#).

## 10. Jurisdiction of family court over particular offenses

Where a 17-year-old boy was charged in a complaint filed by his mother with being a wayward minor in that he was disobedient and stayed out all night drinking and smoking marijuana, the Family Court had jurisdiction of the action which constituted intrafamilial disorderly conduct within the ambit of § 812 of the Family Court Act. Accordingly, a Family Court order transferring the proceedings to District Court was reversed, with directions to the Family Court to consider whether the processes of that court were appropriate and if not to transfer the action to an appropriate criminal court. *B. v B.*, 32 A.D.2d 808, 303 N.Y.S.2d 216, 1969 N.Y. App. Div. LEXIS 3728 (N.Y. App. Div. 2d Dep't 1969).

Although not all of wife's allegations against husband were proved, protective order under CLS Family Ct Act Art 8 was warranted by proof of at least second degree harassment in violation of CLS [Penal § 240.26\(1\)](#) where wife testified that husband attempted to strangle her with belt in presence of children, that he threw her across room causing her to hit her head on couch, that he punched, pinched, and grabbed her and called her offensive names in presence of children, and that he slapped child in back of head and called him offensive names, and court also considered child's testimony, which, although unsworn, was taken in presence of all counsel, who had opportunity to examine him. [Machukas v Wagner](#), 246 A.D.2d 840, 667 N.Y.S.2d 817, 1998 N.Y. App. Div. LEXIS 547 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1302 (N.Y. 1998).

Family offense petition was properly dismissed for lack of subject matter jurisdiction because the father's alleged acts were not the proper subject of a family offense proceeding since the mother's petition failed to allege any of the enumerated offenses in *N.Y. Fam. Ct. Act § 812(1)*. *Matter of Rachel L. v Abraham L.*, 37 A.D.3d 720, 831 N.Y.S.2d 218, 2007 N.Y. App. Div. LEXIS 2060 (N.Y. App. Div. 2d Dep't 2007).

Family court properly found that a respondent willfully violated two temporary orders of protection because the court adhered to the prescribed statutory procedures and did not exceed its jurisdiction by issuing a final order of protection, the respondent was on notice of the conduct prohibited under the order of protection and that the order would be extended, his emails contained statements clearly intended to harass the petitioner, a finding of the commission of a family offense was not required, and the petition before the court alleged acts that were specifically enumerated in the statute. [Matter of Lisa T. v King E.T.](#), 147 A.D.3d 670, 48 N.Y.S.3d 119, 2017 N.Y. App. Div. LEXIS 1472 (N.Y. App. Div. 1st Dep't), aff'd, 30 N.Y.3d 548, 91 N.E.3d 1215, 69 N.Y.S.3d 236, 2017 N.Y. LEXIS 3778 (N.Y. 2017).

Family court erred in finding that the respondent committed the family offenses of third-degree menacing and disorderly conduct, and in directing that an order of protection be entered in favor of the petitioner and against the respondent for a period of six months because the family court lacked subject matter jurisdiction over the matter where the parties did not have an intimate relationship inasmuch as they were only connected through a third party—the petitioner's live-in boyfriend and the appellant's brother—the parties had never resided together, and their contact with one another was purely by happenstance, as they lived in the same building. [Matter of Royster v Murray](#), 157 A.D.3d 701, 69 N.Y.S.3d 328, 2018 N.Y. App. Div. LEXIS 128 (N.Y. App. Div. 2d Dep't 2018).

Conduct of husband swerving his automobile abruptly in front of wife's automobile did not constitute "assault" or "disorderly conduct" so as to give jurisdiction to Family Court as a "family offense". [Seymour v Seymour](#), 56 Misc. 2d 546, 289 N.Y.S.2d 515, 1968 N.Y. Misc. LEXIS 1554 (N.Y. Fam. Ct. 1968).

Family Court did have jurisdiction over matter where conduct with which estranged husband was charged did not constitute disorderly conduct, harassment, menacing, reckless endangerment, or assault. [Di Donna v Di Donna](#), 72 Misc. 2d 231, 339 N.Y.S.2d 592, 1972 N.Y. Misc. LEXIS 1360 (N.Y. Fam. Ct. 1972).

Mere possession of dangerous weapon per se is a crime in and of itself which is not to be sent to family court as a family offense. [People v Coady](#), 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 (N.Y. Sup. Ct. 1974).

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Where family unit no longer existed and for many years the relationship between son, in his forties, and his 74-year-old mother had been continuously strained and had frequently resulted in recourse to litigation, and where the alleged acts of assault and unlawful imprisonment had arisen from 20-year long property dispute and not from intimate family relationship, and, further, in view of severity and premeditated nature of attack, by son upon his mother, family court was not appropriate forum for case. [Mouquin v Mouquin, 91 Misc. 2d 440, 398 N.Y.S.2d 211, 1977 N.Y. Misc. LEXIS 2325 \(N.Y. Fam. Ct. 1977\).](#)

In a prosecution for criminal possession of a loaded weapon, defendant's motion for an order dismissing the indictment and transferring the matter to Family Court on the ground that his wife wished to proceed in Family Court was denied where the crime involved a danger to the public at large, despite the fact that in a proper case a criminal charge may be dismissed or a guilty plea vacated, and notwithstanding that the complainant spouse was not advised of her statutory right to select the forum in that the complainant spouse is not vested with the power to determine whether to prosecute as crimes acts which constitute a danger to the public at large. [People v Harris, 113 Misc. 2d 46, 448 N.Y.S.2d 961, 1982 N.Y. Misc. LEXIS 3253 \(N.Y. County Ct. 1982\).](#)

Offense of criminal mischief is not within Family Court jurisdiction as delineated in CLS *Family Ct Act* § 812 and CLS *CPL* § 530.11, and thus exclusion provision of CLS [CPL § 100.07](#) does not apply to such offense. [People v Bulin, 142 Misc. 2d 776, 538 N.Y.S.2d 436, 1989 N.Y. Misc. LEXIS 115 \(N.Y. Dist. Ct. 1989\).](#)

Defendant can be subject to both Family Court proceeding involving charge of disorderly conduct and criminal proceeding involving charge of criminal mischief, even though both arise from same transaction, since family offense proceedings are civil in nature and there is no constitutional prohibition against concurrent criminal and civil remedies for same acts or transactions. [People v Bulin, 142 Misc. 2d 776, 538 N.Y.S.2d 436, 1989 N.Y. Misc. LEXIS 115 \(N.Y. Dist. Ct. 1989\).](#)

Local criminal court had exclusive jurisdiction over charge of second degree criminal contempt under CLS [Penal § 215.50\(3\)](#) although it was based on violation of Family Court order of protection since (1) crime was not designated "family offense" within CLS *Family Ct Act* § 812(1) and CLS *CPL* § 530.11(1), and (2) language of CLS [Penal § 215.50\(3\)](#), which referred to disobedience of "mandate of a court," meant mandate of any court, including Family Court. [People v Jhon, 150 Misc. 2d 842, 570 N.Y.S.2d 427 \(N.Y. City Crim. Ct. 1991\).](#)

Because a father and a mother's boyfriend had not been married to each other, were not related by blood or marriage, did not have a child in common or an intimate relationship, the family court lacked jurisdiction to issue and the father lacked standing to seek, under *N.Y. Fam. Ct. Act* §§ 812, [842](#), an order of protection against the boyfriend. [Matter of Mark W. v Damion W., 887 N.Y.S.2d 822, 25 Misc. 3d 1148, 2009 N.Y. Misc. LEXIS 2885 \(N.Y. Fam. Ct. 2009\).](#)

Because the statutory language in [N.Y. Fam. Ct. Act](#) §§ [1056\(c\)](#) or 812(1) made no reference to a foster care agency's employees, they were deemed excluded; consequently, the Family Court lacked jurisdiction to grant a temporary order of protection or to find a father in contempt for violating previous orders. [Matter of B.H. Children \(Robert H.\), 904 N.Y.S.2d 653, 29 Misc. 3d 161, 2010 N.Y. Misc. LEXIS 2810 \(N.Y. Fam. Ct. 2010\).](#)

Caregiver's complaint against a referee, alleging that the referee had issued an order of protection against the caregiver without having the authority or jurisdiction to do so, did not give rise to liability because the doctrine of judicial immunity exempted the referee from any liability in the matter; it could not have been disputed that the referee was acting in a judicial capacity when she issued the subject order of protection. [Lodichand v Kogut, 915 N.Y.S.2d 792, 30 Misc. 3d 891, 2011 N.Y. Misc. LEXIS 8 \(N.Y. Sup. Ct. 2011\)](#), aff'd, [91 A.D.3d 608, 936 N.Y.S.2d 553, 2012 N.Y. App. Div. LEXIS 212 \(N.Y. App. Div. 2d Dep't 2012\).](#)

**11. —Assault**

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The family court has jurisdiction to deal in the first instance with family offenses, including any complaint of assault, felonious or simple, between spouses or between parent and child or between members of the same family. [People v Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481, 229 N.E.2d 180, 1967 N.Y. LEXIS 1268 \(N.Y. 1967\)](#).

The New York State Constitution gives the legislature the power to vest in the family court, without qualification, jurisdiction over all “crimes and offenses” between spouses, and by use of the statutory language “disorderly conduct or an assault” in *Family Court Act § 812*, the legislature simply intended to limit the specific “crimes and offenses” to be heard by the family court to certain types of violence and the statutory phrase “an assault between spouses” is broad enough to include any assault, felonious as well as petit. [People v Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481, 229 N.E.2d 180, 1967 N.Y. LEXIS 1268 \(N.Y. 1967\)](#).

Family Court is given exclusive original jurisdiction subject to the provisions of § 813 of the Family Court Act over any proceeding concerning acts which would constitute an assault between spouses. [People v Gemmill, 34 A.D.2d 177, 310 N.Y.S.2d 244, 1970 N.Y. App. Div. LEXIS 4885 \(N.Y. App. Div. 3d Dep’t 1970\)](#).

The Family Court’s jurisdictional grant under the statute extends to any assault, felonious as well as petty. [United States ex rel. Herrington v Mancusi, 415 F.2d 205, 1969 U.S. App. LEXIS 11003 \(2d Cir. N.Y. 1969\)](#).

## 12. —Assault and non-assault charges arising from same incident

When assault and non-assault charges are inextricably related by a common element in the offenses, the transaction lies in the first instance within the jurisdiction of the Family Court. Accordingly, where the defendant was accused of having broken into the apartment of his wife and of stabbing her, and was indicted on two counts of assault and counts of burglary and possession of a dangerous weapon; his Supreme Court conviction was reversed and the proceeding transferred to the Family Court. [People v Williams, 24 N.Y.2d 274, 300 N.Y.S.2d 89, 248 N.E.2d 8, 1969 N.Y. LEXIS 1416 \(N.Y. 1969\)](#).

Where defendant stood indicted for crimes of attempted murder, assault in the first degree and possession of weapons and dangerous instruments and appliances as a misdemeanor all arising out of the alleged stabbing of his wife, the indictment would be dismissed and proceedings transferred to the family court for initial disposition pursuant to statute dealing with certain intrafamily offenses. [People ex rel. Balk v Warden, Queens House of Detention for Men, 46 A.D.2d 224, 362 N.Y.S.2d 180, 1974 N.Y. App. Div. LEXIS 3363 \(N.Y. App. Div. 2d Dep’t 1974\)](#).

Family court’s exclusive original jurisdiction, under former provision of Family Court Act, over proceedings concerning acts constituting assault between parent and child extended to charges inextricably related to assault, or which depended upon intent to assault as component part of crime, such as felonious possession of a weapon. [People v Jones, 59 A.D.2d 617, 398 N.Y.S.2d 162, 1977 N.Y. App. Div. LEXIS 13441 \(N.Y. App. Div. 2d Dep’t 1977\)](#).

Although defendant was indicted for criminal trespass and unlawful imprisonment, those crimes were inextricably related by a common element to charges of assaulting his wife, and were thus within the jurisdiction of the family court; therefore, the county court lacked jurisdiction when it tried defendant for charges of criminal trespass in the first degree, unlawful imprisonment in the first degree, menacing and assault in the third degree. [People v McCarthy, 59 A.D.2d 749, 398 N.Y.S.2d 585, 1977 N.Y. App. Div. LEXIS 13766 \(N.Y. App. Div. 2d Dep’t 1977\)](#).

Where the charge of assault contained in the first count of an indictment must be transferred to the Family Court, the second count of the indictment charging the possession of the knife as a felony must also be transferred to the Family Court, since it is an integral part of the assault charge. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\)](#).

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Where assault and nonassault charges such as unlawful imprisonment were inextricably related by common element in the offenses, and not otherwise, transaction lay in first instance within jurisdiction of family court. [Mouquin v Mouquin, 91 Misc. 2d 440, 398 N.Y.S.2d 211, 1977 N.Y. Misc. LEXIS 2325 \(N.Y. Fam. Ct. 1977\).](#)

**13. —Murder, manslaughter and related offenses**

Where a husband was charged with the murder of his wife, and nothing was submitted to spell out a claim that defendant could be found guilty of assault and not murder or manslaughter, the defendant was not entitled to have the case referred in the first instance to the Family Court. [People v Brennan, 33 A.D.2d 139, 306 N.Y.S.2d 384, 1970 N.Y. App. Div. LEXIS 5797 \(N.Y. App. Div. 3d Dep't 1970\).](#)

The Family Court has no jurisdiction over offenses of manslaughter or murder since, by the very nature of these offenses, no future benefit or protection may be afforded to the victim under the statute; thus the jurisdiction of the Family Court is limited to the offenses enumerated therein. [Whiting v Shepard, 35 A.D.2d 11, 312 N.Y.S.2d 414, 1970 N.Y. App. Div. LEXIS 4097 \(N.Y. App. Div. 3d Dep't 1970\).](#)

Where the defendant was charged with attempted murder of his wife but was convicted of assault in the first degree, the Family Court did not have exclusive original jurisdiction by virtue of *Family Court Act* § 812, and the County Court had jurisdiction. [People v Bronson, 39 A.D.2d 464, 337 N.Y.S.2d 215, 1972 N.Y. App. Div. LEXIS 3603 \(N.Y. App. Div. 4th Dep't 1972\).](#)

Attempted murder is not included within meaning of "assault" so as to give family court jurisdiction. [People v Coady, 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 \(N.Y. Sup. Ct. 1974\).](#)

Jurisdiction of the Family Court over an attempted murder of the defendant's wife has not been established by New York law. [United States ex rel. Herrington v Mancusi, 415 F.2d 205, 1969 U.S. App. LEXIS 11003 \(2d Cir. N.Y. 1969\).](#)

**14. —Sodomy, incest, sexual abuse and the like**

Where defendant was acquitted of incest but convicted of second degree assault and impairing the morals of his 11-year-old daughter, it was held the judgment should be modified by reversing the conviction for assault and that charge transferred to the Family Court which had exclusive original jurisdiction over aggravated and felonious assaults within the family group. Since the charge of endangering the morals of a minor did not come within the statutory definition of either assault or disorderly conduct and was essentially "a different crime" from either, it was held the Family Court did not have exclusive original jurisdiction of that charge. [People v Nuernberger, 25 N.Y.2d 179, 303 N.Y.S.2d 74, 250 N.E.2d 352, 1969 N.Y. LEXIS 1110 \(N.Y. 1969\).](#)

Proceedings concerning sodomy and sexual abuse, each in the first degree, committed between members of the same household, are not transferable to the Family Court pursuant to the statute. [People ex rel. Doty v Krueger, 32 A.D.2d 845, 302 N.Y.S.2d 605, 1969 N.Y. App. Div. LEXIS 3561 \(N.Y. App. Div. 2d Dep't 1969\), app. dismissed, 26 N.Y.2d 881, 309 N.Y.S.2d 932, 258 N.E.2d 215, 1970 N.Y. LEXIS 1477 \(N.Y. 1970\).](#)

Act of forceable sodomy between parent and child is not an "assault" within meaning and intent of section of Family Court Act requiring original jurisdiction in family court for assault between members of the same family or household, and county court had jurisdiction to entertain defendant's plea of guilty and to impose sentence. [People v Webb, 52 A.D.2d 8, 382 N.Y.S.2d 369, 1976 N.Y. App. Div. LEXIS 11521 \(N.Y. App. Div. 3d Dep't 1976\).](#)

Petition seeking order of protection should have been dismissed for lack of subject matter jurisdiction where acts alleged to have been committed by respondent, including various forms of sexual misconduct, most serious of which constituted class B felony of first degree aggravated sexual abuse, were not specifically enumerated in CLS

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Family Ct Act § 812. [Hamm-Jones v Jones, 267 A.D.2d 904, 702 N.Y.S.2d 130, 1999 N.Y. App. Div. LEXIS 13597 \(N.Y. App. Div. 3d Dep't 1999\).](#)

Prosecution of father for sodomy committed upon his child was properly brought in Supreme Court rather than in Family Court, since this section is limited by its terms to offenses of disorderly conduct or assault. [People v Fuentes, 51 Misc. 2d 354, 273 N.Y.S.2d 321, 1966 N.Y. Misc. LEXIS 1659 \(N.Y. Sup. Ct. 1966\).](#)

Jurisdiction of charges of sodomy and sexual abuse of the defendant's 9-year-old cousin was in the county court, rather than in the Family Court, since the very nature of the acts which constitute the crimes charged against the defendant negatives the theory that the Legislature intended that these be "family offenses" to be treated as "domestic quarrels" with exclusive original jurisdiction in the Family Court under the statute. [People ex rel. Doty v Krueger, 58 Misc. 2d 428, 295 N.Y.S.2d 581, 1968 N.Y. Misc. LEXIS 995 \(N.Y. Sup. Ct. 1968\)](#), aff'd, 32 A.D.2d 845, 302 N.Y.S.2d 605, 1969 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 1969).

