

At a term of the Family Court of the State of New York, held in and for the County of New York at 60 Lafayette Street, New York, New York on July 30, 2008

**P R E S E N T:**

**HON. KAREN I. LUPULOFF**  
**Judge of the Family Court**

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In the Matter of a Proceeding Under Article 8  
of the Family Court Act

E.H.,

Petitioner,

Docket No.  
O-14185-07

-against-

**DECISION and ORDER**

D.B.,

Respondent.

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**LUPULOFF, J.**

**INTRODUCTION**

On November 5, 2007, the Abington Township, Pennsylvania, Police Department responded to an assault in the marital residence of Daniel B. and Erin H. According to the police report, Erin H. stated that Daniel B. “beat Erin repeatedly with his cane, pointed a shotgun at her head and threatened to shoot her, repeatedly threatened to kill her, and told her he was going to take [their child] away and she would never see her again.” The report further states that Erin H. told the officer that Daniel B. had been beating her for about three years, with the violence escalating up to the date of this incident in which he beat her and she tried to escape only to be punched by him, grabbed by the hair, and pulled back inside the house. After taking Daniel B. into custody, the police officer returned to the house and retrieved a shotgun. After Daniel B.’s arrest, Erin H. was provided instructions in how to file a family offense petition. She informed the officer that after its filing she was going to immediately leave Pennsylvania to stay with friends in New York.

In connection with this incident, Daniel B. was charged with two counts of aggravated assault under 18 Pa.C.S. § 2702(a)(1), a first degree felony; two counts of aggravated assault under 18 Pa.C.S. § 2702(a)(4), a second degree felony; two counts of simple assault under 18

Pa.C.S. § 2701(a)(1), a second degree misdemeanor; reckless endangerment of another person under 18 Pa.C.S. § 2705, a second degree misdemeanor; terroristic threats under 18 Pa.C.S. § 2706(a)(1), a first degree misdemeanor; and possessing instruments of crime under 18 Pa.C.S. § 907(a), a first degree misdemeanor.

On November 6, 2007, before the Criminal Court of the Commonwealth of Pennsylvania, County of Montgomery, Daniel B. was released upon posting bail of \$100,000 cash. As further conditions of his release, the court required him to surrender his passport, and ordered that he not go within 500 yards of any place Erin H. may be found, including her residence or household or her place of employment.

According to Daniel B.'s New York attorney, Daniel B. waived his right to a preliminary hearing in Pennsylvania and was awaiting arraignment. Soon after, Daniel B. was arrested in Delaware for a violation of the Pennsylvania order of protection and a violation of his bail conditions. He waived extradition while in the custody of Delaware authorities and was returned to Pennsylvania. Daniel B. remains incarcerated on a remand status, without opportunity to post bail.

Also on November 6, 2007, in Montgomery County, Pennsylvania, Erin H. brought a family offense petition pursuant to 23 Pa.C.S. § 6106 on behalf of herself and their four-year-old daughter, seeking an order of protection against Daniel B. The Court of Common Pleas of Montgomery County, Pennsylvania issued a three-year Final Order of Protection on November 21, 2007, to which defendant Daniel B. consented, prohibiting him from having any contact with Erin H., directing him to turn over any weapons, and granting Erin H. sole custody of the parties' child. The order evicted and excluded defendant Daniel B. from the Pennsylvania marital residence, permitting his return only after February 1, 2008. The Pennsylvania Court ruled that any such exclusion in respect to the parties' Manhattan property, namely 33 East 65<sup>th</sup> Street, was left to be determined by the New York courts.

## **NEW YORK FAMILY COURT PROCEDURAL HISTORY**

Just two days after the alleged attack in Pennsylvania, on November 7, 2007, Erin H. filed a family offense petition in New York County Family Court pursuant to Article 8 of the Family Court Act (“F.C.A.”) seeking an order of protection on behalf of herself and their daughter. This court issued an *ex parte* temporary order of protection, including full stay-away provisions, and ordered that the respondent Daniel B. be served. On November 8, 2007, Daniel B. was personally served in the Montgomery County Jail in Pennsylvania with the Summons, the Family Offense Petition and the Undersigned’s full stay-away, Temporary Order of Protection.<sup>1</sup> Erin H. alleged that Daniel B. committed the following acts, on or about November 5th, constituting family offenses, against her and their daughter:

- a. That Daniel B. attacked and beat her;
- b. That Daniel B. smashed windows with a sword at the marital residence;
- c. That Daniel B. shot at her with a gun;
- d. That Daniel B. threatened to kill her;
- e. That Daniel B. threatened to burn the house down;
- f. That Daniel B. hit the parties’ daughter.

