

Supreme Court of the State of New York
COUNTY OF QUEENS: Part IDV x

In the Matter of a Family Court Act Violation Proceeding, Date: October 26, 2006

ANITA W. ,

Petitioner,

Docket: O-00038/05/05A

-against-

**AMENDED
DECISION\ORDER**

ROHAN W. ,

Respondent.

Esther M. Morgenstern J.S.C.

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Petitioner filed the instant Violation Petition on April 21, 2005 alleging that Respondent violated a Final Order of Protection issued on consent by going to the home of P. Winter, a friend of Anita W. , on April 20, 2005 while carrying a machete seeking to harm Petitioner.

Petitioner alleged in the Family Court worksheet used to prepare the Violation Petition that Rohan W. had been stalking her since August of 2002. The section designated "Most Serious Incident" describes Petitioner's allegation that in 2003 Respondent "intentionally crashed his car into my parked car ...he got out of his and smashed my passenger side window with his fist threatening me and grabbing me by my hair." The Family Court worksheet section designated "Most Recent Incident" described the instant allegation. " On April 20, Rohan W. went to the home of P. Winter ... with a machete looking to harm me." The Petitioner alleged that the actions of the Respondent going to the home of her friend, Plaintiff. P. Winter, and brandishing a machete were communicated to her by her friends who resided there.

The Petitioner was granted a Final Order of Protection by this Court on February 22, 2005 under Docket # O-00038-05. The parties were both present in Court when the Final Order of Protection was issued on consent in Petitioner's favor. In pertinent part, it ordered Respondent to stay away from:

Anita W. ;

the home of Anita W.;

Refrain from communications or any other contact by mail, telephone, e-mail, voice mail or other means with Anita W.;

Refrain from assault, stalking, harassment, menacing, reckless endangerment, disorderly contact, intimidation, threats or any criminal offense against Anita W.;

It is further ordered that this Order of Protection shall remain in effect up to and including February 22, 2007.”

The parties have had a turbulent and acrimonious relationship. Two days before the alleged violation of the Final Order of Protection took place the Respondent’s Petition for Visitation of the child was dismissed with leave to renew.

A fact-finding hearing was held where Petitioner testified and the Court found her to be a credible witness. Petitioner and Respondent are still married and have a six-year-old son, Michael. Petitioner lives with the child at a confidential location. Petitioner testified that Respondent knew that the Petitioner and P. Winters were good friends. Respondent was acquainted with P. Winters and knew her address. Petitioner testified that she had received prior Orders of Protection against Respondent from Queens Criminal and Family Court and that Respondent has violated the Orders of Protection. At the time of this alleged violation the Respondent’s visitation with Michael was suspended.

The Petitioner testified that in August of 2002 the Respondent pushed Petitioner down some stairs, kicked her, punched her, and grabbed her hair. Respondent alleged that Plaintiff has been stalking her since the 2002 incident. The Petitioner testified that the first domestic violence occurred in 1999 and that Respondent’s actions prompted her to seek Orders of Protection which the Respondent regularly violated. Petitioner testified that the parties had physically separated in 2002. She testified that Respondent, in August of 2003, crashed his car into the driver’s side of her parked car while she sat in the driver’s seat. Respondent then smashed through the passenger-side window of the vehicle and grabbed Petitioner by the hair while threatening to hurt her. She testified that she was injured by broken glass from the smashed window during that incident.

Subsequently the Respondent was charged with Criminal Contempt in the Second Degree (PL §215.50-3) and pled guilty to Harassment in the Second Degree (PL §240.26) in 2004.

Petitioner testified that on April 20, 2005 she left work at 5:30 p.m. and picked up her son from daycare at 6:00 p.m. She met a friend, Christine, and together they went to a Home Depot store. At the Home Depot, they saw two friends of the Respondent, one of whom, had supervised the visitation of the Respondent with his son in the past. The other woman who Petitioner believed to be Respondent's girlfriend said, "Hi" to Michael.