"Family discord" is accurate description of results of an incestuous liaison between a 16-year-old brother living with his 12-year-old sister until their baby is born, and family court has initial jurisdiction thereof. [S v S, 63 Misc. 2d 1, 311 N.Y.S.2d 169, 1970 N.Y. Misc. LEXIS 1600 \(N.Y. Fam. Ct. 1970\).](#)

Offenses such as sodomy and sexual abuse and other similar sexual offenses were not intended to fall within the Family Court's exclusive jurisdiction under Art 8 of the Family Court Act. [People v Abrams, 73 Misc. 2d 534, 341 N.Y.S.2d 515, 1973 N.Y. Misc. LEXIS 2130 \(N.Y. County Ct. 1973\).](#)

The Family Court does not have exclusive original jurisdiction of a charge of endangering the morals of a minor. [People v Abrams, 73 Misc. 2d 534, 341 N.Y.S.2d 515, 1973 N.Y. Misc. LEXIS 2130 \(N.Y. County Ct. 1973\).](#)

## 15. Members of same family or household

Stepfather and stepson were "members of the same family or household," as that term is used in CLS *Family Ct Act* § 812, although they did not share same living quarters, and Family Court had jurisdiction over matters involving claimed assault and harassment of stepfather by his stepson, since their relationship was one by affinity and of first degree. [Nadeau v Sullivan, 204 A.D.2d 913, 612 N.Y.S.2d 501, 1994 N.Y. App. Div. LEXIS 5616 \(N.Y. App. Div. 3d Dep't 1994\).](#)

Family Court lacked subject matter jurisdiction to grant order of protection in family offense proceeding brought by petitioner in 1995 against her former stepfather, who had been convicted of raping her in 1985, as parties were not "members of the same family or household" under CLS *Family Ct Act* § 812(1) where petitioner's mother divorced respondent in 1985, thereby terminating relation of affinity between petitioner and her former stepfather. [Orellana v Escalante, 228 A.D.2d 63, 653 N.Y.S.2d 992, 1997 N.Y. App. Div. LEXIS 1712 \(N.Y. App. Div. 4th Dep't 1997\).](#)

Dismissal of a father's first two family offense petitions seeking protection orders in favor of his child against the child's aunt and uncle was error because, based on the fact that the aunt was the sister of the child's mother, and that the uncle was married to the aunt, the father alleged the necessary relations to establish jurisdiction pursuant to *N.Y. Fam. Ct. Act* § 812(1)(a); further, based on the allegation that the father was a first cousin of the uncle and, as a result, his child was a cousin to the uncle, the father also established a sufficient relationship in the second two petitions. The trial court's proper inquiry should have been the child's relation to the aunt and uncle, not the father's relation to the aunt and uncle. [Matter of Bibeau v Ackey, 56 A.D.3d 971, 869 N.Y.S.2d 244, 2008 N.Y. App. Div. LEXIS 8649 \(N.Y. App. Div. 3d Dep't 2008\).](#)

Because the parties had no direct relationship, and were only connected by virtue of the fact that the petitioner and the respondent's brother, who had never married, had a child together, the Family Court properly determined that they were not "members of the same family or household" within the meaning of *N.Y. Fam. Ct. Act* § 812(1), and

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dismissed the petition for an order of protection without a hearing. [Matter of Seye v Lamar, 72 A.D.3d 975, 900 N.Y.S.2d 112, 2010 N.Y. App. Div. LEXIS 3254 \(N.Y. App. Div. 2d Dep't 2010\)](#).

The Legislature intended to broaden the scope of this section by including the word “family” to be construed on a case by case basis more broadly than the classical implication of father, mother, and children, and/or immediate blood relatives living in the same household. [People v Harkins, 49 Misc. 2d 673, 268 N.Y.S.2d 482, 1966 N.Y. Misc. LEXIS 2071 \(N.Y. County Ct. 1966\)](#).

There is no merit in the contention that the Family Court has exclusive jurisdiction of a charge of third degree assault upon a teacher on the theory that assault is a family offense because the teacher stands in the position of “parens patriae”. [Vergara v Criminal Court of New York, 59 Misc. 2d 134, 298 N.Y.S.2d 422, 1969 N.Y. Misc. LEXIS 1717 \(N.Y. Sup. Ct.\)](#), aff'd, 32 A.D.2d 838, 302 N.Y.S.2d 386, 1969 N.Y. App. Div. LEXIS 3546 (N.Y. App. Div. 2d Dep't 1969).

Fact that support proceedings may be instituted pursuant to [Family Court Act § 415](#) against stepfather if stepson becomes a recipient of public welfare is not sufficient to create such legal interdependence as would confer jurisdiction upon the family court over charge of harassment and assault by stepfather of stepson where the defendant was no longer living with the boy's mother. [People v Weisman, 72 Misc. 2d 465, 339 N.Y.S.2d 482, 1973 N.Y. Misc. LEXIS 2331 \(N.Y. City Crim. Ct. 1973\)](#).

An order of protection would be granted to a fetus under art 8 of the Family Ct Act as being within the jurisdiction of the Family Court to issue and consistent with its statutory purpose of protecting a person from harm by another member of the family or household, where the proceeding was brought by the natural mother against her husband, in that the state's interest in protecting the fetus would be consistent with the mother's desire and right to give birth to a healthy baby and no way conflicted with her privacy right to freely decide what to do with her pregnancy; the birth of the child is not a condition precedent to enforcement of an order of protection. [Gloria C. v William C., 124 Misc. 2d 313, 476 N.Y.S.2d 991, 1984 N.Y. Misc. LEXIS 3202 \(N.Y. Fam. Ct. 1984\)](#).

Putative father who denied paternity lacked standing to seek protective order under CLS Family Ct Act Art 8, since he did not fall within any class of persons entitled to originate family offenses proceedings under CLS [Family Ct Act § 822](#). [Robert F. Z. v Michelle McG., 134 Misc. 2d 950, 513 N.Y.S.2d 628, 1987 N.Y. Misc. LEXIS 2133 \(N.Y. Fam. Ct. 1987\)](#).

Family Court lacked subject matter jurisdiction over family offense proceeding brought by natural father against his natural daughter since father's past consent to his daughter's adoption terminated existence of parent-child relationship necessary to maintain such action under CLS [Family Ct Act § 812](#). [Robert R. v Eve M., 135 Misc. 2d 770, 517 N.Y.S.2d 116, 1987 N.Y. Misc. LEXIS 2301 \(N.Y. Fam. Ct. 1987\)](#).

Allegation that parties had child in common established petitioner's standing to bring proceeding for order of protection under CLS Family Ct Act Art 8; thus, motion by putative father of petitioner's children to dismiss proceeding against him was properly denied. [Lydia B. v Pedro G., 152 Misc. 2d 272, 576 N.Y.S.2d 178, 1991 N.Y. Misc. LEXIS 619 \(N.Y. Fam. Ct. 1991\)](#).

CLS Family Ct Act art 8 does not authorize person who is not child's parent or lawful custodian to originate and maintain proceeding to remove child from custodial parent's home. [Rader v Rader, 183 Misc. 2d 185, 701 N.Y.S.2d 855, 1999 N.Y. Misc. LEXIS 589 \(N.Y. Fam. Ct. 1999\)](#).

## 16. —By consanguinity

Affirming a conviction of assault in the third degree, the Court of Appeals held that absent a common living arrangement between the uncle, who was the victim, and the nephew, the assailant, and the fact cause of the conflict was an incident of the landlord-tenant relationship arising from the uncle's ownership of the house; the

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assault did not arise out of the family or household context. [People v Williams, 24 N.Y.2d 274, 300 N.Y.S.2d 89, 248 N.E.2d 8, 1969 N.Y. LEXIS 1416 \(N.Y. 1969\)](#).

Family court had subject matter jurisdiction over family offense petition because, although respondent birth mother was no longer legally a minor child's family member as the child had been legally adopted under [N.Y. Dom. Rel. Law § 117](#), respondent was still related to the child by consanguinity under *N.Y. Fam. Ct. Act § 812(1)(a)* and still had an intimate relationship with the child under § 812(e). [Matter of K.J. v K.K., 873 N.Y.S.2d 867, 23 Misc. 3d 754, 241 N.Y.L.J. 29, 2009 N.Y. Misc. LEXIS 204 \(N.Y. Fam. Ct. 2009\)](#).

### 17. —By affinity

The alleged assault committed by the father-in-law of petitioner's daughter, on petitioner, the mother-in-law of defendant's son, was not a family offense, where the parties did not reside together and were not members of the same family or household within the meaning of *Family Court Act § 812*. It was held the issue was one which the Supreme Court, Appellate Division, could consider de novo notwithstanding a contrary determination by another judge of the Family Court. [Klemes v Sohnen, 32 A.D.2d 935, 303 N.Y.S.2d 533, 1969 N.Y. App. Div. LEXIS 3410 \(N.Y. App. Div. 2d Dep't 1969\)](#).

Appeal from denial of family offense petition was dismissed as academic where, following denial of requested relief, marriage between petitioner and respondent's father was dissolved by divorce, terminating relationship of affinity between petitioner and respondent; Family Court did not have jurisdiction to entertain petitioner's application for order of protection against her former stepdaughter. [Dulanto v Dulanto, 276 A.D.2d 694, 714 N.Y.S.2d 748, 2000 N.Y. App. Div. LEXIS 10879 \(N.Y. App. Div. 2d Dep't 2000\)](#).

Although this act (prior to amendment) contains no definition of the term "family" a mother-in-law and son-in-law may be considered members of the same family, although they are not living in the same household, with respect to an assault committed by the one against the other. [People v Keller, 37 Misc. 2d 122, 234 N.Y.S.2d 469, 1962 N.Y. Misc. LEXIS 2205 \(N.Y. Dist. Ct. 1962\)](#).

A defendant who assaulted his wife and his brother-in-law in the defendant's home at the same time and out of the same transaction was entitled to transfer proceedings brought against him by the brother-in-law to the Erie County Family Court. [People v Harkins, 49 Misc. 2d 673, 268 N.Y.S.2d 482, 1966 N.Y. Misc. LEXIS 2071 \(N.Y. County Ct. 1966\)](#).

A sister and brother-in-law are members of the same family for the purpose of vesting exclusive original jurisdiction in the Family Court. [People ex rel. Clifford v Krueger, 59 Misc. 2d 87, 297 N.Y.S.2d 990, 1969 N.Y. Misc. LEXIS 1728 \(N.Y. Sup. Ct. 1969\)](#) (further holding that fact that defendant fired into the home of a sister and brother-in-law from the public sidewalk does not relieve the statutory purpose).

Assault by one sister-in-law upon another who did not reside in same house did not constitute "family offense" within meaning of statute governing family offenses proceedings, and thus, misdemeanor information alleging perpetration of such assault would be retransferred from family court to appropriate criminal court. [Sarno v O'Toole, 86 Misc. 2d 764, 383 N.Y.S.2d 527, 1976 N.Y. Misc. LEXIS 2514 \(N.Y. Fam. Ct. 1976\)](#).

The death of a spouse severs any stepparent-stepchild relationship between the surviving spouse and children of the deceased spouse for purposes of jurisdiction in family offense proceedings under *N.Y. Fam. Ct. Act § 812*; to find that a stepparent relationship ceases when a marriage is dissolved for death, divorce, or any reason is compatible with the goal of § 812 to protect members of the same family or household. [Matter of Rita F. v Neil F., 819 N.Y.S.2d 439, 12 Misc. 3d 894, 235 N.Y.L.J. 112, 2006 N.Y. Misc. LEXIS 1245 \(N.Y. Fam. Ct. 2006\)](#).

Family court lacked jurisdiction under *N.Y. Fam. Ct. Act § 812* over a widow's family offense petition against her deceased husband's son because family offense proceedings under § 812 applied to members of the same family or household, defined as persons related by consanguinity or affinity, and the stepchild-stepparent relationship

between the widow and the son terminated when the husband died. [Matter of Rita F. v Neil F., 819 N.Y.S.2d 439, 12 Misc. 3d 894, 235 N.Y.L.J. 112, 2006 N.Y. Misc. LEXIS 1245 \(N.Y. Fam. Ct. 2006\).](#)

#### 18. —Unmarried persons living together

The “family” and “household” categories of the statute should be read to confer jurisdiction on the Family Court over disputes arising in relationship characterized by a unity of living arrangements, and of social, economic, and legal interdependence. [People v Williams, 24 N.Y.2d 274, 300 N.Y.S.2d 89, 248 N.E.2d 8, 1969 N.Y. LEXIS 1416 \(N.Y. 1969\).](#)

The Family Court has exclusive jurisdiction of an attempted assault by the defendant if the parties had contracted a common-law marriage in Alabama, thus rendering the same valid in New York and conferring exclusive original jurisdiction on the Family Court. [People v Haynes, 26 N.Y.2d 665, 308 N.Y.S.2d 391, 256 N.E.2d 545, 1970 N.Y. LEXIS 1627 \(N.Y. 1970\).](#)

Since the Legislature has chosen not to give legal recognition to common-law marriages, the court should not, in construing *Family Court Act* § 812, contradict that policy. [People v Allen, 27 N.Y.2d 108, 313 N.Y.S.2d 719, 261 N.E.2d 637, 1970 N.Y. LEXIS 1119 \(N.Y. 1970\).](#)

The “family” and “household” categories of § 812 of the Family Court act confer jurisdiction on the Family Court over the disputes arising in relationships only when there is a legal interdependence either through a solemnized marriage or a recognized common-law union and does not contemplate an illicit relationship entered into by the parties in a state which did not recognize common-law marriages and where the incident occurred in New York, which also does not recognize common-law marriages. [People v Allen, 27 N.Y.2d 108, 313 N.Y.S.2d 719, 261 N.E.2d 637, 1970 N.Y. LEXIS 1119 \(N.Y. 1970\).](#)

As the relationship between defendant and the victim, considering their former relationship and the fact that they were roommates at the time of the assault, was subject to classification as involving domestic violence, it was relevant for purposes of diagnosis and treatment that the victim’s assault was at the hands of a former boyfriend. Therefore, references in the victim’s medical records to domestic violence were admissible under the business records exception to the hearsay rule, [People v Ortega, 15 N.Y.3d 610, 917 N.Y.S.2d 1, 942 N.E.2d 210, 2010 N.Y. LEXIS 3336 \(N.Y. 2010\).](#)

There was no jurisdiction in the Family Court under Family Ct A § 812 to issue a protective order as between parties who lived together as husband and wife but had never gone through a ceremonial marriage, on the ground that such persons are not “spouses” within the meaning of Family Ct A § 812, and therefore there could be no commitment of a party who had violated the order. [Potter v Bennett, 40 A.D.2d 546, 334 N.Y.S.2d 511, 1972 N.Y. App. Div. LEXIS 3985 \(N.Y. App. Div. 2d Dep’t 1972\).](#)

Preponderance of the evidence supported the determination that the father committed the family offense of harassment in the second degree because the father: (1) insisted the child stay home from school to witness an argument between the parents; (2) threw the mother onto a bed and tried to rip the engagement ring off of her finger; and (3) confronted the mother and the child at a public event, pursuing them and screaming obscenities and insults as they fled to their vehicle. [Matter of Vincent X. v Christine Y., 151 A.D.3d 1229, 55 N.Y.S.3d 831, 2017 N.Y. App. Div. LEXIS 4429 \(N.Y. App. Div. 3d Dep’t 2017\).](#)

The expression “members of the same household” as used in this section is sufficiently broad to extend its coverage to an instance where a man and woman and several children are living together and have been so doing for several years in apparently normal family relationship, notwithstanding the man and woman are not legally married. [People v Dugar, 37 Misc. 2d 652, 235 N.Y.S.2d 152, 1962 N.Y. Misc. LEXIS 2153 \(N.Y. Dist. Ct. 1962\).](#)

Where man assaulted woman with whom he lived in meretricious relationship case was not one for Family Court under this section since Family Court could only bring about conciliation between married people and court could

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not countenance use of its powers to encourage illicit relationship where two minor children were present who were not fathered by defendant. [Best v Macklin, 46 Misc. 2d 622, 260 N.Y.S.2d 219, 1965 N.Y. Misc. LEXIS 1820 \(N.Y. Fam. Ct. 1965\)](#).

The application of a defendant charged with felonious assault to transfer the matter to the Family Court was properly granted, where the defendant and prosecuting witness shared the same apartment and held themselves out to be man and wife, although they had never legally been married. [People v Johnson, 48 Misc. 2d 536, 265 N.Y.S.2d 260, 1965 N.Y. Misc. LEXIS 1423 \(N.Y. Dist. Ct. 1965\)](#).

The expression “members of the same household” as used in this section includes an unmarried couple living as man and wife under the same roof. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\)](#).