The New York County Family Court Temporary Order of Protection, issued on November 7, 2007, by the Undersigned, directed Daniel B. to stay away from Erin H. and their daughter, including their home and Erin H.’s place of employment. It further ordered him to have no contact with them either directly or through a third party. The order also directed Daniel B. to surrender any and all weapons.<sup>2</sup>

On December 18, 2007, respondent Daniel B. filed a motion to dismiss Erin H.’s petition on the ground that neither party resided in New York, an argument made since the inception of this case.

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<sup>1</sup> No jurisdictional issue has been raised as to whether respondent had minimum contacts in New York resulting in this state’s having jurisdiction over him. Respondent has acknowledged more than minimum contacts with the State of New York due to his ownership of a business/apartment, and respondent never contested jurisdiction as it related to him.

<sup>2</sup> Erin H. asserted to the court on December 21, 2007 that two weapons were subsequently removed from the 33 East 65<sup>th</sup> Street New York premises by the New York City Police Department.

In her family offense petition, Erin H. listed the location at 33 East 65<sup>th</sup> Street, New York, New York, as her residence. Contesting this assertion, Daniel B. claimed that the described address is a leased storefront which houses an art gallery, owned by a limited liability corporation of which respondent is a sole owner. Respondent alleged that all of the art and antiques contained in the premises were acquired by him by way of a trust, were separate property, and were obtained independently of Erin H. He further contended that petitioner's only involvement with the art and antiques was through her work at the premises, initiated at his request, earlier in their marriage. Counsel for respondent advocated the need to have access to the gallery, as it was alleged to be Daniel B.'s primary, if not sole source of income.

Earlier, on December 4, 2007, Erin H. acknowledged that she was not currently residing at 33 East 65<sup>th</sup> Street.<sup>3</sup> She claimed, rather, that she was working in the gallery but living in Manhattan at a confidential address. The court continued its Temporary Order of Protection without amending it to permit access by respondent or his agents.

On December 19, 2007, Erin H. filed a petition alleging a violation of this court's Temporary Order of Protection. In the violation petition, brought via an Order to Show Cause, petitioner alleged that on December 3, 2007, and December 4, 2007, respondent's criminal attorney from Pennsylvania, acting on respondent's behalf, gained illegal access to the 33 East 65<sup>th</sup> Street premises, achieving entry by destroying the lock and removing various personal effects as well as antiques of significant material value. According to Erin H., she was further alarmed to find strange men at the location upon her arrival to the premises on the morning of December 5, 2007, with the men having allegedly been given a work order from respondent instructing them to be there. In response to the new allegations, this court amended the

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<sup>3</sup> In respondent's Notice of Motion dated December 18, 2007, the court was provided with a copy of the lease for Daniel B. Antiques and Fine Art LLC, "a 2<sup>nd</sup> Floor Store in the building known as 33 East 65<sup>th</sup> Street." The lease refers to the premises as "Art Gallery/Apartment."

Temporary Order of Protection to strictly read that no one was permitted to enter the location on respondent's behalf.

On January 11, 2008, in her Affidavit in Opposition to respondent's Motion to Dismiss, Erin H. alleged that respondent attempted to contact petitioner by telephone directly and through the use of third parties on December 26, 27, and 29, 2007, and that numerous threatening voice mail messages had been left for her.

While petitioner maintained that her residential address in New York was confidential, she argued that the 33 East 65<sup>th</sup> Street premises was her place of employment, and sometimes, a place of overnight stay. Accordingly, this court further expanded the Temporary Order of Protection on January 14, 2008, by removing the reference to the above named premises as a "home" of petitioner and by continuing the order that respondent fully stay away from petitioner and their child at that location or wherever they may be.

Respondent, through his counsel, provided filings that showed that on November 8, 2007, Erin H. filed for divorce in Pennsylvania, listing their marital home in Pennsylvania as her residence in that action. Respondent alleged that because she listed her home in Pennsylvania for residency purposes in the divorce action, it followed that the same permanent address applies in the instant case. Respondent further alleged that their daughter had been attending pre-school in Pennsylvania prior to the commencement of the legal proceedings. Respondent urged this court to dismiss Erin H.'s New York petition on grounds of improper venue.