Petitioner testified that at approximately 7:00 p.m. after she saw the Respondent's friends she received a call on her cellular telephone from W. Winter, the brother of her friend P. Winter. W. communicated to Petitioner that Respondent had just appeared at the Winters residence with a machete in his hand. Petitioner testified further that P. Winters was a friend of the Respondent and the Petitioner met P. in 1995 through the Respondent. Petitioner further testified that the Winters residence was located at -----th Street in Queens and that Respondent lived 10 to 15 minutes from that location.

Petitioner placed into evidence a monthly statement for her cellular telephone. Petitioner testified that after she received the call from W. Winter stating that Respondent showed up at the Winter residence with a machete she drove her friend, Christine, home and then called a social worker at Safe Horizon Domestic Violence Law Project who was familiar with the Petitioner and Respondent. She was unable to reach her at that late hour and called Marjorie Steinberg Esq., of The Children's Law Center, the Law Guardian appointed to represent Michael. Petitioner identified the calls on the telephone statement. Petitioner testified that she called Ms. Steinberg because she was terrified by the information given to her by W. Winter and did not know what to do. Petitioner testified that she was advised to call the police and the witness identified that call on the telephone statement to 911 which was made shortly after 8:00 p.m. The police met the Petitioner at a parking lot where the Petitioner had driven but it was in Nassau County, out of the jurisdiction of the New York City Police Department, and, according to the

witness, the police would not take the report. Petitioner testified that she went to the 113th Precinct, along with W. Winter and filed a report the next day.

Petitioner testified she returned to Court and filed the instant Violation Petition on April 21, 2005. Petitioner further testified that she requested that W. accompany her because he had witnessed the Respondent at the home of P. Winter with a machete. W. accompanied Petitioner back to the same precinct on April 29, 2005, when she signed a complaint report concerning the incident.

Petitioner testified that she felt threatened and intimidated so much so that after April 20, 2005, she moved to a different residence and went for counseling once a week at Safe Horizon. Petitioner testified that since April 20, 2005, she is terrified of encountering the Respondent. Petitioner maintained that she has grave concerns about her own safety and the safety of her son everyday due to the Respondent's threatening and violent behavior. Petitioner testified further that Respondent violated prior Orders of Protection in the past. She claimed that Respondent violated the stay away provisions of prior Orders of Protection in 2002, 2003, and in 2005. Petitioner seeks to have the Court incarcerate the Respondent for the violation of the Order of Protection since previous court actions and Orders of Protection have not deterred the Respondent from threatening and intimidating her. Petitioner maintained that Respondent must suffer a sanction in order to prevent him from continuing to try to control her through threats of violence and intimidation. Petitioner testified further that Respondent has threatened to kill her on several occasions. According to the Petitioner, Respondent informed Petitioner's mother that he would kill Petitioner and repeated the same threat to friends of the Petitioner. Petitioner placed a copy of the Final Order of Protection granted on February 22, 2005, into evidence and described her expectation that it would protect her from Respondent's acts of violence and intimidation.

Petitioner called C. Winter, who resides with his siblings at -----th Street, in Queens, to testify. The Court found him to be credible. C. testified that he knew the Petitioner and Respondent, for about three or four years, because both were friendly with his sister, P. Winter, with whom he shares the house. C. testified that in February 2005

the Petitioner's automobile tires were slashed when she visited the Winter residence. C. testified that he did not observe who slashed the tires.

C. testified further that between six and seven o'clock in the evening of April 20, 2005, he was standing in front of the residence at the trunk of his automobile with his 13 year-old daughter standing beside him. C.'s 16 year-old daughter was also with him. C. testified that he and his daughters were outside of the house at approximately 6 p.m. to 7 p.m. when the Respondent approached them, passed by them, stopped and looked into the backyard and to the side of the residence. C. testified that while he was looking around, Respondent seemed to be perturbed with, "a knit of his face" or a frown on his face. He testified that Respondent was carrying a machete with an 18 inch blade and a natural wood handle in his right hand. Respondent did not speak to C. and after he looked around the residence he walked to a car and drove away. Respondent did not enter the house. The witness testified that the Respondent approached within 2 feet of him and that it was still light outside.