The Family Court does not have exclusive original jurisdiction of an assault between a couple living together as man and wife, who are not legally married, where one or both of the parties is married to someone else, inasmuch as such parties were not members of the same household at the time of the alleged assault and therefore were not entitled to the benefits of Article 8 of the Family Court Act. [People v Ostrander, 58 Misc. 2d 383, 295 N.Y.S.2d 293, 1968 N.Y. Misc. LEXIS 1055 \(N.Y. County Ct. 1968\)](#), aff'd, 32 A.D.2d 844, 302 N.Y.S.2d 998, 1969 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 2d Dep't 1969).

Where there was no solemnized marriage or common-law union between complainant and defendant, who was charged with harassment, matter did not fall within exclusive jurisdiction of Family Court over disorderly conduct between members of the same family or household. [People v Dorns, 88 Misc. 2d 1064, 390 N.Y.S.2d 546, 1976 N.Y. Misc. LEXIS 2832 \(N.Y. J. Ct. 1976\)](#), aff'd, [96 Misc. 2d 54, 409 N.Y.S.2d 956, 1978 N.Y. Misc. LEXIS 2548 \(N.Y. App. Term 1978\)](#).

Although want of solemnized ceremonial marriage or recognized common-law type union precluded issuance of protective order, in favor of mother of out-of-wedlock children, under authority of statute giving family court jurisdiction of acts which would constitute harassment, etc., between spouses or parent and child or members of the same family or household, such order properly issued as ancillary to prior filiation orders involving the same parties, especially since need for protective order arose out of family strife that developed following acknowledgment and finding of paternity. [Muhlhausen v Ray, 89 Misc. 2d 298, 391 N.Y.S.2d 55, 1977 N.Y. Misc. LEXIS 1840 \(N.Y. Fam. Ct. 1977\)](#).

Defendant, who had been sharing complainant's apartment, was properly convicted of harassment ([Penal Law, § 240.25](#)) for remaining in complainant's apartment after he was no longer welcome and then blocking her exit from parking lot, and making threatening statements since, although defendant never actually carried out his threats to subject complainant to physical contact, intent to “harass, annoy or alarm” can be inferred from all surrounding circumstances considering fact that defendant had beaten complainant in past and had threatened her life on day in question. Town Court was not divested of subject matter jurisdiction over harassment charge by virtue of FCA § 812, which at that time, vested Family Court with exclusive jurisdiction over disorderly conduct between members of same “family” or “household” since defendant and complainant were not married and were therefore not members of same “family” or “household” within meaning of statute. [People v Dorns, 96 Misc. 2d 54, 409 N.Y.S.2d 956, 1978 N.Y. Misc. LEXIS 2548 \(N.Y. App. Term 1978\)](#).

Where the parties lived together as a family, as defined by *N.Y.Fam. Ct. Act § 812*, and the father was obligated to support his illegitimate children pursuant to *N.Y. Fam. Ct. Act art. 5*, the father's eviction action under [N.Y. Real Prop. Acts. Law § 713](#) was dismissed so that it could be addressed in the mother's pending child support action under [N.Y. Fam. Ct. Act §§ 413, 513. DeJesus v Rodriguez, 196 Misc. 2d 881, 768 N.Y.S.2d 126, 2003 N.Y. Misc. LEXIS 1053 \(N.Y. Civ. Ct. 2003\)](#).

## 19. —Divorced former spouses

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In an assault action instituted by the allegedly divorced wife of defendant in which the defendant contended the Family Court should have heard the cause of action in the first instance, the Court of Appeals held that the Family Court had no jurisdiction over criminal matters between divorced parties, but remanded the case for the taking of additional evidence as to the alleged divorce, since the only testimony as to the divorce was the uncorroborated testimony of the victim. [People v Williams, 24 N.Y.2d 274, 300 N.Y.S.2d 89, 248 N.E.2d 8, 1969 N.Y. LEXIS 1416 \(N.Y. 1969\)](#).

A divorced husband and wife are still members of the same family within the meaning of this section. [Koepfel v Judges of Family Court, 44 Misc. 2d 799, 254 N.Y.S.2d 600, 1964 N.Y. Misc. LEXIS 1263 \(N.Y. Sup. Ct. 1964\)](#).

A defendant charged with assaulting his four-year-old son with whom he holds visitation rights under a divorce decree may be prohibited from any and all visitation with his son under a temporary order of protection issued pursuant to CPL 530.11, which empowers the court to issue a temporary order of protection as a condition of a pretrial release where a criminal action is pending involving a complaint charging assault between parent and child; the class "parent and child" is enumerated without reference to the marital status of the parents, and to deny the child the protections intended by the statute simply because, as part of a divorce decree, the defendant parent had been granted visitation rights, would be clearly contrary to legislative intent. [People v Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291, 1980 N.Y. Misc. LEXIS 2278 \(N.Y. City Crim. Ct. 1980\)](#).

Parties' divorce does not preclude Family Court from entertaining petitioner's charge that her ex spouse harassed her, as CLS *Family Court Act* § 812(1)(c) expressly includes "persons formerly married to one another" as proper parties in family offense proceeding. [Hayes v Hayes, 131 Misc. 2d 317, 500 N.Y.S.2d 475, 1986 N.Y. Misc. LEXIS 2501 \(N.Y. Fam. Ct. 1986\)](#).

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## 20. —Persons in "intimate relationship"

2008 amendment to *N.Y. Fam. Ct. Act* § 812(1)(e) was construed as operating prospectively based upon past events because the legislature intended its amendment to remedy a deficiency in the existing statute; petitioner was entitled to an order of protection based on alleged acts of misconduct which took place before the date that § 812(1)(e) was amended to permit a party in an "intimate relationship" to seek an order of protection. [Matter of K.V. v K.F., 867 N.Y.S.2d 670, 22 Misc. 3d 372, 2008 N.Y. Misc. LEXIS 6887 \(N.Y. Fam. Ct. 2008\)](#).

Petitioner was entitled to seek order of protection against respondent, who was described as petitioner's "ex-boyfriend." [Matter of K.V. v K.F., 867 N.Y.S.2d 670, 22 Misc. 3d 372, 2008 N.Y. Misc. LEXIS 6887 \(N.Y. Fam. Ct. 2008\)](#).

Court had jurisdiction under *N.Y. Fam. Ct. Act* § 812(1)(e) over a family offense petition brought by a father's girlfriend against the mother of the father's children because while the statute did not define the term "intimate relationship," § 812(1)(e) was clear that a sexual relationship was not necessary; because the girlfriend was placed in the role similar to that of a stepmother as the father had custody of the children and the girlfriend lived with the father, an intimate relationship was alleged. [Matter of R.M.W. v G.M.M., 873 N.Y.S.2d 864, 23 Misc. 3d 713, 241 N.Y.L.J. 26, 2009 N.Y. Misc. LEXIS 183 \(N.Y. Fam. Ct. 2009\)](#).

Although a girlfriend was married to another man, she had been in an intermittent sexual relationship with the boyfriend; consequently, because the Legislature intended to include "boyfriend/girlfriend" relationships within the plain terms of *Family Ct Act* § 812(1)(e), the Family Court should not have dismissed the girlfriend's petition for an

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order of protection on public policy grounds. *Matter of Jessica D. v Jeremy H.*, 77 A.D.3d 87, 906 N.Y.S.2d 119, 2010 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't 2010).

Child and her mother's live-in boyfriend were in an "intimate relationship" within the meaning of *N.Y. Fam. Ct. Act § 812(1)(e)* such that the family court had jurisdiction over a family offense petition filed by the child's father, as the child and boyfriend's relationship was direct and was akin to the relationship between a stepparent and a stepchild. *Matter of Jose M. v Angel V.*, 99 A.D.3d 243, 951 N.Y.S.2d 195, 2012 N.Y. App. Div. LEXIS 6263 (N.Y. App. Div. 2d Dep't 2012).

Family court erred in dismissing a heterosexual female's petition for a protective order because her pleadings unambiguously alleged that her roommate, a homosexual male, committed family offenses by, inter alia, destroying items of her property, throwing items at her, shoving her and threatening her, which constituted, at a minimum, the family offenses of third-degree menacing, fourth-degree criminal mischief, and second-degree harassment, and the female's implicit acknowledgment that she had not had a sexual relationship with the roommate did not mean that the two did not have an "intimate relationship" within the meaning of the Family Court Act. *2015 N.Y. App. Div. LEXIS 7797*.

## 21. Allegations sufficient to bring offense within family court jurisdiction

Since the evidence at the dispositional hearing established that father was an immediate and ongoing danger to the children inasmuch as he exhibited violent behavior toward the children and, in their presence, toward the mother, the court properly found the existence of an additional aggravating circumstance in regard to a protective order. *Matter of Kristine Z. v Anthony C.*, 21 A.D.3d 1319, 803 N.Y.S.2d 331, 2005 N.Y. App. Div. LEXIS 10044 (N.Y. App. Div. 4th Dep't 2005), app. dismissed, 6 N.Y.3d 772, 811 N.Y.S.2d 338, 844 N.E.2d 793, 2006 N.Y. LEXIS 28 (N.Y. 2006).

While further development of the record might have clarified and perhaps even eroded a father's contention that the family court lacked subject matter jurisdiction to consider the mother's family offense petition, it nonetheless provided the family court a sufficient basis to exercise its jurisdiction to issue a temporary protective order, and the father's willful failure to appear in court left the contention unchallenged. *Matter of Scott KK. v Patricia LL.*, 110 A.D.3d 1260, 974 N.Y.S.2d 152, 2013 N.Y. App. Div. LEXIS 6862 (N.Y. App. Div. 3d Dep't 2013).

Family court properly concluded that it had jurisdiction to issue an order of protection against an ex-wife because she committed the family offense of disorderly conduct, the ex-wife and the ex-husband's fiancée had an ongoing relationship by virtue of the fact that the ex-wife's children were residing with the ex-husband and the fiancée, the fiancée was acting as a stepmother to the children, and there was frequent contact between the ex-wife and the fiancée in order to arrange for the ex-wife's visitation with the children. *Matter of Winston v Edwards-Clarke*, 127 A.D.3d 771, 6 N.Y.S.3d 566, 2015 N.Y. App. Div. LEXIS 2796 (N.Y. App. Div. 2d Dep't 2015).

Evidence supported the family court's determination that the parties were in an "intimate relationship" and the court had jurisdiction over petitioner's family offense proceeding because the parties had a personal and close relationship over a period of roughly six months, the parties had frequent contact, and respondent entrusted petitioner to act as a live-in nanny to her child. *Matter of Kristina L. v Elizabeth M.*, 156 A.D.3d 1162, 67 N.Y.S.3d 690, 2017 N.Y. App. Div. LEXIS 8980 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 901, 102 N.E.3d 432, 77 N.Y.S.3d 656, 2018 N.Y. LEXIS 430 (N.Y. 2018).

Statement in wife's supporting affidavit that husband in intoxicated condition pulled pistol out of his pocket and threatened to "blow your damn brains out" stated the necessary elements to support a charge of menacing, attempted assault or reckless endangerment, which offenses fall within the exclusive jurisdiction of the Family Court pursuant to *Family Court Act § 812*. *People v Diggs*, 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 (N.Y. Dist. Ct. 1973).

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A criminal court has jurisdiction to transfer a proceeding to the Family Court whenever the facts in a case contain the necessary elements to constitute an offense for which the Family Court has original jurisdiction, and the failure of the accusatory instrument to charge such offense should not and may not prevent criminal court from exercising its obligation to transfer the matter to the Family Court; thus where husband was accused of possession of a loaded revolver but the facts in the wife's supporting deposition clearly spelled out the elements of the charge of menacing and attempted assault for reckless endangerment as to her person, matter could be transferred to Family Court although the latter offenses were not specifically charged and the possession charged does not fall within Family Court § 812. [People v Diggs, 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 \(N.Y. Dist. Ct. 1973\).](#)

Ex-husband's threat to shoot his ex-wife and her boyfriend and burn her house down, communicated to ex-wife's daughter but never communicated directly to ex-wife by ex-husband, cannot constitute family offense within meaning of CLS *Family Court Act* § 812, in absence of any proof that ex-husband authorized or understood that daughter would relay his threats to ex-wife. [Hayes v Hayes, 131 Misc. 2d 317, 500 N.Y.S.2d 475, 1986 N.Y. Misc. LEXIS 2501 \(N.Y. Fam. Ct. 1986\).](#)

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Family Court had subject matter jurisdiction in petition for order of protection brought against father who allegedly committed acts of harassment against his son, possibly over telephone from father's location in Florida, since act of harassment occurred when phone rang in son's home in New York and father's words were heard by son. [Anthony T. v Anthony J., 134 Misc. 2d 375, 510 N.Y.S.2d 810, 1986 N.Y. Misc. LEXIS 3110 \(N.Y. Fam. Ct. 1986\).](#)

Family Court lacked jurisdiction to entertain application for order of protection against putative father of petitioner's unborn child where parties were not married or otherwise related and did not share same household; unborn child cannot be deemed "child" that parties have in common for purpose of conferring jurisdiction on Family Court in family offense proceeding under CLS *Family Ct Act* § 812. [Gina C. v Stephen F., 150 Misc. 2d 459, 576 N.Y.S.2d 776, 1991 N.Y. Misc. LEXIS 672 \(N.Y. Fam. Ct. 1991\).](#)

Because [N.Y. Const. art. VI, § 13](#) and [N.Y. Fam. Ct. Act §§ 115\(e\)](#), 812(1) provided a family court with subject matter jurisdiction over a grandmother's family offense proceeding against her grandson, and because the allegations in the grandmother's petition—that the grandson and his mother drew large sums of money from the grandmother's saving and checking accounts without her consent to pay their bills and that he would not leave her residence after being asked—might constitute second-degree harassment under [N.Y. Penal Law § 240.26\(3\)](#), the grandmother's petition would not be dismissed. [Matter of Mabel R. v Rayshawn D., 933 N.Y.S.2d 529, 33 Misc. 3d 1023, 2011 N.Y. Misc. LEXIS 5051 \(N.Y. Fam. Ct. 2011\).](#)

Allegations that a daughter employed a fraudulent power of attorney to withdraw money from a mother's bank accounts, used the mother's name to open credit cards and to make purchases, and induced the mother to convey title of a home to the daughter, taking a mortgage on the house before ultimately reconveying it to the mother, did not constitute harassment in the second degree under [N.Y. Penal Law § 240.26\(3\)](#); the allegations did not constitute any criminal act specifically enumerated in *N.Y. Fam. Ct. Act* § 812, and the trial court lacked subject matter jurisdiction to entertain a petition for an order of protection. [Matter of Steinhilper v Decker, 35 A.D.3d 1101, 827 N.Y.S.2d 738, 2006 N.Y. App. Div. LEXIS 15728 \(N.Y. App. Div. 3d Dep't 2006\).](#)

In circumstances where a mother came to the residence of the father of her children and his girlfriend, tried to force her way in, used abusive language, and then grabbed one of her minor children with the father, pulled her out of the house, and tried to force the child into a car, the mother's conduct would constitute disorderly conduct under [N.Y. Penal Law § 240.20](#) and, thus, was a proper basis for a family offense petition under *N.Y. Fam. Ct. Act* § 812(1).