### **ISSUE**

The issue before this court was whether or not Erin H. had residency status in New York when she filed the Family Offense Petition in order for this court to find that New York was a proper venue.

### **DISCUSSION**

It is well settled law that the "residence of a party for purposes of venue must be determined as of the time of the commencement of the action." Mandelbaum v. Mandelbaum, 151 A.D.2d 727, 728 (1989). Proof of residence acquired after the

commencement of the action is irrelevant to a determination of venue. Although it is not necessary to prove intent to make a place a permanent home in order to establish residency, “mere physical presence is not necessarily sufficient to establish residency for purposes of venue.” *Id.* at 728. Nevertheless, a party may maintain more than one residence that can be used for venue purposes. For example, New York’s Civil Practice Law and Rules, section 503, entitled, “Venue based on residence,” provides in part that “[a] party resident in more than one county shall be deemed a resident of each such county.” N.Y. C.P.L.R. § 503(a).

### **VENUE IN A FAMILY OFFENSE CASE DEFINED**

Under New York Family Court Act Article 8, residence for the purpose of establishing venue is liberally construed. Regarding venue, Section 818 of the Family Court Act currently provides that

Proceedings under this article may be originated in the county in which the act or acts referred to in the petition allegedly occurred or in which the family or household resides or in which any party resides. For the purposes of this section, residence shall include any residential program for victims of domestic violence, as defined in subdivision four of section four hundred fifty-nine-a of the social services law, or facility which provides shelter to homeless persons or families on an emergency or temporary basis.

Fam. Ct. Act § 818.

In determining whether Erin H. satisfied the residency requirements in New York to bring a family offense case here, this court closely scrutinized the legislative history of F.C.A. § 818. As originally enacted in 1962, the statute’s wording included coverage for those people who came to New York and resided in a “special care home” or a shelter for homeless persons. The definition of venue was then twice expanded. First, in 1996, the law was amended to make corrections to the statute, replacing the obsolete term of residency in a “special care home” with a “residential program for victims of domestic violence.” F.C.A. § 818, as amended by Laws 1996, Ch. 539, eff. August 8, 1996. The statute was further expanded in 2004, to its current language, to include a person that resided in “any” such residential program for victims of

domestic violence, and further, in a “facility which provides shelter to homeless persons or families on an emergency or temporary basis.” F.C.A. § 818, as amended by Laws 2004, Ch. 391, eff. August 17, 2004. The 2004 Bill Jacket explained that, “homeless families sometimes reside in temporary homeless facilities which are not technically classified as a ‘homeless shelter’ (such as motels).” The intention of this expanded statute was to clarify that residence in any homeless facility would serve as a proper basis to establish venue for family offense proceedings. N.Y. Bill Jacket, 2004 A.B. 5513, Ch. 391.

The unique facts of the instant case required this court to determine whether our Legislature meant only to expand the venue provisions of Section 818 for victims of domestic violence who fled from their attackers and were forced to reside in a motel or a homeless facility due to their low economic means or because they had nowhere else to go, or, whether the intent of these expanded definitions of venue was to provide protection to *any* alleged victim of domestic violence who fled to New York for safety and stayed in a dwelling of their choosing, hence receiving protection irrespective of economic status. This second view is supported by a Domestic Relations Law practice commentary which noted that the 1996 expansion of Section 818 permitted a “battered woman who is being housed by a relative or at a public shelter to file from the location most convenient or safe for her.” Hon. Joyce L. Sparrow, Helen Carroll Scholfield, Esq., & revised by Jan G. Zager, Esq., 3-36 NY Practice Guide: Domestic Relations § 36.07 (2005).

When a victim’s chosen place of shelter cannot be recognized as a “residential program for victims of domestic violence...or facility which provides shelter to homeless persons or families on an emergency or temporary basis,” as delineated in Section 818, courts have ultimately relied on the place of residence at the commencement of the proceeding in determining venue. In H.P. v. B.P., 01/22/08 N.Y.L.J. 19, (col 3) (Fam. Ct. Nassau County); 2007 N.Y. Misc. LEXIS 8933, the respondent father's motion to change venue from Nassau County, in a family offense proceeding filed by the mother, was denied pursuant to F.C.A. § 818. In that case, the petitioner-mother and children had fled to Nassau County (where the action was

commenced), from the marital residence in Queens County due to alleged abuse. At the time she filed, petitioner was residing in her sister's Nassau County home on a temporary basis. The court noted that even though petitioner's residence did not meet the criteria of a "residential program for victims of domestic violence," Nassau County was, at a minimum, where petitioner was residing and staying with her children when the proceeding was commenced, thereby establishing venue.