C. testified that after Respondent drove away he saw his brother, W., across the street, and asked him if he observed what had occurred. According to C., W. replied, "Yes.". He then told his children that they had to go inside. The witness testified that he spoke to his mother about what had occurred and she was concerned whether Respondent would come back to the house. Cranston testified that he observed the Respondent drive by the residence on at least two different days before the incident.

W. Winter was called as a witness and testified credibly that he was familiar with the Petitioner and the Respondent. W. testified that he was an electrician with no criminal history and lives with his siblings P. and C. at ----- Street.

He testified that the Petitioner was a friend of his sister, P., and the Respondent was a social acquaintance. He testified that he saw the Respondent on April 20, 2005 when he appeared at the Winter residence with a machete. He was across the street from his house and saw a white car drive into a neighbor's driveway. W. observed his brother, C., standing by his car with his two daughters and he saw the Respondent step out of the car with a machete in his hand, which he held to his side. He then observed the Respondent walk toward C. The witness testified that C. had his head in the trunk of the

car, and that Respondent walked by, looked in the trunk, looked around and then walked back to the white car in which he came and drove away. The witness testified that Respondent did not say anything during the time he was there.

W. described the machete as having “a good length” blade, more than two feet long and about two and a half inches wide. It appeared to have a brown wooden handle. The machete was not covered and the blade was exposed. W. testified that the incident occurred between 6:30 p.m. and 7:00 p.m. He testified that he was at least 8 feet away from the Respondent but that it was still light outside when the incident occurred.

He testified further that he went inside the house and told his sister what had happened after Respondent drove away. W. testified that P. was home at the time since she normally leaves for work after 8:00 p.m. He then called Petitioner on her cellular telephone and told her what had occurred because Petitioner visited the house, occasionally, in the evening and left her son there from time to time. The witness wanted to warn the Petitioner to stay away since Respondent had just visited with a machete. He testified that Petitioner sounded frightened on the phone when he communicated what had happened.

W. testified that he had never been romantically involved with Petitioner and that he had no knowledge that his brother had any romantic relationship with Petitioner. He testified that he went to the police precinct with Petitioner on April 21, 2005. W. testified that there was no acrimony between himself and the Respondent. He testified that he had not spoken to Petitioner about his testimony. He had spoken to Petitioner’s attorney about his testimony previously, but not on the day he testified. W. testified that he had never spoken to C. about his testimony.

Respondent did not testify and Petitioner called P. Winter, who lives with C., W. and other family members at the residence as his sole witness. She testified that she worked in the nursing field. Her normal work schedule is from 3 p.m. to 11 p.m. although her hours vary. She testified that on April 20, 2005, she worked from 3 p.m. until 11 p.m. P. testified that she called home and spoke to her niece, S. Winter, who informed her that Respondent had come to the residence that evening with a big knife.

P. stated she was upset to hear what the Respondent had done so she obtained his telephone number from Petitioner and called him immediately from her workplace to ask him why he had come to her home with a machete in hand. Respondent denied going to the residence when she questioned him over the telephone. P. stated to Respondent that her niece had seen him there with a big knife. P. called the Respondent again the next morning, and she testified that he then admitted that he went to the residence in order to talk to Anita.

On cross examination P. Winter testified she was not at home when the Respondent showed up at the residence and that she did not speak to W. that evening. This inconsistency is not dispositive since the issue in this hearing is not whether P. was at home or if she called home on the day of the incident but whether she communicated with the Respondent. The witness testified credibly about speaking to the Respondent regarding the incident. The Family Court as the trier of fact determines the witness's credibility and its determination is given great weight. Bart v. Bart, 219 AD 2d 710 (2d Dept. 1995).