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[Matter of R.M.W. v G.M.M., 873 N.Y.S.2d 864, 23 Misc. 3d 713, 241 N.Y.L.J. 26, 2009 N.Y. Misc. LEXIS 183 \(N.Y. Fam. Ct. 2009\).](#)

Respondent birth mother was not entitled to dismissal under N.Y. [C.P.L.R. § 4401](#) of a family offense petition on the basis that that no cognizable claim had been made under N.Y. Fam. Ct. Act art. 8 because the conduct alleged fell within harassment in the second degree under [N.Y. Penal Law § 240.26](#) and stalking in the fourth degree under [N.Y. Penal Law § 120.45\(1\)](#); it made no difference that the minor child, who had been adopted, was unaware that she was being followed and photographed as respondent should reasonably have known that such conduct was likely to cause the child a reasonable fear for her safety. [Matter of K.J. v K.K., 873 N.Y.S.2d 867, 23 Misc. 3d 754, 241 N.Y.L.J. 29, 2009 N.Y. Misc. LEXIS 204 \(N.Y. Fam. Ct. 2009\).](#)

Because an aunt alleged assault, even though she failed to raise it or prove it at trial, her petition was sufficient under [N.Y. Fam. Ct. Act § 821](#) to get in the door of the family court and to proceed to trial, where she then proved one of the family offenses listed in N.Y. Fam. Ct. Act § 812. [Matter of Paulette PG v Evan CG, 890 N.Y.S.2d 304, 26 Misc. 3d 323, 2009 N.Y. Misc. LEXIS 2960 \(N.Y. Fam. Ct. 2009\).](#)

Trial court did not err in finding that a father committed a family offense predicated on aggravated harassment, N.Y. Fam. Ct. Act § 812(1); the father had engaged in a profanity-laced phone call in which he berated the mother, called her names, and repeatedly indicated that she was going to get hurt. There was ample proof of an intent to “harass, annoy, threaten or alarm” the mother. [Matter of Jennifer G. v Benjamin H., 84 A.D.3d 1433, 923 N.Y.S.2d 249, 2011 N.Y. App. Div. LEXIS 3664 \(N.Y. App. Div. 3d Dep’t 2011\).](#)

Evidence was not legally sufficient to establish that a wife committed a family offense because the husband failed to establish that the wife’s acts constituted harassment in the second degree, under [N.Y. Penal Law § 240.26\(3\)](#), because (1) even assuming that the husband was alarmed or seriously annoyed by the conduct of the wife in opening her medicine to eat it with pudding based on her inability to swallow the pills, and further assuming that the wife thereby intended to harass, annoy, or alarm him, the husband failed to establish that the conduct served no legitimate purpose because the husband testified that the wife took the medication as prescribed to prevent acid reflux, and that the wife opened the pills and ate the medication with food because she was unable to swallow the pills; and (2) with respect to the husband’s allegation that he was allergic to certain medications, he failed to establish that he was allergic to the particular medication taken by the wife, or to introduce any expert evidence in support of his testimony that the medication was a poison, a toxic poison that caused death. [Matter of Marquardt v Marquardt, 97 A.D.3d 1112, 948 N.Y.S.2d 484, 2012 N.Y. App. Div. LEXIS 5370 \(N.Y. App. Div. 4th Dep’t 2012\).](#)

Evidence was not legally sufficient to establish that a wife committed a family offense because the husband failed to establish that the wife’s acts constituted harassment in the first degree, under [N.Y. Penal Law § 240.25](#), because, even assuming that the husband was in fear of physical injury when the wife opened her medication, he failed to establish that his fear was reasonable because he failed to establish that he was allergic to the particular medication taken by the wife, or to introduce any expert evidence in support of his testimony that the medication was a poison, a toxic poison that caused death. [Matter of Marquardt v Marquardt, 97 A.D.3d 1112, 948 N.Y.S.2d 484, 2012 N.Y. App. Div. LEXIS 5370 \(N.Y. App. Div. 4th Dep’t 2012\).](#)

## 22. Other procedural matters

In mother’s family offense proceeding against father under CLS *Family Ct Act* § 812, court did not abuse its discretion in denying mother’s motion for recusal where motion was based solely on fact that trial judge had not previously ruled in her favor, and there was no allegation that recusal was statutorily required. [Petkovsek v Snyder, 251 A.D.2d 1086, 674 N.Y.S.2d 208, 1998 N.Y. App. Div. LEXIS 7214 \(N.Y. App. Div. 4th Dep’t 1998\).](#)

In a proceeding involving order of protection applications against a father, his waiver of the right to counsel was knowing, voluntary, and intelligent, and there was no need for appointment of a guardian ad litem for him pursuant to N.Y. [C.P.L.R. 1201](#) where the record did not indicate that he was incapable of understanding the proceedings;

further, the competency procedures under N.Y. Crim. Proc. Law art. 730 were inapplicable to family offense proceedings because they were civil in nature under *N.Y. Fam. Ct. Act § 812(2)(c)*. [\*Matter of Julie G. v Yu-jen G.\*, 81 A.D.3d 1079, 917 N.Y.S.2d 355, 2011 N.Y. App. Div. LEXIS 1057 \(N.Y. App. Div. 3d Dep't 2011\)](#).

### **23. —Choice of forum; forum non conveniens**

Distance from forum is not basis by itself for dismissal of petition for order of protection arising from allegations of family offense so long as petitioner meets other requirements of jurisdiction and service. [\*Anthony T. v Anthony J.\*, 134 Misc. 2d 375, 510 N.Y.S.2d 810, 1986 N.Y. Misc. LEXIS 3110 \(N.Y. Fam. Ct. 1986\)](#).

Complainant's election to proceed in Family Court was not rendered invalid by fact that she was not informed of her right to initiate prosecution in Criminal Court, even if her election was not product of informed decision or was not appropriate to her needs, since such information at most consists of threshold, statutory directive with respect to procedures to be followed for access to Family Court or to criminal courts, unrelated to judicial competence of those courts. [\*People v Singleton\*, 140 Misc. 2d 960, 532 N.Y.S.2d 208, 1988 N.Y. Misc. LEXIS 509 \(N.Y. City Crim. Ct. 1988\)](#).

### **24. —Choice of remedy**

Family Court would decline to entertain action under CLS Family Ct Act Art 8 by parent against child under age of 16, and matter would instead proceed by way of restoration of proceeding for persons in need of supervision which had been adjourned in contemplation of dismissal, since dispositional alternatives under latter type of proceeding were more appropriate than those available under former type of proceeding. [\*Paula S. v Steven S.\*, 154 Misc. 2d 567, 585 N.Y.S.2d 964, 1992 N.Y. Misc. LEXIS 291 \(N.Y. Fam. Ct. 1992\)](#).

### **25. —Jurisdiction; timeliness of objection**

Question of lack of subject matter jurisdiction can properly be raised by way of motion at any time while the order is in force and effect; hence, challenge to jurisdiction of family court to issue order of protection where there was neither a solemnized marriage nor a recognized common-law union between petitioner and respondent was not untimely although not made until approximately eight months following issuance of the order, especially in view of grave liabilities respondent would face if a wilful violation were established. [\*Muhlhausen v Ray\*, 89 Misc. 2d 298, 391 N.Y.S.2d 55, 1977 N.Y. Misc. LEXIS 1840 \(N.Y. Fam. Ct. 1977\)](#).

### **26. — —Long-arm jurisdiction**

Second degree assault case wherein wife lived in Ohio and husband in Pennsylvania was not for Family Court whose jurisdiction extends only within boundaries of New York and conciliation procedures contemplated under Family Court Act could not be utilized because of distances involved and lack of jurisdiction. [\*Parrett v Parrett\*, 46 Misc. 2d 573, 260 N.Y.S.2d 382, 1965 N.Y. Misc. LEXIS 1812 \(N.Y. Fam. Ct. 1965\)](#).

Family Court lacked personal jurisdiction over father who was served outside state in petition for order of protection based on allegations of harassment of his son, even though acts of harassment were deemed to have occurred within state over telephone from father's location out of state, since court, under CLS [\*Family Ct Act § 154\*](#), has no long-arm jurisdiction or extraterritorial service in family offense cases. [\*Anthony T. v Anthony J.\*, 134 Misc. 2d 375, 510 N.Y.S.2d 810, 1986 N.Y. Misc. LEXIS 3110 \(N.Y. Fam. Ct. 1986\)](#).

In CLS Family Ct Art 8 proceeding in which petitioner sought order of protection against her brother-in-law who resided in Florida, petitioner's assertion of fear resulting from threat allegedly made by him in Florida was sufficient

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to establish jurisdictional requirement of CLS [CPLR § 302\(a\)\(3\)](#) that out-of-state act must have claimed effect within New York. [M.P. v M.S., 186 Misc. 2d 173, 715 N.Y.S.2d 831, 2000 N.Y. Misc. LEXIS 461 \(N.Y. Fam. Ct. 2000\)](#).

Because a father made threatening and harassing telephone calls from Connecticut to the mother in New York, and because a prior court order mandated that the father transact business in New York, pursuant to N.Y. [C.P.L.R. 302\(a\)\(1\)](#) and [N.Y. Fam. Ct. Act § 154\(c\)](#) personal jurisdiction could be obtained over the non-resident father on the mother's N.Y. Fam. Ct. Act art. 8 petition. [Matter of C.V. v T.B., 853 N.Y.S.2d 510, 19 Misc. 3d 577, 239 N.Y.L.J. 52, 2008 N.Y. Misc. LEXIS 1119 \(N.Y. Fam. Ct. 2008\)](#).

## 27. — —Transfer to criminal court

In a proceeding against a minor on a charge of first-degree assault against his wife, the family court did not abuse its discretion in affecting a transfer to the criminal court, where the absence of criteria warranting retention of family court jurisdiction, i.e., a reasonable opportunity for reconciliation between the parties and for the preservation of the family unit, coupled with the grievous nature of the assault supported the court's decision to transfer the case. [People v Brown, 80 A.D.2d 902, 437 N.Y.S.2d 22, 1981 N.Y. App. Div. LEXIS 10772 \(N.Y. App. Div. 2d Dep't\)](#), app. denied, [53 N.Y.2d 941, 1981 N.Y. LEXIS 4156 \(N.Y. 1981\)](#).

Delay between commission of crime and a subsequent indictment after first indictment was dismissed due to invalid transfer of case from family court to criminal court would not be chargeable to People, in light of fact that the delay would have been occasioned by accused's failure to make application to rescind the transfer until eve of trial. [People v Reuscher, 89 Misc. 2d 160, 390 N.Y.S.2d 568, 1976 N.Y. Misc. LEXIS 2838 \(N.Y. Sup. Ct. 1976\)](#).

Transfer from family court to criminal court of a widow's family offense proceeding alleging that the son of her deceased husband committed acts which, under the N.Y. Penal Law, would have constituted aggravated harassment in the second degree and harassment in the first degree was mandatory under [N.Y. Const. art. 6, § 19e](#); the widow's motion for transfer was granted because it was made before the family court ruled on the jurisdictional issue. [Matter of Rita F. v Neil F., 819 N.Y.S.2d 439, 12 Misc. 3d 894, 235 N.Y.L.J. 112, 2006 N.Y. Misc. LEXIS 1245 \(N.Y. Fam. Ct. 2006\)](#).

## 28. — —Waiver of jurisdictional defects

In a criminal prosecution for assault in the second degree, defendant waived his contention on appeal that the prosecution was jurisdictionally defective, because it concerned acts that constituted assault between spouses and because his wife as complainant was never advised of the procedures available for the institution of family offense proceedings in Family Court, where defendant pleaded guilty in the criminal proceeding. [People v Mack, 53 N.Y.2d 803, 439 N.Y.S.2d 912, 422 N.E.2d 572, 1981 N.Y. LEXIS 2387 \(N.Y. 1981\)](#).

## 29. — —Standing

Voluntary agreement entered into by parties during their divorce action and incorporated into court's order, which granted respondent visitation with petitioner's son "at such times and for such duration as parties may mutually agree," did not confer standing on respondent to assert legal claim to visitation with petitioner's son as defense to petitioner's application for order of protection where respondent was not biological or adoptive parent of petitioner's son; visitation rights may not be granted to biological stranger where child is properly in custody of his mother. [Cindy P. v Danny P., 206 A.D.2d 615, 614 N.Y.S.2d 479, 1994 N.Y. App. Div. LEXIS 7329 \(N.Y. App. Div. 3d Dep't\)](#), app. denied, [84 N.Y.2d 808, 621 N.Y.S.2d 517, 645 N.E.2d 1217, 1994 N.Y. LEXIS 4167 \(N.Y. 1994\)](#).

Petitioner, whose child had been adopted by her parents, did not have standing to file family offense petition against child's biological father even though she still resided with child, as she and child's father no longer had child in

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common for purposes of jurisdiction under CLS *Family Ct Act* § 812(1); parent-child relationship was severed on adoption (CLS *Dom Rel* § 117). [Sowich v Taurisano, 179 Misc. 2d 57, 682 N.Y.S.2d 834, 1998 N.Y. Misc. LEXIS 585 \(N.Y. Fam. Ct. 1998\)](#).

Child's stepfather who was estranged from child's mother (who had full custody of child) lacked standing to bring CLS Family Ct Act art 8 family offense proceeding against child's mother, because gravamen of allegations and specific relief demanded (order of protection requiring mother to stay away from child) sounded within purview of Article 10 child protection proceeding, which may be originated only by child protective agency or "a person on the court's direction." [Rader v Rader, 183 Misc. 2d 185, 701 N.Y.S.2d 855, 1999 N.Y. Misc. LEXIS 589 \(N.Y. Fam. Ct. 1999\)](#).

Dismissal of a mother's petition to commence a family offense proceeding on behalf of her minor son based on the mother allegedly lacking standing was in error, because a parent has standing to commence such a petition. However, the reviewing court refused to reinstate the petition, because the allegations that a father slapped one of the parties' children three times were deemed unfounded by the county social services agency and no evidence was presented supporting the allegations. [Hamm-Jones v Jones, 14 A.D.3d 956, 788 N.Y.S.2d 690, 2005 N.Y. App. Div. LEXIS 604 \(N.Y. App. Div. 3d Dep't 2005\)](#).

### 30. —Disclosure

In proceeding under CLS Family Ct Act Art 8, court properly denied father's motion requesting copies of probation and forensic reports where court permitted counsel to review reports in chambers. [Scuderi-Forzano v Forzano, 213 A.D.2d 652, 624 N.Y.S.2d 942, 1995 N.Y. App. Div. LEXIS 3147 \(N.Y. App. Div. 2d Dep't 1995\)](#).

### 31. — Examination before trial

In a family offense proceeding pursuant to *Family Ct Act* § 812, it would not be appropriate to permit an examination before trial since in most cases parties who bring such petitions seek immediate protection for themselves and their children and to subject them to examinations before trial would be totally inappropriate and would discourage future petitioners from bringing such proceedings. [Kunz v Kunz, 119 Misc. 2d 80, 462 N.Y.S.2d 559, 1983 N.Y. Misc. LEXIS 3462 \(N.Y. Fam. Ct. 1983\)](#).

### 32. —Continuance of Family Court proceedings

An application for continuation of a child abuse proceeding until conclusion of related criminal proceedings against applicants was properly denied, since no constitutional rights were thereby violated, and the Family Court did not abuse its discretion and clearly had the right to consider the interests of the children in an expeditious determination of the child abuse proceeding. *In re Germaine B.*, 86 A.D.2d 847, 447 N.Y.S.2d 448, 1982 N.Y. App. Div. LEXIS 15471 (N.Y. App. Div. 1st Dep't 1982).

In family offense proceeding, it was abuse of discretion to deny husband's request for reasonable adjournment, thereby requiring him to appear pro se at fact-finding and dispositional hearing, where he informed court that attorney he believed he had retained had recently decided that he would not take case, and he requested that court allow him time to secure representation. *Cindy L. S. v David L. S.*, 247 A.D.2d 543, 669 N.Y.S.2d 306, 1998 N.Y. App. Div. LEXIS 1511 (N.Y. App. Div. 2d Dep't 1998).

### 33. —Need for dispositional hearing

Family Court's findings of harassment and attempted assault were supported by preponderance of evidence showing that husband hit wife with thick piece of rubber, threw her against wall, and dragged her out of bed and

onto floor, and husband was properly directed to stay away from marital residence as reasonably necessary, without need for separate dispositional hearing, where court received and considered type of evidence at fact-finding hearing that would have been admitted at dispositional hearing had it formally chose to bifurcate matter. *Quintana v Quintana*, 237 A.D.2d 130, 654 N.Y.S.2d 27, 1997 N.Y. App. Div. LEXIS 2201 (N.Y. App. Div. 1st Dep't 1997).

### 34. —Orders of protection; evidence of violation

Family Court's determination that respondent violated temporary order of protection by engaging in disorderly conduct directed toward his stepfather was supported by stepfather's testimony that firecrackers were thrown from window above his head and that respondent was only person on second floor of building at time, and by respondent's admission that he set off firecrackers; respondent's assertion that he tossed firecrackers out of different window merely presented question of credibility, which court explicitly resolved against him. [\*Nadeau v Sullivan\*, 204 A.D.2d 913, 612 N.Y.S.2d 501, 1994 N.Y. App. Div. LEXIS 5616 \(N.Y. App. Div. 3d Dep't 1994\)](#).

Husband, who committed family offense of harassment, was properly directed to vacate and stay away from marital premises for having conducted himself in offensive and frightening manner toward wife. *Braham v Braham*, 264 A.D.2d 418, 693 N.Y.S.2d 239, 1999 N.Y. App. Div. LEXIS 8637 (N.Y. App. Div. 2d Dep't 1999).

Husband's act of committing harassment constituted proper basis for granting order of protection to wife. *Hogan v Hogan*, 271 A.D.2d 533, 705 N.Y.S.2d 678, 2000 N.Y. App. Div. LEXIS 3985 (N.Y. App. Div. 2d Dep't 2000).

Evidence was insufficient to support a father's conviction of harassment and issuance of a protective order sought on behalf of a teen-aged son where all the evidence indicated that he was simply picking younger children, as was his right, when the son and the son's friends attacked the father with a baseball bat and a chain. *Cavanaugh v Madden*, 298 A.D.2d 390, 751 N.Y.S.2d 225, 2002 N.Y. App. Div. LEXIS 9374 (N.Y. App. Div. 2d Dep't 2002).

Because a mother continued to make numerous unfounded neglect and abuse reports against the father that negatively impacted their child's emotional well being, the trial court properly denied her N.Y. Fam. Ct. Act arts. 6 and 8 applications for a modification of custody and for orders of protection against the father. [\*Eck v Eck\*, 57 A.D.3d 1243, 870 N.Y.S.2d 543, 2008 N.Y. App. Div. LEXIS 9809 \(N.Y. App. Div. 3d Dep't 2008\)](#).

Order of protection issued against a husband for the family offense of disorderly was reversed on appeal because the wife failed to present any evidence that the husband's conduct was committed with the intent to cause, or recklessly posed a risk of causing, public inconvenience, annoyance, or alarm. [\*Matter of Cassie v Cassie\*, 109 A.D.3d 337, 969 N.Y.S.2d 537, 2013 N.Y. App. Div. LEXIS 5372 \(N.Y. App. Div. 2d Dep't 2013\)](#).