Like the court in H.P. v. B.P., this court finds that venue has been established in New York County. Whether Erin H. fled to the apartment that constituted part of the premises at the 33 East 65<sup>th</sup> Street location or whether she stayed on a friend's couch in a Manhattan apartment, Erin H. fled from Daniel B. to New York County and resided here at the time she filed the family offense petition. Section 818 of the Family Court Act places on alleged victims of domestic violence no burden that they prove home ownership or that they are leaseholders here in New York. Daniel B.'s argument that the parties have resided in Pennsylvania over the past nine years is not determinative as to Erin H.'s status on November 7, 2007, when she sought protection of our courts after seeking refuge on a friend's couch or at their gallery's apartment within New York County's borders.<sup>4</sup>

**NEW YORK FAMILY COURT'S JURISDICTION IS NOT LIMITED TO ACTS WHICH OCCURRED WITHIN THE STATE**

Even though the acts of domestic violence complained of in the petition filed by Erin H. occurred outside New York State, New York Family Court may still assert subject matter jurisdiction over such family offense proceedings. In Pierson v. Pierson, 147 Misc. 2d 209 (Fam. Ct. Monroe County 1990), petitioner wife and respondent husband moved from New York to Florida with their children. After respondent allegedly assaulted and threatened petitioner and beat their young son, petitioner moved back to New York where she moved into a shelter and initiated an Article 8 proceeding. Although all alleged incidents against the petitioner wife and

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<sup>4</sup> Though not considered by the court in its decision finding venue, it should be noted that according to Erin H., she and their daughter have remained in Manhattan since the petition was filed. Erin H. informed the court that she has rented an apartment and enrolled their child in school.

child occurred in Florida, the New York Family Court in Monroe County exercised subject matter jurisdiction on the grounds that Article 8 does not limit family court jurisdiction to in-state assaults. Further, the court found that personal jurisdiction was obtained where respondent was served in this state upon his return, with his subsequent stay in the state satisfying constitutional “minimal contacts.” In Pierson, the court held that New York's public policy interest in protecting the family was strongly invoked by the respondent's return from Florida to New York, where his presence constituted a continuing risk to the family. Hence, acts committed outside the boundaries of New York against a resident of New York may be subject to New York jurisdiction.

The court in Matter of Eileen W. v. Mario A., 169 Misc. 2d 484 (Fam. Ct. N.Y. County 1996), likewise found that there was jurisdiction to entertain a petition for an order of protection when the alleged act of harassment took place in the respondent's attorney's offices in the State of New Jersey. Petitioner, a resident of New York, alleged that her husband, a resident of New Jersey, made threats while in New Jersey, and assaulted her in the past. The court determined that it had jurisdiction over alleged family offenses which occurred in New Jersey, even though a criminal court would not have had such jurisdiction, noting that “[t]here is no indication ... that by defining family offenses as acts which would also constitute offenses under the Penal Law, the Legislature sought to limit the family court's jurisdiction to acts which have occurred in the State.” Id. at 488. The court reasoned that the geographic limitation contained in New York Criminal Procedure Law Article 20 is inapplicable to Family Court proceedings, as Family Court family offense proceedings are civil in nature.

As articulated in Pierson v. Pierson, this court similarly recognizes New York's public policy interest in protecting a family's individual members, especially significant when a respondent's reappearance in the state consequently increases the risk of renewed family violence. Daniel B.'s direct ties to the Manhattan art gallery and apartment frequented by Erin H. increases significantly the risk of potential family violence if he were to reappear there.