DISCUSSION

An Order of Protection may issue directing a party to observe conditions of behavior when the party requesting the order has filed a petition in accordance with Family Court Act (FCA) and the Respondent has given a knowing, intelligent and voluntary consent to its issuance. See, FCA §154-[c] (3). An order of protection may set forth “reasonable conditions of behavior to be observed ... by the petitioner or respondent” (FCA §842-a).

Article §8 of the FCA establishes a civil proceeding designed to protect family members from domestic violence. See, McKinney's Consolidated Laws of NY, Book 29A, FCA §8, Practice Commentaries by Douglas J. Besharov 1999 page 171.

FCA§812 (2) (b) states in pertinent part:

“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;”

The purpose of Article 8 is to provide a civil alternative to criminal prosecution for certain enumerated criminal conduct. However, once a court’s jurisdiction is established an Order of Protection may be issued which reaches beyond the enumerated family offenses or prohibited criminal conduct. FCA§ 842 allows for any “reasonable conditions of behavior” to be set in an Order of Protection. The only limitation is that there be a rational relationship between the order and the possible resolution of the underlying family problem. see, Besharov, at page 184.

FCA§ 842 states in pertinent part:

“An Order of Protection may set forth reasonable conditions of behavior to be observed ... Such an order may require the respondent: to observe such other conditions as are necessary to further the purposes of protection.”

A proceeding pursuant to FCA Article 8 is “to vindicate private rights” of the person protected by an Order of Protection and a lesser evidentiary standard than proof beyond a reasonable doubt is appropriate. See, Williams v. Williams, 230 Ad 2d 916 (2nd Dept.1996). Unrefuted testimony can establish a violation of a Family Court Order of Protection beyond a reasonable doubt. The standard of proof to commit a Respondent to the Department of Corrections for a violation of an Order of Protection is proof by clear and convincing evidence. No inference is drawn from the Respondent’s failure to testify.

FCA §846 (b) (ii) (B) states that upon filing a violation petition the court may:

“Retain jurisdiction to hear and determine whether such violation constitutes contempt of court, and transfer the allegations of criminal conduct constituting such violation to the district attorney for prosecution...”

FCA §841 and §842 authorize the imposition of orders of protection as part of dispositional orders in family offense proceedings. FCA §846-a prescribes the procedure and penalty for the wilful failure to obey such an order:

“If a respondent is brought before the court for failure to obey any lawful

order issued under this article and if, after hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey any such order the court may ... commit the respondent to jail for a term not to exceed six months.”

Section 846-a of the FCA delineates the Court’s power to punish a party’s failure to obey a lawful court order providing the Court a framework in which to hold Respondent accountable for violating the Court’s Order of Protection.

Sections 846 and 846-a establish formal procedures with specific remedies for the willful violation of the lawful order of the court. In addition, the Court, on its own motion may retain jurisdiction to hear and determine if the alleged violation constitutes contempt of court. FCA §156 allows the Court to apply the Judiciary Law provisions concerning civil and criminal contempt if no “specific punishment or other remedy for such violation” is provided in the FCA or other law.

The order must have been lawful. A respondent may not be punished for violating an invalid court order. See, Anderson v. Anderson, 25 AD 2d 512 (1st Dept. 1966). The failure to obey the lawful order must be determined to be willful in order to sustain a finding of a violation; the Order must be “clear and explicit” and the act complained of clearly prescribed. See, Kuenen v. Kuenen, 122 AD 2d 616 (4th Dept. 1986). In Kuenen the violation petition was brought against a husband who obtained court permission to remove his personal belongings from the marital residence. He removed furniture as part of his personal belongings. The court found that this removal of furniture, although not permitted, occurred within the context of the permission granted and therefore did not rise to the level of a willful violation.

If the alleged conduct involves non-criminal behavior, it may be difficult to establish the willfulness of the violation. McKinney’s Consolidated Laws of NY, Book 29A, FCA §846-a, Practice Commentaries by Douglas J. Besharov at page 270 (1999). However the gravaman of a violation proceeding is an allegation that Respondent violated a reasonable condition of behavior contained in an Order of Protection. The Order of Protection is meant to ensure a protected party’s right to be free from communication, contact or intimidation from the Respondent. In the case at bar, the Court finds that the Respondent wilfully

violated the spirit and letter of the February 22, 2005 Order of Protection. See, Leighton-Ryan v. Ryan, 274 A.D.2d 775 (3d Dept. 2000).