Even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. [\*Matter of Cassie v Cassie\*, 109 A.D.3d 337, 969 N.Y.S.2d 537, 2013 N.Y. App. Div. LEXIS 5372 \(N.Y. App. Div. 2d Dep't 2013\)](#).

Supreme court erred in dismissing a wife's application for a stay-away protective order after the close of her evidence as the evidence established a prima facie showing that the husband committed second degree harassment, as required under N.Y. Family Ct Act §§ 812, 821, so that the hearing should have proceeded to determine what evidence the husband had in response. [\*Jennifer JJ. v Scott KK.\*, 117 A.D.3d 1158, 985 N.Y.S.2d 316, 2014 N.Y. App. Div. LEXIS 2961 \(N.Y. App. Div. 3d Dep't 2014\)](#).

Trial court properly wife issued an order of protection directing a wife to stay away from her husband for a certain period of time because, while the trial court's findings of the family offenses of attempted assault and menacing were not supported by the evidence, there was no basis to disturb the order of protection where the wife, with the intent to harass, annoy, or alarm the husband, engaged in a course of conduct, consisting of threatening to call the

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police and make false accusations against him, cursing at him, shoving him, and throwing his personal belongings, which alarmed or seriously annoyed the husband and served no legitimate purpose. [Matter of Frimer v Frimer, 143 A.D.3d 895, 39 N.Y.S.3d 226, 2016 N.Y. App. Div. LEXIS 6734 \(N.Y. App. Div. 2d Dep't 2016\)](#).

Family court properly issued an order of protection against the mother because the evidence established, by a fair preponderance of the evidence, that the mother committed acts against the father which constituted the family offense of harassment in the second degree. [Matter of Pierre v Dal, 142 A.D.3d 1021, 37 N.Y.S.3d 317, 2016 N.Y. App. Div. LEXIS 5899 \(N.Y. App. Div. 2d Dep't 2016\)](#).

Mother was not entitled to vacate the order of protection because the mother with the intent to harass, annoy, or alarm the father, engaged in a course of conduct that alarmed and seriously annoyed the father, and which served no legitimate purpose, and, as such, the mother committed the family offense of harassment in the second degree; the mother admitted to sending a text message to the father in violation of the order of protection. [Rosenstock v Rosenstock, 149 A.D.3d 887, 51 N.Y.S.3d 593, 2017 N.Y. App. Div. LEXIS 2775 \(N.Y. App. Div. 2d Dep't 2017\)](#).

With or without physical presence of defendant, Family Court had personal jurisdiction when it issued temporary order of protection after filing of family offense petition, and thus final order of protection, which was served on defendant and explained to him, constituted lawful process or mandate for purpose of criminal contempt prosecution under CLS [Penal § 215.50\(3\)](#). [People v Williams, 181 Misc. 2d 415, 696 N.Y.S.2d 369, 1999 N.Y. Misc. LEXIS 329 \(N.Y. City Crim. Ct. 1999\)](#).

Ex-wife was entitled to an order of protection against her ex-husband because, by renting a house directly behind the ex-wife's house in a vacation community, the ex-husband committed fourth degree stalking under [N.Y. Penal Law § 120.45](#), which was included as a family offense under [N.Y. Fam. Ct. Act § 812](#) and authorized an order of protection under [N.Y. Dom. Rel. Law § 252](#); the ex-wife testified credibly that she believed ex-husband rented the house to be near her and to intimidate her and, although the ex-husband sought to explain why it was so important that he live in the vacation community, his testimony was not credible and often bizarre. Every indication was that the ex-husband's renting the house was largely fueled by the knowledge that it would cause the ex-wife fear. [Weiner v Weiner, 899 N.Y.S.2d 555, 27 Misc. 3d 1111, 2010 N.Y. Misc. LEXIS 750 \(N.Y. Sup. Ct. 2010\)](#).

Preponderance of the evidence under [N.Y. Fam. Ct. Act § 832](#) established that appellant had committed disorderly conduct, menacing, and harassment under [N.Y. Penal Law §§ 125.15, 240.20, .25](#) warranting the issuance of the order of protection pursuant to [N.Y. Fam. Ct. Act §§ 812\(1\), 832](#) against appellant, as the family court's determination, which was entitled to great weight, was not against the weight of the credible evidence; for this reason, appellant was not entitled to an order of protection as appellant had not established that respondent had committed acts constituting the family offenses of harassment or assault under [N.Y. Fam. Ct. Act §§ 812, 832](#). [Matter of Ford v Pitts, 30 A.D.3d 419, 817 N.Y.S.2d 332, 2006 N.Y. App. Div. LEXIS 7362 \(N.Y. App. Div. 2d Dep't 2006\)](#).

Order of protection to a mother and two children against the father was supported by the evidence pursuant to [N.Y. Fam. Ct. Act §§ 812\(1\) and 832](#), as testimony by the mother and another family member that the father threatened the mother upon being served with a custody petition was deemed credible; the preponderance of the evidence supported the determination that the father had committed aggravated harassment in the second degree, which was a family offense. [Matter of Boulerice v Heaney, 45 A.D.3d 1217, 846 N.Y.S.2d 734, 2007 N.Y. App. Div. LEXIS 12214 \(N.Y. App. Div. 3d Dep't 2007\)](#).

Trial court erred in finding, by clear and convincing evidence, that a husband violated an order of protection because, as the trial court imposed a jail term pursuant to [N.Y. Fam. Ct. Act § 846-a](#), the contempt finding was criminal in nature, and thus the trial court should have used the higher standard of proof of beyond a reasonable doubt; the prior decisions of the [Supreme Court of New York, Appellate Division, Second Department, in Matter of Williams v Williams, 646 N.Y.S.2d 861 \(App. Div. 1996\)](#), [Matter of Hijri v Fargaly, 854 N.Y.S.2d 190 \(App. Div. 2008\)](#), and [Matter of Sarmuksnis v Priest, 800 N.Y.S.2d 28 \(App. Div. 2005\)](#), cases where the respondent has been committed to a term in jail pursuant to [Family Court Act § 846-a](#), holding that the standard of proof is one of the

lesser standards, should no longer be followed. [Matter of Rubackin v Rubackin, 62 A.D.3d 11, 875 N.Y.S.2d 90, 2009 N.Y. App. Div. LEXIS 1482 \(N.Y. App. Div. 2d Dep't 2009\).](#)

Order of protection barring a father from having any contact with the mother and the parties' child was proper in an N.Y. Fam. Ct. Act art. 8 proceeding because, inter alia, the content of letters sent to the mother by the father from prison, where he was incarcerated, justified the mother's belief that they were sent with the intent of alarming and annoying her; given the circumstances under which the mother received the letters, they provided ample support for the trial court's conclusion that the father had committed a family offense in writing and sending them to her pursuant to *N.Y. Fam. Ct. Act § 812(1)* and *N.Y. Penal Law § 240.30*. Given the apparent threat that the father presented to the mother and her fiancée, and the fact that he had previously been convicted of sexual abuse in the first degree and endangering the welfare of a child, the trial court's decision to include the child in the order of protection was a proper exercise of its discretion pursuant to [N.Y. Fam. Ct. Act §§ 841\(d\), 842. Matter of Amy SS. v John SS., 68 A.D.3d 1262, 891 N.Y.S.2d 178, 2009 N.Y. App. Div. LEXIS 8923 \(N.Y. App. Div. 3d Dep't 2009\)](#), app. denied, *14 N.Y.3d 704, 899 N.Y.S.2d 128, 925 N.E.2d 932, 2010 N.Y. LEXIS 709 (N.Y. 2010)*.

Because a mother provided no supporting circumstances independent of her own statement that a stranger told her that the stranger was sent by the father to kill the mother by bashing her head with a hammer, and by cutting her throat with a knife, the mother's fear of the father was insufficient by itself to prove a family offense under Family Ct Act art. 8. [Dorene L. v Dhaneswar R., 906 N.Y.S.2d 871, 29 Misc. 3d 462, 2010 N.Y. Misc. LEXIS 3701 \(N.Y. Fam. Ct. 2010\)](#), aff'd, [89 A.D.3d 428, 931 N.Y.S.2d 862, 2011 N.Y. App. Div. LEXIS 7544 \(N.Y. App. Div. 1st Dep't 2011\)](#).

No violation of a protective order entered in divorce case resulted when the husband's private investigator emailed the wife's counsel, even if the emails amounted to a threat to have the wife evicted, because the conduct was not criminal harassment; rather, the emails were addressed solely to counsel and amounted to nothing more than hard-edged bargaining and negotiations. [Matter of Millie S. v Thomas S., 60 Misc. 3d 493, 77 N.Y.S.3d 829, 2018 N.Y. Misc. LEXIS 1694 \(N.Y. Fam. Ct. 2018\)](#).

### 35. Miscellaneous

In an action for declaratory and injunctive relief by 12 "battered wives" against clerks of the New York City Family Court and officials of the New York City Department of Probation, wherein it is alleged that defendants engage in a pattern of conduct calculated (1) to deter battered wives from filing petitions for orders of protection against their offending husbands, (2) to block them from meaningful access to Family Court Judges empowered to issue temporary orders of protection, and (3) by failing to advise the wives that the defendants' proffer of counseling is voluntary, to dissuade complainants from pursuing their legal remedies, an order of the Appellate Division dismissing the complaint is affirmed. [Bruno v Codd, 47 N.Y.2d 582, 419 N.Y.S.2d 901, 393 N.E.2d 976, 1979 N.Y. LEXIS 2184 \(N.Y. 1979\)](#).

Stipulation by respondent to entry of order of protection against him in context of family offense proceeding under CLS Family Ct Act Art 8 did not collaterally estop him from contesting issue of paternity raised in collateral proceeding by separate petition, notwithstanding jurisdictional determination in family offense proceeding as to whether he and petitioner had child in common, since (1) burdens of proof in proceedings were different, and (2) nothing was actually litigated and determined in family offense proceeding. [Arnold v Goosby, 186 A.D.2d 1037, 588 N.Y.S.2d 675, 1992 N.Y. App. Div. LEXIS 11611 \(N.Y. App. Div. 4th Dep't 1992\)](#).

Husband's unwillingness to file "immediate relative" petition on behalf of wife in order to regularize her immigration status was not family offense so as to warrant granting of final or interim relief under CLS Family Ct Act Art 8. [Garrett v Garrett, 221 A.D.2d 340, 633 N.Y.S.2d 514, 1995 N.Y. App. Div. LEXIS 11176 \(N.Y. App. Div. 2d Dep't 1995\)](#).

Petitioner was not denied effective assistance at family offense hearing, even though her attorney was not present and had sent substitute counsel to appear on his behalf, since substitute counsel was well prepared in her

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representation and was sufficiently familiar with case as to continue with hearing in attorney's place, despite fact that petitioner had met substitute counsel for first time that morning; petitioner's bare assertion that substitute counsel failed to call certain witnesses, by itself, did not show in effective assistance. [Thompson v Jones, 253 A.D.2d 989, 678 N.Y.S.2d 166, 1998 N.Y. App. Div. LEXIS 9744 \(N.Y. App. Div. 3d Dep't 1998\)](#).

Family Court properly dismissed mother's petition for permanent order of protection where she failed to prove that father committed acts constituting family offenses of second degree harassment or third degree assault. [Strully v Schwartz, 255 A.D.2d 593, 680 N.Y.S.2d 871, 1998 N.Y. App. Div. LEXIS 12854 \(N.Y. App. Div. 2d Dep't 1998\)](#).

In family offense proceeding, fact that respondent arrived 20 minutes after hearing began was not valid basis to preclude her from testifying, where she was present in courtroom during last day of hearing. [Combs v Solomon, 261 A.D.2d 473, 690 N.Y.S.2d 103, 1999 N.Y. App. Div. LEXIS 4711 \(N.Y. App. Div. 2d Dep't 1999\)](#).

Family Court properly denied husband's request for adjournment of hearing in family offense proceeding where he had previously been granted adjournment, and had been directed by Family Court to appear for instant hearing with counsel, which he failed to do. [Hogan v Hogan, 271 A.D.2d 533, 705 N.Y.S.2d 678, 2000 N.Y. App. Div. LEXIS 3985 \(N.Y. App. Div. 2d Dep't 2000\)](#).

In family offense proceeding under CLS Family Ct Act Art 8, accused was not entitled to new fact-finding hearing where he gave no excuse for nearly 7-month delay in moving for new hearing, and information offered could have been presented at original fact-finding hearing. [Schiafone v Schiafone, 273 A.D.2d 394, 710 N.Y.S.2d 924, 2000 N.Y. App. Div. LEXIS 7078 \(N.Y. App. Div. 2d Dep't 2000\)](#).

Mother with untreated chronic paranoid schizophrenia failed to establish a sufficient change in circumstances warranting an award of child custody to her or, in the alternative, warranting an increase in her visitation. [Watts v Watts, 290 A.D.2d 822, 736 N.Y.S.2d 537, 2002 N.Y. App. Div. LEXIS 574 \(N.Y. App. Div. 3d Dep't\)](#), app. denied, [97 N.Y.2d 614, 742 N.Y.S.2d 606, 769 N.E.2d 353, 2002 N.Y. LEXIS 565 \(N.Y. 2002\)](#).

Five-year order of protection issued after a former husband was found to have committed family offenses under *N.Y. Fam. Ct. Act § 812* was modified to a two-year order of protection because the finding of aggravating circumstances under [N.Y. Fam. Ct. Act §§ 827\(a\)\(vii\), 842](#) was inconsistent with the family court's finding that the husband committed acts which constituted menacing in the third degree under [N.Y. Penal Law § 120.15](#) as opposed to menacing in the second degree under [N.Y. Penal Law § 120.14\(1\)](#); while the family court was not precluded from finding that the husband had used a dangerous instrument against the wife after the dispositional hearing as the parties were free to submit additional evidence at that hearing, no evidence was presented to support such a finding. [Matter of Pereira-Marshall v Marshall, 48 A.D.3d 574, 852 N.Y.S.2d 233, 2008 N.Y. App. Div. LEXIS 1278 \(N.Y. App. Div. 2d Dep't 2008\)](#).

Trial court properly dismissed a mother's family offense petition; the evidence proffered in support of the petition failed to establish that the father committed the family offense of assault against the child as charged in the petition. [Matter of Melikishvili v Grigolava, 50 A.D.3d 1147, 857 N.Y.S.2d 621, 2008 N.Y. App. Div. LEXIS 3875 \(N.Y. App. Div. 2d Dep't 2008\)](#).

In related visitation proceedings pursuant to *N.Y. Fam. Ct. Act art. 6* and a family offense proceeding pursuant to *N.Y. Fam. Ct. Act art. 8*, the trial court erred in denying a grandmother's motion for leave to renew her petition seeking modification of the visitation provisions of a settlement agreement allowing her supervised visitation with her grandchildren as the 93-year-old grandmother presented evidence that she was physically unable to travel to the county where visitation was held due to a deterioration in her health, involving a recently fractured pelvis and injured ligaments in her knee. The grandmother's submissions showed that there had been a material change in circumstances sufficient to warrant a hearing on her petition for modification; thus, her motion to renew should have been granted to the extent of allowing an evidentiary hearing on the issue of whether a material change in circumstances warranted modification of the visitation provisions of the settlement agreement. [Matter of Gold v Gold, 53 A.D.3d 485, 861 N.Y.S.2d 748, 2008 N.Y. App. Div. LEXIS 5944 \(N.Y. App. Div. 2d Dep't 2008\)](#).

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Trial court's obligation under [N.Y. Dom. Rel. Law § 76-c\(4\)](#) to communicate with a Pennsylvania court which had issued a prior custody order was triggered, and the trial court erred in failing to so communicate, because the trial court, exercising temporary emergency jurisdiction, was asked to, and did, make a "child custody determination" as the mother sought, in her proceeding brought pursuant to N.Y. Fam. Ct. Act art. 8, and was granted temporary orders of protection precluding the father from exercising his visitation rights under the Pennsylvania order. [Matter of Woods v Woods, 56 A.D.3d 789, 868 N.Y.S.2d 272, 2008 N.Y. App. Div. LEXIS 9060 \(N.Y. App. Div. 2d Dep't 2008\)](#).

Trial court's order granting the mother's family offense petition to the extent of finding that on August 8, 2007, and February 15, 2008, the father committed acts against the mother constituting harassment in the second degree and disorderly conduct was error because the record did not support a determination that the father committed family offenses on those dates. [Matter of Brown v Brown, 97 A.D.3d 673, 948 N.Y.S.2d 349, 2012 N.Y. App. Div. LEXIS 5431 \(N.Y. App. Div. 2d Dep't 2012\)](#).

Family court properly denied the family offense petitions, because the father failed to establish by a fair preponderance of the evidence, the allegations contained in the petitions. [Matter of James A.-S. v Cassandra A.-S., 107 A.D.3d 703, 967 N.Y.S.2d 99, 2013 N.Y. App. Div. LEXIS 3917 \(N.Y. App. Div. 2d Dep't 2013\)](#).

Respondent committed the family offense of menacing in the third degree because respondent became upset with petitioner about the condition of the home and, during a confrontation in the kitchen, threw a coffee mug in her direction, and petitioner avoided contact with the mug, which hit a door and broke, by moving to the side and, had she not done so, it would have hit her in the face. [Matter of Kristina L. v Elizabeth M., 156 A.D.3d 1162, 67 N.Y.S.3d 690, 2017 N.Y. App. Div. LEXIS 8980 \(N.Y. App. Div. 3d Dep't 2017\)](#), app. denied, 31 N.Y.3d 901, 102 N.E.3d 432, 77 N.Y.S.3d 656, 2018 N.Y. LEXIS 430 (N.Y. 2018).