Although, as stated above, jurisdiction over Daniel B. is not at issue, it is important to note that the C.P.L.R also addresses acts that occur wholly outside of New York. C.P.L.R. § 302, entitled, “Personal jurisdiction by acts of non-domiciliaries,” permits a New York court to obtain personal jurisdiction over a non-domiciliary respondent if the act causes injury within New York and certain other conditions are met. Those conditions, delineated in C.P.L.R. § 302(a)(3), provide that New York may exercise personal jurisdiction when a non-domiciliary commits a tortious act without the state, causing injury to a person within New York, if he, among other things, regularly does business in New York, or expects or should expect the act to have consequences in New York and he derives substantial revenue from interstate or international commerce. C.P.L.R. § 302(a)(3).

In M.P. v. M.S., 186 Misc. 2d 173 (Fam. Ct. N.Y. County 2000), the court held that a petitioner's assertion of fear resulting from a threat alleged to have been made in another state is sufficient to satisfy the jurisdictional requirement of C.P.L.R. § 302(a)(3) that an out-of-state act must have a claimed effect within New York. There, the petitioner, a New York resident, sought an order of protection against the respondent, her brother-in-law, who resided in Florida, alleging that he threatened to kill her while in Florida. The court found that the out-of-state threats caused injury to the petitioner in her home state, and that upon her return to New York, she remained in fear as a result of those threats, thereby falling within the scope of C.P.L.R. § 302(a)(3). The court reasoned that the frightened emotional state of Petitioner brought on by an alleged threat to kill her made in Florida by the Florida resident represented a “serious, potentially long-term New York effect of an out-of-state act.” Id. at 175.

The court finds that the alleged acts that occurred in the State of Pennsylvania have a direct and real effect in New York. Given the severity of the alleged threats made at their marital residence in Pennsylvania, Erin H. sought an order of protection in this State due to her fear that Daniel B. would follow her across state lines to carry out those threats, and her realization that the art gallery/apartment could serve as a conduit for such contact. Just like the

petitioner in M.P. v. M.S., who upon her return to New York suffered psychological harm believing that respondent would follow her to carry out his threat, Erin H. has articulated a continuing fear of Daniel B. on behalf of herself and their daughter, thereby resulting in a serious, potentially long-term effect of harm suffered by Erin H. here in New York.<sup>5</sup>

While a later family court case came to a different conclusion than that of M.P. v. M.S., it is distinguishable from the instant case. In J.A. v. J.C., 6/25/2001 N.Y.L.J. 32, (col. 6), New York Law Journal, Volume 225, Number 121 (2001), a Second Judicial Department Family Court Judge agreed that in order for jurisdiction to lie, a tortious act committed outside the state must have caused injury within New York. The court concluded that based on the facts of J.A. v. J.C., no such injury occurred, and that “residual” injury from the tortious act was not enough. In J.A. v. J.C., petitioner mother, a New York resident, filed a family offense petition on behalf of her son against the son’s maternal aunt, a resident of Massachusetts, after she threatened the child one time in a disagreement during his visit with her in Massachusetts. This threat concerned an act the aunt said she would do at the specific moment of time during his visit, that is, that if she had had a gun at that moment, she would have shot him on the spot. No further threats or actions were committed and there was no suggestion of future contact between the aunt and the victim. Hence, the J.A. v. J.C. court declined to find subject matter jurisdiction, rejecting petitioner’s allegations that the injury sustained by her son in Massachusetts caused claimed effects upon his return to his home state of New York in satisfaction of C.P.L.R. § 302(a)(3).

Unlike the facts described in J.A. v. J.C., in the instant case, an acute danger exists that respondent could carry out his threats, even after Erin H.’s flight to New York, given the history and severity of his alleged conduct, and due to the fact that they share a Manhattan business/apartment. Daniel B. is accused of not only committing extremely violent felonies

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<sup>5</sup> The court did not base its venue finding on respondent’s alleged violations of the Temporary Orders of Protection. However, it should be noted that respondent’s first alleged violation of this court’s order purportedly committed by harassing petitioner through the use of third parties, coupled with the second alleged violation in which Daniel B. purportedly left numerous threatening voice mail messages for Erin H., have, according to Erin H., further terrorized her. Petitioner asserted that it was her sincere belief that the intent of such messages was to show that Daniel B. intended to kill both himself and her.

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### **CONCLUSION**

For all of these reasons, Erin H.'s family offense case meets the requirements for venue and jurisdiction and will proceed. The foregoing opinion constitutes the decision of the court, entered orally, on February 19, 2008.

This matter is adjourned to September 22, 2008. The temporary order of protection is continued until further order of this court.

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