Respondent committed the family offense of harassment in the second degree because after petitioner left respondent's home, respondent sent petitioner numerous unsettling text messages, which often denigrated petitioner and threatened that police officers were going to arrest her, and petitioner testified that the threats of police involvement "were absolutely terrifying" and the content of the numerous text messages over a span of several days caused her to be "alarmed." [Matter of Kristina L. v Elizabeth M., 156 A.D.3d 1162, 67 N.Y.S.3d 690, 2017 N.Y. App. Div. LEXIS 8980 \(N.Y. App. Div. 3d Dep't 2017\)](#), app. denied, 31 N.Y.3d 901, 102 N.E.3d 432, 77 N.Y.S.3d 656, 2018 N.Y. LEXIS 430 (N.Y. 2018).

As an alternative approach to prevention and cure of narcotic addiction without resort to the Narcotic Control Act, it was held the Family Court would enter an order of protection effective for one year providing that the narcotic addict, a 17-year-old son who had assaulted his father, must reside in the home of his grandmother, stay away from drugs, cooperate strictly with an out patient program and any short term hospitalization required by the director of such program, and return for further dispositional hearing and progress report to the Family Court. ["S" v "S", 60 Misc. 2d 359, 303 N.Y.S.2d 166, 1969 N.Y. Misc. LEXIS 1271 \(N.Y. Fam. Ct. 1969\)](#).

Trial court properly determined that modifying custody by awarding sole custody to the father and supervised visitation to the mother was in the children's best interests because the mother obstructed law enforcement efforts to investigate a sexual assault against one of the children, attempted to sabotage the father's relationship with the children, and placed her own needs above those of the children. [Matter of Guillermo v Agramonte, 137 A.D.3d 1767, 29 N.Y.S.3d 720, 2016 N.Y. App. Div. LEXIS 2246 \(N.Y. App. Div. 4th Dep't 2016\)](#).

Trial court erred in issuing an order of protection in favor of an ex-husband and against the ex-wife because no matrimonial action was pending and the pleadings did not contain allegations of conduct that would constitute one of certain enumerated family offenses under the Family Court Act. [Xiaokang Xu v Xiaoling Shirley He, 147 A.D.3d 1223, 48 N.Y.S.3d 530, 2017 N.Y. App. Div. LEXIS 1395 \(N.Y. App. Div. 3d Dep't 2017\)](#).

An order of protection directing that a husband remove the family dog from the marital home would properly issue, on the basis of allegations that the husband was frequently under the influence of alcohol in the home and had

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seriously assaulted the wife on two occasions, and that the dog had become so allied with the husband as to be a source of continuing, imminent danger to the wife and her children, since the order was reasonable and in furtherance of the purposes of Art 8 of the Family Ct Act, and since the order did not improperly affect title to property in that ownership of the dog was not an issue before the court. [Jane Y. v Joseph Y., 123 Misc. 2d 771, 474 N.Y.S.2d 681, 1984 N.Y. Misc. LEXIS 3076 \(N.Y. Fam. Ct. 1984\).](#)

In cases of educational neglect, local public school board of education has primary responsibility for evaluating prospective home education and ascertaining whether child receives instruction "substantially equivalent" in time and quality to that provided in public school, under CLS [Education § 3204\(2\)](#), and Family Court is neither authorized nor competent to approve or disprove program of prospective home instruction. [In re Adam D., 132 Misc. 2d 797, 505 N.Y.S.2d 809, 1986 N.Y. Misc. LEXIS 2781 \(N.Y. Fam. Ct. 1986\).](#)

In cases of educational neglect, local public school board of education has primary responsibility for evaluating prospective home education and ascertaining whether child receives instruction "substantially equivalent" in time and quality to that provided in public school, under CLS [Education § 3204\(2\)](#), and Family Court is neither authorized nor competent to approve or disprove program of prospective home instruction. [In re Adam D., 132 Misc. 2d 797, 505 N.Y.S.2d 809, 1986 N.Y. Misc. LEXIS 2781 \(N.Y. Fam. Ct. 1986\).](#)

Court would dismiss, in interests of justice, count charging defendant with second degree criminal contempt for violating Family Court protection order since defendant's wife had already brought petition for violation of order in Family Court, which effectively resolved matter on parties' consent and opted to forgo holding defendant in contempt. [People v McGraw, 138 Misc. 2d 349, 524 N.Y.S.2d 343, 1988 N.Y. Misc. LEXIS 30 \(N.Y. Fam. Ct. 1988\).](#)

Family Court had subject matter jurisdiction of family offense proceeding in which respondent was served in New York State, notwithstanding fact that all predicate incidents occurred outside state, since CLS Family Ct At §§ 812(1) and 821(1) do not limit Family Court's jurisdiction to in-state assaults or harassment, presence of respondent and service on him in New York constituted required constitutional "minimal contacts," and respondent's presence in state continued risk to petitioner. [Pierson v Pierson, 147 Misc. 2d 209, 555 N.Y.S.2d 227, 1990 N.Y. Misc. LEXIS 211 \(N.Y. Fam. Ct. 1990\).](#)

Family Court lacked subject matter jurisdiction to entertain a family offense between the parties because, while they initially had a social relationship, they were subsequently involved in nothing more than a business transaction, there was no intimate relationship between them, and *Family Ct Act § 812(1)(e)* specifically excluded ordinary fraternization between two individuals in business or social contexts. [Matter of Shannon M. v Michael C., 948 N.Y.S.2d 831, 36 Misc. 3d 669, 2012 N.Y. Misc. LEXIS 3359 \(N.Y. Fam. Ct. 2012\).](#)

Since the evidence proffered in family court did not show by a preponderance of the evidence the necessary elements of the offenses of stalking in the fourth degree, harassment in the second degree, or aggravated harassment in the second degree, the appellate court dismissed the family court's initial protective orders. [London v Blazer, 2 A.D.3d 860, 770 N.Y.S.2d 375, 2003 N.Y. App. Div. LEXIS 14216 \(N.Y. App. Div. 2d Dep't 2003\).](#)

Dismissal of a mother's family offense petition was proper under *N.Y. Fam. Ct. Act § 812(1)* as the petition was conclusory and failed to allege conduct by the father that would constitute the offense of harassment in the second degree under [N.Y. Penal Law § 240.26\(3\)](#). [Matter of Davis v Venditto, 45 A.D.3d 837, 846 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 12135 \(N.Y. App. Div. 2d Dep't 2007\).](#)

Because the allegations contained in a husband's petition failed to rise to the level of a family offense under *N.Y. Fam. Ct. Act § 812*, and described an isolated incident, not a course of conduct, the wife's motion to dismiss the husband's temporary order of protection was granted. [Matter of M.T. v E.T., 846 N.Y.S.2d 877, 18 Misc. 3d 418, 238 N.Y.L.J. 115, 2007 N.Y. Misc. LEXIS 7753 \(N.Y. Fam. Ct. 2007\).](#)

Petitioner was not entitled to an order of protection against her boyfriend because while petitioner, although she did not cohabit with the boyfriend, was engaged in an intimate relationship under *N.Y. Fam. Ct. Act § 812(1)* as the

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relationship was both recurring and sexual in nature, the court concluded that it could not entertain the petition as the relationship between the parties was antagonistic to petitioner's marital relationship; it would be a violation of public policy for the court to extend to petitioner the benefits of proceeding civilly when that would tend to undermine her marriage, and petitioner could seek an order of protection in a local criminal court. [Matter of Jessica D. v Jeremy H.](#), 878 N.Y.S.2d 578, 24 Misc. 3d 664, 2009 N.Y. Misc. LEXIS 960 (N.Y. Fam. Ct. 2009), rev'd, 77 A.D.3d 87, 906 N.Y.S.2d 119, 2010 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't 2010).

N.Y. Fam. Ct. Act § 812 grants the family court subject matter jurisdiction over family offense proceedings where the alleged acts occurred outside of the state of New York and even outside of the United States. [Matter of Richardson v Richardson](#), 80 A.D.3d 32, 910 N.Y.S.2d 149, 2010 N.Y. App. Div. LEXIS 8053 (N.Y. App. Div. 2d Dep't 2010).

While a father's conduct caused or significantly contributed to estrangement from his child, the drastic remedy of suspending all visitation was not required; rather, pursuant to Family Ct Act arts. 6 and 8, the exercise all available visitation, counseling, and communication with the child, which offered the father an opportunity to rebuild the child's trust, was in the child's best interests. [Matter of Susan LI. v Victor LI.](#), 88 A.D.3d 1116, 931 N.Y.S.2d 189, 2011 N.Y. App. Div. LEXIS 7227 (N.Y. App. Div. 3d Dep't 2011).

Given a sister's demonstrated proclivity to engage in vexatious and baseless litigation against her brother, and the strong suggestion that she might be afflicted with untreated mental illness, her fourth N.Y. Fam. Ct. Act art. 8 petition was dismissed, and a prior order directing her to obtain court permission before initiating further family offense petitions was continued. [Matter of Adefunke A. v Adeniyi A.](#), 946 N.Y.S.2d 447, 36 Misc. 3d 699, 2012 N.Y. Misc. LEXIS 2533 (N.Y. Fam. Ct. 2012).

## II. Under Former Law

### A. Under Former § 811

#### 36. In general

The thrust of provision of Family Court Act which requires a transfer to family court of any criminal complaint charging disorderly conduct or an assault between spouses or between parent and child or between members of same family or household is to preserve family under certain conditions of stress, and it is remedial in nature. [People v Kenyon](#), 46 A.D.2d 409, 362 N.Y.S.2d 644, 1975 N.Y. App. Div. LEXIS 8505 (N.Y. App. Div. 4th Dep't 1975).

Article 8 of the [Family Court Act \(§§ 811–846\)](#) does not provide for criminal proceedings but rather furnishes avenues of help to the parties. [Koeppel v Judges of Family Court](#), 44 Misc. 2d 799, 254 N.Y.S.2d 600, 1964 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1964).

[Family Court Act § 813](#) must be read together with §§ 811 and 812 thereof. [People v Diggs](#), 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 (N.Y. Dist. Ct. 1973).

#### 37. Purpose

The Legislature in enacting Article VIII of the Family Court Act had as its aim the preservation of the family unit. [People v Allen](#), 27 N.Y.2d 108, 313 N.Y.S.2d 719, 261 N.E.2d 637, 1970 N.Y. LEXIS 1119 (N.Y. 1970).

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Implicit in the legislation is the proposition that the family or household unit which is sought to be preserved must be one whose continued existence is consistent with both policy and the laws of the state. [People v Allen, 27 N.Y.2d 108, 313 N.Y.S.2d 719, 261 N.E.2d 637, 1970 N.Y. LEXIS 1119 \(N.Y. 1970\)](#).

The purpose of the Family Court's "family offense" jurisdiction is not to secure criminal conviction and punishment but practical help primarily through efforts of conciliation, orders for financial support, orders of protection regarding a family or household member's exclusion from the home, visitation, custody or children, or conduct towards other family members, or medical, psychiatric, or case work treatment, and, clearly, the major criterion of the appropriateness of the Family Court's retention of a proceeding, is whether these processes are likely to be helpful to the family from which the charge extrudes as the symptom of turmoil. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

Article 8 of the Family Court Act is remedial in nature and was apparently intended to preserve the family unit under certain conditions of stress; the thrust thereof is that when certain acts which are defined as crimes are committed between or among members of a family or household, the Family Court should examine the matter first to determine if the family unit will be better served by civil disposition rather than by allowing criminal charges. [People v Kenyon, 72 Misc. 2d 82, 338 N.Y.S.2d 496, 1972 N.Y. Misc. LEXIS 1290 \(N.Y. County Ct. 1972\)](#).

[Family Court Act § 811](#) spells out the "finding and purpose" of the Family Court Act granting the Family Court exclusive original jurisdiction, and the section clearly points out the intent of permitting wives to bring certain problems before the Family Court for practical help rather than having to bring criminal charges against their husbands. [People v Diggs, 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 \(N.Y. Dist. Ct. 1973\)](#).

### **38. Persons considered members of family of household**

The expression "members of the same household" as used in this section includes an unmarried couple living as man and wife under the same roof. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\)](#).

A sister and brother-in-law are members of the same family for the purpose of vesting exclusive original jurisdiction in the Family Court. [People ex rel. Clifford v Krueger, 59 Misc. 2d 87, 297 N.Y.S.2d 990, 1969 N.Y. Misc. LEXIS 1728 \(N.Y. Sup. Ct. 1969\)](#) (further holding that fact that defendant fired into the home of a sister and brother-in-law from the public sidewalk does not relieve the statutory purpose).

Assault by one sister-in-law upon another who did not reside in same house did not constitute "family offense" within meaning of statute governing family offenses proceedings, and thus, misdemeanor information alleging perpetration of such assault would be retransferred from family court to appropriate criminal court. [Sarno v O'Toole, 86 Misc. 2d 764, 383 N.Y.S.2d 527, 1976 N.Y. Misc. LEXIS 2514 \(N.Y. Fam. Ct. 1976\)](#).

### **39. Crimes and offenses to which family offense proceedings may be applied**

The county court may not try an indictment accusing a husband of feloniously assaulting his wife without first having transferred the proceeding to the family court for an initial determination of whether the assault should be disposed of there as a "family offense" or transferred to county court for prosecution as a crime. [People v Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481, 229 N.E.2d 180, 1967 N.Y. LEXIS 1268 \(N.Y. 1967\)](#).

The New York State Constitution gives the legislature the power to vest in the family court, without qualification, jurisdiction over all "crimes and offenses" between spouses, and by use of the statutory language "disorderly conduct or an assault" in *Family Court Act § 812*, the legislature simply intended to limit the specific "crimes and offenses" to be heard by the family court to certain types of violence and the statutory phrase "an assault between

spouses” is broad enough to include any assault, felonious as well as petit. [People v Johnson, 20 N.Y.2d 220, 282 N.Y.S.2d 481, 229 N.E.2d 180, 1967 N.Y. LEXIS 1268 \(N.Y. 1967\).](#)

The Family Court has no jurisdiction over offenses of manslaughter or murder since, by the very nature of these offenses, no future benefit or protection may be afforded to the victim under the statute, thus the jurisdiction of the Family Court is limited to the offenses enumerated therein. [Whiting v Shepard, 35 A.D.2d 11, 312 N.Y.S.2d 414, 1970 N.Y. App. Div. LEXIS 4097 \(N.Y. App. Div. 3d Dep’t 1970\).](#)

In view of the stated purposes of the Family Court, felony complaints involving family assaults were not intended to be within its jurisdiction. [People v Klaff, 35 Misc. 2d 859, 231 N.Y.S.2d 875, 1962 N.Y. Misc. LEXIS 2682 \(N.Y. Dist. Ct. 1962\).](#)

The stated intention of the Legislature to substitute a “civil proceeding” in a Family Court for offenses between spouses was aimed at providing remedial and conciliatory proceedings wherein the complainant needs help, and this objective would not be consistent with substituting a civil proceeding for a criminal trial in cases where the crime is infamous. [Ricapito v People, 38 Misc. 2d 710, 238 N.Y.S.2d 864, 1963 N.Y. Misc. LEXIS 2207 \(N.Y. Sup. Ct.\), aff’d, 20 A.D.2d 567, 245 N.Y.S.2d 846, 1963 N.Y. App. Div. LEXIS 2631 \(N.Y. App. Div. 2d Dep’t 1963\).](#)

“Family discord” is accurate description of results of an incestuous liaison between a 16-year-old brother living with his 12-year-old sister until their baby is born, and family court had initial jurisdiction thereof. [S v S, 63 Misc. 2d 1, 311 N.Y.S.2d 169, 1970 N.Y. Misc. LEXIS 1600 \(N.Y. Fam. Ct. 1970\).](#)

Fact that respondent’s family wishes to pursue community resources to rehabilitate respondent, 15-year-old charged with rape, sodomy and sexual abuse of his younger sisters, is insufficient to warrant dismissal of delinquency petition in interest of justice since Family Court must consider “need for protection of the community” as well as “needs and best interests of respondent” ([FCA § 711](#)); since no in-depth investigation or studies of respondent have been made by auxiliary services of Family Court, it would be premature to dismiss petition on ground that any further supervision, treatment or confinement is unnecessary nor is substitution of neglect petition appropriate since there is no manifestation of parental neglect; although Family Court possesses wide discretion to deal “with the complexities of family life so that its actions may fit the particular needs of those before it” ([FCA § 141](#)) and court’s approach to intrafamily discord is rehabilitative in scope and design ([FCA § 811](#)), court has no power to commence family offense proceeding in place of delinquency petition since acts allegedly committed by respondent are not within ambit of designated family offenses ([FCA § 812](#)); however, respondent is granted hearing to determine if substitution of person in need of supervision petition ([FCA § 716](#)) would be more appropriate to assure delivery of treatment needed by respondent. [In re P., 103 Misc. 2d 1102, 427 N.Y.S.2d 694, 1980 N.Y. Misc. LEXIS 2263 \(N.Y. Fam. Ct. 1980\).](#)

#### **40. Transfer of proceedings from criminal court to family court**

A proceeding involving “truly criminal conduct” must be transferred from the Family Court to a Criminal Court and such conduct should not be treated as a family offense rather than a crime and go unpunished. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

Jurisdiction over defendant who had feloniously shot his wife would be transferred from Family Court to Criminal Court where it was shown that (1) retention of this proceeding in Family Court would help the family in some but in not fundamental respects; (2) there was some possibility of respondent’s being dangerous, and there was society’s interest in criminal prosecution for an extremely grave assault; and (3) this respondent could not in any event be spared the detriment of criminal processes since he was subject to trial on a weapons charge regardless of whether this court retained jurisdiction over the assault. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

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A criminal court has jurisdiction to transfer a proceeding to the Family Court whenever the facts in a case contain the necessary elements to constitute an offense for which the Family Court has original jurisdiction, and the failure of the accusatory instrument to charge such offense should not and may not prevent criminal court from exercising its obligation to transfer the matter to the Family Court; thus where husband was accused of possession of a loaded revolver but the facts in the wife's supporting deposition clearly spelled out the elements of the charge of menacing and attempted assault for reckless endangerment as to her person, matter could be transferred to Family Court although the latter offenses were not specifically charged and the possession charged does not fall within Family Court § 812. [People v Diggs, 72 Misc. 2d 898, 339 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2326 \(N.Y. Dist. Ct. 1973\).](#)

**41. —Criteria for determining suitability of case for transfer**

Upon a petition to transfer a matter from Family Court to Criminal Court the petitioner's individual desire can only be weighed as one fact in the transfer decision, else it would rest as an inherently arbitrary and capricious, and therefore unconstitutional, foundation. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

In determining whether to transfer a proceeding from a Family Court to a Criminal Court a factor for the court's consideration is the gravity of the assault as such and the court must be mindful of the value of criminal prosecution as a deterrent to violence in the community, and of the retributive function of the Criminal Law in cases of wilful serious crimes. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

In fairness to the guilty party and to the public interest, his dangerousness as an individual must be weighted in determining whether Family or Criminal Court jurisdiction is appropriate. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

**42. —Transfer hearing**

In order to satisfy due process guaranties the hearing, on a transfer proceeding, need not conform with all the requirements of a criminal trial or even of the usual administrative hearing; the court's use of the probation file and social records is acceptable, so long as they are subject to the respondent's examination, criticism and reputation; and the conference interchange of views in such a type of transfer proceeding may be advantageous to establish agreement on issues of fact, or at least to narrow them. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

The constitutional guaranties of due process require procedural protection for a respondent in a proceeding to determine whether a matter should be transferred from Family Court to a Criminal Court. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

**43. Disposition of particular proceedings**

In proceeding to enforce family protection order granted against son in favor of mother, commitment to county penitentiary was improper where no proof was taken and appellant was never advised of his right to be heard and to present witnesses. [Ryan v Ryan, 42 A.D.2d 733, 346 N.Y.S.2d 105, 1973 N.Y. App. Div. LEXIS 3837 \(N.Y. App. Div. 2d Dep't 1973\).](#)

As an alternative approach to prevention and cure of narcotic addiction without resort to the Narcotic Control Act, it was held the Family Court would enter an order of protection effective for one year providing that the narcotic addict, a 17-year-son who had assaulted his father, must reside in the home of his grandmother, stay away from

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drugs, cooperate strictly with an out patient program and any short term hospitalization required by the director of such program, and return for further dispositional hearing and progress report to the Family Court. ["S" v "S", 60 Misc. 2d 359, 303 N.Y.S.2d 166, 1969 N.Y. Misc. LEXIS 1271 \(N.Y. Fam. Ct. 1969\).](#)

Entry of permanent protective order requiring illegitimate child's mother to refrain from offensive conduct against child's father, including efforts to contact him directly or indirectly through members of his immediate family or business associates, was justified by father's weakened physical condition caused by open heart surgery and fact that a reduction of his ability to earn sufficient monies to continue to pay for child's support and education would not be in child's best interests. [W. v L., 88 Misc. 2d 244, 387 N.Y.S.2d 359, 1976 N.Y. Misc. LEXIS 2661 \(N.Y. Fam. Ct. 1976\).](#)

The Family Court has the authority and obligation to grant a motion by a respondent in a family offense proceeding, respondent having been charged with assault in the third degree against his wife and the charge having been transferred to Family Court from a criminal court, to direct the return to respondent of all photographs and fingerprints taken or made of respondent following the dismissal of the petition for failure of prosecution ([CPL 160.50](#)). It would be inequitable and violative of due process to afford a respondent in a family offense matter in Family Court less rights than a defendant in a criminal court, even though the CPL is applicable to criminal proceedings only and a family offense proceeding is civil in nature. [Schwartz v Schwartz, 94 Misc. 2d 1071, 406 N.Y.S.2d 253, 1978 N.Y. Misc. LEXIS 2348 \(N.Y. Fam. Ct. 1978\).](#)

## B. Under Former § 813

### 44. Generally

If a petition is presented to the Supreme Court in a matter that should have been initiated in Family Court, the Supreme Court is not without jurisdiction either to dismiss or transfer the matter to Family Court, but it may well be that the Supreme Court could also retain the matter and proceed to act as a Family Court, following the processes and procedures of the Family Court Act. [People v De Jesus, 21 A.D.2d 236, 250 N.Y.S.2d 317, 1964 N.Y. App. Div. LEXIS 3680 \(N.Y. App. Div. 4th Dep't 1964\).](#)

Where basis of child abuse charges is assault, criminal courts or district attorney are not prohibited from initiating proceedings until after determination by family court that there was criminal activity. [People v Kenyon, 46 A.D.2d 409, 362 N.Y.S.2d 644, 1975 N.Y. App. Div. LEXIS 8505 \(N.Y. App. Div. 4th Dep't 1975\).](#)

Since "family matter" cases are transferred to the Family Court from Police Court and police court decisions are appealable to the County Court, of which a Family Court judge may act as member, the offices of police justice and Family Court judge are clearly incompatible. [Fauci v Lee, 38 Misc. 2d 564, 237 N.Y.S.2d 469, 1963 N.Y. Misc. LEXIS 2301 \(N.Y. Sup. Ct.\),](#) aff'd, [19 A.D.2d 777, 242 N.Y.S.2d 630, 1963 N.Y. App. Div. LEXIS 6046 \(N.Y. App. Div. 3d Dep't 1963\).](#)

The District Court has original jurisdiction of all misdemeanors committed any place within the territorial jurisdiction of the court, and this jurisdictional fact, taken together with the transferal provisions contained in this section would preclude a dismissal of an information charging a husband with an assault upon his wife except on the grounds of legal insufficiency. [People v Brady, 54 Misc. 2d 638, 283 N.Y.S.2d 175, 1967 N.Y. Misc. LEXIS 1258 \(N.Y. Dist. Ct. 1967\).](#)

Where the District Court failed to transfer an intrafamilial assault case to the family court within the three-day period provided by § 813 of the Family Court Act although the warrant of arrest was issued within that period, the defendant arrested on the warrant some three months later could not properly be charged with the offense of escaping from the arresting officer since he was not in lawful custody at that time. [People v Hebbmann, 54 Misc. 2d 666, 283 N.Y.S.2d 179, 1967 N.Y. Misc. LEXIS 1259 \(N.Y. Dist. Ct. 1967\).](#)

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In action by mother to have son declared delinquent because of latter's act in menacing mother with kitchen knife, mother would bear burden of showing why it would be inappropriate for family court to revoke son's probation as person in need of supervision rather than there being an addition and superfluous finding of delinquency. [In re H, 77 Misc. 2d 406, 354 N.Y.S.2d 293, 1974 N.Y. Misc. LEXIS 1151 \(N.Y. Fam. Ct. 1974\).](#)

Delay of more than three days before transfer of case by criminal court to family court did not deprive defendant of due process of law. [People v Coady, 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 \(N.Y. Sup. Ct. 1974\).](#)

#### 45. Purpose

The purpose of the statute was to avoid delay in handling cases involving the spouses but it cannot be inferred that it was the intention of the Legislature that such conduct would not be punishable in the event such cases were not transferred within the time limited. [People v Gemmill, 34 A.D.2d 177, 310 N.Y.S.2d 244, 1970 N.Y. App. Div. LEXIS 4885 \(N.Y. App. Div. 3d Dep't 1970\).](#)

Language of Family Court Act provision that a criminal complaint charging a family court not more than three days from time that complaint has been made is mandatory and purpose of section is to avoid delay in handling of such cases. [People v Kenyon, 46 A.D.2d 409, 362 N.Y.S.2d 644, 1975 N.Y. App. Div. LEXIS 8505 \(N.Y. App. Div. 4th Dep't 1975\).](#)

The thrust of provision of Family Court Act which requires a transfer to family court of any criminal complaint charging disorderly conduct or an assault between spouses or between parent and child or between members of same family or household is to preserve family under certain conditions of stress, and it is remedial in nature. [People v Kenyon, 46 A.D.2d 409, 362 N.Y.S.2d 644, 1975 N.Y. App. Div. LEXIS 8505 \(N.Y. App. Div. 4th Dep't 1975\).](#)

In view of the stated purpose of this act, this section cannot be construed as requiring transfer to the Family Court of a first-degree criminal assault case merely because the assault was allegedly committed by one spouse against the other. [Ricapito v People, 38 Misc. 2d 710, 238 N.Y.S.2d 864, 1963 N.Y. Misc. LEXIS 2207 \(N.Y. Sup. Ct.\), aff'd, 20 A.D.2d 567, 245 N.Y.S.2d 846, 1963 N.Y. App. Div. LEXIS 2631 \(N.Y. App. Div. 2d Dep't 1963\).](#)

#### 46. Offenses under jurisdiction of Family Court

Fact that defendant who pleaded guilty to assault upon his wife made no application under this section for a transfer from the County Court to the Family Court, although such application might have been appropriate, did not confer jurisdiction upon the County Court. [People v Pieters, 26 A.D.2d 891, 274 N.Y.S.2d 664, 1966 N.Y. App. Div. LEXIS 3367 \(N.Y. App. Div. 4th Dep't 1966\), aff'd, 20 N.Y.2d 691, 282 N.Y.S.2d 760, 229 N.E.2d 441, 1967 N.Y. LEXIS 1291 \(N.Y. 1967\).](#)

Under this section, transfer of family assault charge cases to the Family Court is mandatory. [People v Dugar, 37 Misc. 2d 652, 235 N.Y.S.2d 152, 1962 N.Y. Misc. LEXIS 2153 \(N.Y. Dist. Ct. 1962\).](#)

A District Court has jurisdiction in the first instance to entertain an assault complaint between husband and wife, although only for the purpose of transfer to the Family Court. [People v Hebmann, 54 Misc. 2d 666, 283 N.Y.S.2d 179, 1967 N.Y. Misc. LEXIS 1259 \(N.Y. Dist. Ct. 1967\).](#)

Family Court has original jurisdiction over all assaults including felonious assaults, between members of the same family or household. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\).](#)

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The Family Court has exclusive original jurisdiction under the Family court Act of a charge of assault between an unmarried couple living as man and wife in the same household. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\)](#).

Under [Family Court Act § 813](#), Family court had original jurisdiction over indictment charging violation of [Penal Law § 265.35](#), subd 4(a), a crime inseparable from defendant's assault on his wife with a gun. [People v Edge, 76 Misc. 2d 802, 351 N.Y.S.2d 502, 1973 N.Y. Misc. LEXIS 1582 \(N.Y. Sup. Ct. 1973\)](#).

#### 47. Offenses not under jurisdiction of Family Court

An information by a wife charging defendant husband with feloniously assaulting her and pending in a district court of Nassau County should not be transferred, under this section, to the Family Court. [People v Klaff, 35 Misc. 2d 859, 231 N.Y.S.2d 875, 1962 N.Y. Misc. LEXIS 2682 \(N.Y. Dist. Ct. 1962\)](#).

A motion to transfer a complaint charging defendant's husband with illegal possession of a loaded revolver to Family Court was properly denied, although the weapon came to the attention of the police when defendant's wife called them following a heated argument between the parties. The court pointed out that wrongful possession of the weapon did not depend upon an intent by defendant to use it on his wife, and the act complained of could be prosecuted absent any intent. [People v Mancuso, 59 Misc. 2d 941, 300 N.Y.S.2d 1003, 1969 N.Y. Misc. LEXIS 1514 \(N.Y. Dist. Ct. 1969\)](#).

A defendant charged with various sexual offenses against a 4-year-old child was denied permission to transfer the proceedings to Family Court where there was no claim or evidence that defendant had legally adopted the boy and there was no legal relationship between the mother of the child and the defendant, on the basis that the necessary relationship was not established for the purposes of [Family Court Act § 813](#), and that the crimes alleged were not among those enumerated in the statute. [People v Monsanto, 70 Misc. 2d 996, 335 N.Y.S.2d 451, 1972 N.Y. Misc. LEXIS 1618 \(N.Y. Sup. Ct. 1972\)](#).

Family court did not have original jurisdiction under [Family Court Act § 813](#) of indictment charging felonious possession of a weapon, even though weapon was used in defendant's assault on his wife; such a charge is a crime in and of itself, and capable of standing independently. [People v Edge, 76 Misc. 2d 802, 351 N.Y.S.2d 502, 1973 N.Y. Misc. LEXIS 1582 \(N.Y. Sup. Ct. 1973\)](#).

#### 48. Prosecution by indictment

The Family Court and the Supreme Court had concurrent jurisdiction as to family offenses prosecuted by indictment. [People v Davis, 27 A.D.2d 299, 278 N.Y.S.2d 750, 1967 N.Y. App. Div. LEXIS 4457 \(N.Y. App. Div. 1st Dep't 1967\)](#).

When a putative family offense comes to the attention of the district attorney, he has the power to bring it before the grand jury, instead of either the criminal court or the family court and the grand jury has the power to find a valid indictment. [People v Davis, 27 A.D.2d 299, 278 N.Y.S.2d 750, 1967 N.Y. App. Div. LEXIS 4457 \(N.Y. App. Div. 1st Dep't 1967\)](#).

An information or indictment for assault which comes within the purview of this section, must be dismissed and the matter referred to the Family Court for its consideration in the first instance. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\)](#).

#### 49. Appeal of transfer order

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Denial of a motion in the County Court for transfer of proceedings to the Family Court would be reviewable on appeal from a judgment of conviction under § 517 of the Code of Criminal Procedure, and hence, in absence of such a motion, transfer cannot be required by either applying for prohibition against proceeding in the County Court or mandamus to compel it to make the transfer. [Ricapito v People, 20 A.D.2d 567, 245 N.Y.S.2d 846, 1963 N.Y. App. Div. LEXIS 2631 \(N.Y. App. Div. 2d Dep't 1963\).](#)

An order transferring proceedings within the jurisdiction of a Family Court to that court from the Supreme or County Court is not an appealable order except when a defendant has applied for such a transfer and it has been denied. [People v De Jesus, 21 A.D.2d 236, 250 N.Y.S.2d 317, 1964 N.Y. App. Div. LEXIS 3680 \(N.Y. App. Div. 4th Dep't 1964\).](#)

### C. Under Former § 814

#### 50. Generally

Defendant, who was indicted and convicted, under a grand jury indictment, for assault upon his wife after having entered a plea of guilty, was entitled to have the indictment dismissed, an order denying without a hearing a motion to vacate judgment of conviction for first degree assault reversed, and the matter remitted to the Family Court for further proceedings, since the complaint should have been initiated in the Family Court in the first place, and the matter would only have become one of criminal process if the Family Court had concluded that its process was inappropriate. Only then would the County Court have jurisdiction to consider the criminal matter, and the indictment and guilty plea were complete nullities. [People v Pieters, 26 A.D.2d 891, 274 N.Y.S.2d 664, 1966 N.Y. App. Div. LEXIS 3367 \(N.Y. App. Div. 4th Dep't 1966\)](#), [aff'd, 20 N.Y.2d 691, 282 N.Y.S.2d 760, 229 N.E.2d 441, 1967 N.Y. LEXIS 1291 \(N.Y. 1967\).](#)

### D. Under Former § 815

#### 51. Generally

Dismissal of pending indictment in county court of husband for assault on his wife was required as failure to transfer such matter to the Family Court was jurisdictional and all proceedings thereafter in the criminal court were null and void. [People v Berger, 40 A.D.2d 192, 338 N.Y.S.2d 762, 1972 N.Y. App. Div. LEXIS 3037 \(N.Y. App. Div. 3d Dep't 1972\).](#)

An order of protection, as distinguished from a reconciliation, may require the respondent-defendant to refrain from visiting the home or may direct him to abstain from offensive conduct against any member of the household unit and may direct him to refrain from acts of commission or omission that may tend to make the home an improper place for a child. [People v James, 55 Misc. 2d 953, 287 N.Y.S.2d 188, 1968 N.Y. Misc. LEXIS 1769 \(N.Y. Sup. Ct. 1968\).](#)

The Family Court had no jurisdiction of a prosecution for first-degree assault upon a divorced wife by her ex-husband, particularly in view of the almost fatal assault by the husband, the wife's expressed fear of him, and the fact there was no chance of a reconciliation. [People v King, 59 Misc. 2d 464, 300 N.Y.S.2d 600, 1969 N.Y. Misc. LEXIS 1592 \(N.Y. Fam. Ct. 1969\).](#)

Even if a temporary order of protection was issued on cases that were returned to criminal court by family court, order, which did not show any finality of proceeding, was not a dispositional order and no adjudication on merits of case in family court was had based on such order. [People v Coady, 79 Misc. 2d 929, 361 N.Y.S.2d 587, 1974 N.Y. Misc. LEXIS 1793 \(N.Y. Sup. Ct. 1974\).](#)

## E. Under Former § 816

### 52. Generally

Failure to charge on “serious physical injury” as an element of assault in the second degree, particularly where the seriousness of the injuries was disputed and where assault in the third degree was an includible crime, constituted fundamental and prejudicial error. [People v Wrench, 34 A.D.2d 1055, 312 N.Y.S.2d 561, 1970 N.Y. App. Div. LEXIS 4355 \(N.Y. App. Div. 3d Dep't 1970\)](#).

Either the petitioner, the people through the district attorney, or the respondent-defendant can challenge for an abuse of discretion a Family Court determination of transfer from Family Court to Criminal Court. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

Upon a petition to transfer a matter from Family Court to Criminal Court the petitioner's individual desire can only be weighed as one fact in the transfer decision, else it would rest as a inherently arbitrary and capricious, and therefore unconstitutional, foundation. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

No assault between members of same household may be treated as crime unless and until family court has conducted proceedings in which it determines after hearing that its processes are “inappropriate”. [In re H, 77 Misc. 2d 406, 354 N.Y.S.2d 293, 1974 N.Y. Misc. LEXIS 1151 \(N.Y. Fam. Ct. 1974\)](#).

Finding of “inappropriateness” which is required in assault between members of same family prior to having same treated as crime is not finding to the effect that remedies of Family Court Act are inappropriate but rather that processes of family court itself be so characterized. [In re H, 77 Misc. 2d 406, 354 N.Y.S.2d 293, 1974 N.Y. Misc. LEXIS 1151 \(N.Y. Fam. Ct. 1974\)](#).

### 53. Due process issues

Neither statute nor constitutional principle mandated that in all cases a hearing be held prior to effecting transfer of case from family court to criminal courts. [People v Goodman, 41 N.Y.2d 888, 393 N.Y.S.2d 985, 362 N.E.2d 615, 1977 N.Y. LEXIS 1930 \(N.Y. 1977\)](#).

There is no requirement in the statute that a hearing must be held where the Family Court deems its processes in appropriate upon the fact of the information and other papers before it. [People v Gemmill, 34 A.D.2d 177, 310 N.Y.S.2d 244, 1970 N.Y. App. Div. LEXIS 4885 \(N.Y. App. Div. 3d Dep't 1970\)](#).

Defendant was entitled to notice of family court's retransfer of child beating case to county court under [Family Ct Act § 816](#) subd a, since he could challenge said transfer either by motion ([Family Ct Act § 816](#), subd b) or by appeal ([Family Ct Act § 1112](#)). [People v Bell, 41 A.D.2d 583, 340 N.Y.S.2d 194, 1973 N.Y. App. Div. LEXIS 5366 \(N.Y. App. Div. 4th Dep't 1973\)](#).

In order to satisfy due process guaranties the hearing, on a transfer proceeding, need not conform with all the requirements of a criminal trial or even of the usual administrative hearing; the court's use of the probation file and social records is acceptable, so long as they are subject to the respondent's examination, criticism and reputation; and the conference interchange of views in such a type of transfer proceeding may be advantageous to establish agreement on issues of fact, or at least to narrow them. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

## NY CLS Family Ct Act § 812

The constitutional guaranties of due process require procedural protection for a respondent in a proceeding to determine whether a matter should be transferred from Family Court to a Criminal Court. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

Family Court must state its reasons for decisions that its retention of the proceeding is “inappropriate”; and its method of deciding this question raises due process issues. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

#### 54. Offenses not within jurisdiction of Family Court

Where wife sought a protective order in family court and also filed felony complaint charging defendant had assaulted her by throwing a bowl of lye on her, and defendant was arrested and arraigned, family court did not err in transferring case to criminal court, since from the seriousness of injuries sustained and the request for protective order the Family Court could properly conclude it was inappropriate to apply processes of family court to case. [People v Goodman, 41 N.Y.2d 888, 393 N.Y.S.2d 985, 362 N.E.2d 615, 1977 N.Y. LEXIS 1930 \(N.Y. 1977\)](#).

The alleged assault committed by the father-in-law of petitioner's daughter, on petitioner, the mother-in-law of defendant's son, was not a family offense, where the parties did not reside together and were not members of the same family or household within the meaning of *Family Court Act* § 812. It was held the issue was one which the Supreme Court, Appellate Division, could consider de novo notwithstanding a contrary determination by another judge of the Family Court. [Klimes v Sohnen, 32 A.D.2d 935, 303 N.Y.S.2d 533, 1969 N.Y. App. Div. LEXIS 3410 \(N.Y. App. Div. 2d Dep't 1969\)](#).

In a proceeding brought where the husband was indicted for assault with a knife upon his wife, it was not an abuse of discretion for the Family Court to transfer the proceeding to the District Court of the county, in view of the serious nature of the assault alleged, the previous court proceedings involving orders of protection, and the statement of the wife that she had no hope of reconciliation with the husband, and the Family Court determined that its processes were inappropriate. [Appell v Appell, 37 A.D.2d 966, 327 N.Y.S.2d 190, 1971 N.Y. App. Div. LEXIS 3046 \(N.Y. App. Div. 2d Dep't 1971\)](#), aff'd, [30 N.Y.2d 800, 334 N.Y.S.2d 900, 286 N.E.2d 276, 1972 N.Y. LEXIS 1270 \(N.Y. 1972\)](#).

A proceeding involving “truly criminal conduct” must be transferred from the Family Court to a Criminal Court and such conduct should not be treated as a family offense rather than a crime and go unpunished. [Montalvo v Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 \(N.Y. Fam. Ct. 1968\)](#).

In view of death of wife subsequent to alleged assault against her by husband, processes of family court had become inappropriate, and the matter would be transferred back to justice court of town for further criminal proceeding in that court. [Hawley v Hawley, 78 Misc. 2d 55, 355 N.Y.S.2d 962, 1974 N.Y. Misc. LEXIS 1328 \(N.Y. Fam. Ct. 1974\)](#).

#### 55. Attack on transfer order

Defendant who never appealed from order transferring case from family court to criminal courts, a final appealable order, and who did not seek order rescinding transfer, could not, on appeal from judgment of conviction collaterally attack transfer order. [People v Goodman, 41 N.Y.2d 888, 393 N.Y.S.2d 985, 362 N.E.2d 615, 1977 N.Y. LEXIS 1930 \(N.Y. 1977\)](#).

Defendant accused of a family offense in connection with assault on his wife could not collaterally attack the jurisdiction of county court to subsequently try him for first and second degree assault where he was represented by counsel at time of transfer from Family Court and could have moved for a rehearing under [Family Court Act § 816](#), subd b, or appealed the order of transfer under [Family Court Act § 1112](#). [People v Isaacs, 43 A.D.2d 656, 349 N.Y.S.2d 844, 1973 N.Y. App. Div. LEXIS 3043 \(N.Y. App. Div. 3d Dep't 1973\)](#).

## NY CLS Family Ct Act § 812

In view of right of aggrieved party to seek relief by way of motion or to attack order of transfer from family court to district court directly by appealing from order of transfer, husband did not waive his rights by failing to move for reconsideration of family court's ruling that its processes were inappropriate for disposition of charge that husband had assaulted wife. *Librizzi v Chisholm*, 55 A.D.2d 954, 391 N.Y.S.2d 154, 1977 N.Y. App. Div. LEXIS 10251 (N.Y. App. Div. 2d Dep't 1977).

**56. Factors in determination of transfer**

In determining whether to transfer a proceeding from a Family Court to a Criminal Court a factor for the court's consideration is the gravity of the assault as such and the court must be mindful of the value of criminal prosecution as a deterrent to violence in the community, and of the retributive function of the Criminal Law in cases of wilful serious crimes. [Montalvo v Montalvo](#), 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 (N.Y. Fam. Ct. 1968).

In fairness to the guilty party and to the public interest, his dangerousness as an individual must be weighted in determining whether Family or Criminal Court jurisdiction is appropriate. [Montalvo v Montalvo](#), 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 (N.Y. Fam. Ct. 1968).

Jurisdiction over defendant who had feloniously shot his wife would be transferred from Family Court to Criminal Court where it was shown that (1) retention of this proceeding in Family Court would help the family in some but in not fundamental respects; (2) there was some possibility of respondent's being dangerous, and there was a societal interest in criminal prosecution for an extremely grave assault; and (3) this respondent could not in any event be spared the detriment of criminal processes since he was subject to trial on a weapons charge regardless of whether this court retained jurisdiction over the assault. [Montalvo v Montalvo](#), 55 Misc. 2d 699, 286 N.Y.S.2d 605, 1968 N.Y. Misc. LEXIS 1808 (N.Y. Fam. Ct. 1968).

**57. Rights of defendant at transfer stage**

Defendant was entitled to a notice of family court action in transferring his case, which had initially been transferred from city court to family court, to the criminal court so that he might avail himself of his right to appeal or, in the alternative, to challenge the action by way of motion to rescind the transfer. [People v Hopkins](#), 49 A.D.2d 682, 370 N.Y.S.2d 744, 1975 N.Y. App. Div. LEXIS 10527 (N.Y. App. Div. 4th Dep't 1975).

Although at time of sentencing on charge of assault in the second degree defendant's counsel indicated an awareness of family court's action, i.e., transfer of case from that court to criminal court, record was unclear as to whether defendant was represented by counsel at time of transfer or was served with copy of transfer order, interests of justice required that case be remitted to family court for a hearing on whether defendant received notice of the family court action and whether such action was taken when defendant was without counsel. [People v Hopkins](#), 49 A.D.2d 682, 370 N.Y.S.2d 744, 1975 N.Y. App. Div. LEXIS 10527 (N.Y. App. Div. 4th Dep't 1975).

Determination whether a matter should be transferred out of family court is a critically important one and should not be made when defendant is without counsel. [People v Hopkins](#), 49 A.D.2d 682, 370 N.Y.S.2d 744, 1975 N.Y. App. Div. LEXIS 10527 (N.Y. App. Div. 4th Dep't 1975).

**F. Under Former Domestic Relations Court Act § 61****58. Generally**

Whipping child with belt for lying held unnecessarily assaultive by father and punishable under this section. [In re Carl, 22 N.Y.S.2d 782, 174 Misc. 985, 1940 N.Y. Misc. LEXIS 2225 \(N.Y. Dom. Rel. Ct. 1940\).](#)

## Opinion Notes

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### Agency Opinions

#### I. In General

##### 1. Other procedural matters

A district attorney may use discretion as to whether or not to prosecute a case under the above-cited section of the Family Court Act, and such discretion includes the right to decline prosecution where a complaint has been filed by a complainant with the Court on his or her own. When a district attorney accepts a complaint of a spouse, he is not required to accept a cross complaint by the defendant's spouse, based on the same incident, prior to adjudication of the first complaint. 1979 NY Ops Atty Gen Mar 21 (informal).

#### II. Under Former Law

##### A. Under Former § 813

##### 2. Generally

Justice of Peace has power to admit to bail or parole defendant in family row; conflict of authority as to felonious assault cases. 1966 NY Ops Atty Gen Apr 4.

##### B. Under Former § 815

##### 3. Generally

[General Municipal Law § 99-m](#) does not authorize a county treasurer to deduct two percent of the amount of bail deposited in his office, upon exoneration of the bail, when the bail was ordered by the family court pursuant to [section 815 of the Family Court Act](#). 1977 NY Ops Atty Gen May 13.

## Research References & Practice Aids

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### Cross References:

This section referred to in §§ 155., 821., 847.

Functions, powers and duties of the commissioner with respect to the council, CLS [Exec § 841](#).

Designation of persons to inform complainant of procedures available for the institution of family offense proceedings, CLS Family Ct R § 205.70 [[22 NYCRR § 205.70](#)].

Preliminary probation conferences and procedures (family offenses), CLS Family Ct R § 205.71 [[22 NYCRR § 205.71](#)].

Infancy, CLS [Penal § 30.00](#).

### Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1996.

**Causes of Action:**

Cause of Action Against Police for Failure to Protect Victim of Domestic Violence. 33 COA2d 131.

**Law Reviews:**

Dowd, Battered women: a perspective on injustice. 1 Cardoza Women's Law Journal 1.

Symposium on reconceptualizing violence against women by intimate partners: critical issues. [58 Alb. L. Rev. 957](#).

Symposium, Domestic violence and the law. [16 Pace L. Rev. 1](#).

**Treatise References****Matthew Bender's New York Civil Practice:**

Carrieri & Lansner, [New York Civil Practice: Family Court Proceedings § 1.08](#) .Family Offense Proceedings.

Lansner & Reichler, [New York Civil Practice: Matrimonial Actions § 35.03](#). Forums in Which Domestic Violence May be Addressed.

New York Practice Guide: Domestic Relations § 36.04. Jurisdiction.

[LexisNexis AnswerGuide New York Family Court Proceedings § 1.09](#). Checklist for Determining Matters Where Court Has Concurrent Jurisdiction.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 1.20](#) .Understanding Subject Matter Jurisdiction in Family Offense Proceedings.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 2.20](#) .Obtaining Assistance of Corporation Counsel or County Attorney in Family Offense Proceeding.

**Matthew Bender's New York Civil Practice:**

LexisNexis AnswerGuide New York Matrimonial Actions § 4.12 .Obtaining Temporary and Permanent Order of Protection.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 12.04](#) .Determining Whether Behavior Alleged in Petition Constitutes Family Offense.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 12.11](#) .Determining that Pre-Filing Notice Requirements Have Been Met.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 12.16](#) .Establishing Proper Party Petitioner and Respondent.

[LexisNexis AnswerGuide New York Family Court Proceedings § 2.17](#) .Recognizing Role of Corporation Counsel, County Attorney, or District Attorney in Juvenile Delinquency Proceeding.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 12.29](#) .Challenging Adequacy of Petition.

**Matthew Bender's New York Practice Guides:**

[LexisNexis AnswerGuide New York Family Court Proceedings § 12.30](#) .Considering Transfer to Criminal Court.

**Matthew Bender's New York Practice Guides:**

Checklist for Weighing What Relief to Request LexisNexis AnswerGuide New York Matrimonial Actions § 4.06.

**FORMS:**

[Bender's Forms for the Civil Practice Form No. FCA 812:1](#) .Information Concerning Proceedings Involving Family-Related Offenses.

[Bender's Forms for the Civil Practice Form No. FCA 812:2](#) .Information Concerning Proceedings Involving Family-Related Offenses (Spanish Translation).

**Hierarchy Notes:**

[NY CLS Family Ct Act, Art. 8](#)

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## [NY CLS Penal § 245.15](#)

Current through 2019 released Chapters 1-105

***New York Consolidated Laws Service > Penal Law (Pts. ONE — FOUR) > Part THREE Specific Offenses (Titles G — P) > Title N Offenses Against Public Order, Public Sensibilities and the Right to Privacy (Arts. 240 — 250) > Article 245 Offenses Against Public Sensibilities (§§ 245.00 — 245.20)***

### **§ 245.15 Unlawful dissemination or publication of an intimate image. [Effective September 21, 2019]**

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1. A person is guilty of unlawful dissemination or publication of an intimate image when:

(a) with intent to cause harm to the emotional, financial or physical welfare of another person, he or she intentionally disseminates or publishes a still or video image of such other person, who is identifiable from the still or video image itself or from information displayed in connection with the still or video image, without such other person's consent, which depicts:

(i) an unclothed or exposed intimate part of such other person; or

(ii) such other person engaging in sexual conduct as defined in subdivision ten of section 130.00 of this chapter with another person; and

(b) such still or video image was taken under circumstances when the person depicted had a reasonable expectation that the image would remain private and the actor knew or reasonably should have known the person depicted intended for the still or video image to remain private, regardless of whether the actor was present when the still or video image was taken.

2. For purposes of this section "intimate part" means the naked genitals, pubic area, anus or female nipple of the person.

2-a. For purposes of this section "disseminate" and "publish" shall have the same meaning as defined in section 250.40 of this title.

3. This section shall not apply to the following:

(a) the reporting of unlawful conduct;

(b) dissemination or publication of an intimate image made during lawful and common practices of law enforcement, legal proceedings or medical treatment;

(c) images involving voluntary exposure in a public or commercial setting; or

(d) dissemination or publication of an intimate image made for a legitimate public purpose.

4. Nothing in this section shall be construed to limit, or to enlarge, the protections that 47 U.S.C. Section 230 confers on an interactive computer service for content provided by another information content provider, as such terms are defined in 47 U.S.C. Section 230.

Unlawful dissemination or publication of an intimate image is a class A misdemeanor.

### **History**

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*L 2019, ch 109, § 1, eff Sept 21, 2019.*

Annotations

## **Research References & Practice Aids**

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### **Hierarchy Notes:**

[\*NY CLS Penal, Pt. THREE\*](#)

[\*NY CLS Penal, Pt. THREE, Title N, Art. 245\*](#)

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