“ Tragically court orders designed to prevent further domestic violence are frequently violated sometimes with grievous results ...section 846-a establishes the remedies for a violation. ” see, Besharov, page 267. If the behavior complained of does not fit into a designated family offense or satisfy the requirements of a prima facie crime under the Penal Law, the Respondent may still have violated the Order of Protection if the order was lawful, explicit and there was a willful violation of the Order’s prescribed conditions of behavior.

FCA §846-a requires the Court to hold a hearing and be satisfied by “competent proof” that the allegations are true so the court can find that the Respondent violated an Order of the Court and to determine if the violation was willful. The hearing must comport with due process requirements. See, Ryan v. Ryan, 42 AD 2d 733 (2d Dept. 1973). Respondent must be afforded a fact finding hearing with an opportunity to present evidence, call witnesses on his behalf and cross-examine witnesses.

Competent proof in a violation proceeding means proof by a fair preponderance of the evidence. Halleck v. Hayden, 47 AD 2d 855 (2d Dept. 1975). Since a Respondent’s liberty is at peril some courts apply a higher standard and require proof by clear and convincing evidence. See, Addington v. Texas, 441 US 418 (1979). However proceedings under the FCA are “essentially civil in nature” (see, FCA § 165) and civil contempt proceedings permit a sentence of imprisonment where appropriate. (see, Judiciary Law § 753).” A showing of proof by “clear and convincing evidence” is competent proof in an §846-a proceeding that results in incarceration. See, Williams v. Williams, *supra*.

The commission of a crime or a family offense would certainly be the basis for sustaining the allegation in a violation petition, however, the purpose of having violation procedures is to assure the party protected that there are consequences for violating the protection order not merely if there is a crime or family offence committed. A Respondent’s actions that constitute “unlawful intrusions” on the protected party’s rights secured by the Order of Protection would be a violation of the order if proved by a “fair preponderance of the evidence” even if it did not constitute a threat to assault or assault upon the Petitioner.

See, Sarmuksnis v. Priest, 21 AD 3rd 381, (2d Dept. 2005) citing, Cole v. Cole, 147 Misc. 2d 297, (Fam.Ct. Delaware Cty. 1990).

The Respondent, in the case at bar, contends that he cannot be found to have violated the Order of Protection because he did not have direct contact with the Petitioner and did not commit a crime or family offense against the Petitioner therefore the Violation Petition cannot be sustained. However, in the context of a FCA violation proceeding, a principal may be liable for the imposition of the punitive sanctions of the statute if an agent's behavior violated the provisions of an order of protection. Leggio v. Leggio, 190 Misc 2d 571, (Fam. Ct. Albany Cty. 2002). In our case, the Court finds the Respondent, by going to Petitioner's friend's house with a machete, acted with the mental culpability required to commit a family offense.

In the case at bar, the Order of Protection contained a prohibition of committing offenses against the Petitioner as well as specific restrictions on the Respondent's personal behavior and directed Respondent to "refrain from communication or any contact by mail ... or other means with Anita W.." The Respondent's actions were assured of causing direct or indirect threatening contact with the Petitioner through the Winters.

The provisions of FCA §846-a alone may not adequately redress a violation of the Court's Order of Protection. The Court possesses contempt powers to punish the Respondent as well. "The provisions of the judiciary law relating to civil and criminal contempt shall apply to the family court in any proceeding in which it has jurisdiction ... a violation of an order of the family court in any proceeding which directs a person to do an act or refrain from doing an act shall be punishable under ... the judiciary law, unless a specific provision is provided in this act or any other law" (FCA §156).

There must be a lawful order in effect at the time of the alleged violation. Anderson, supra. The violation of the Court order must have been willful. The performance of an action clearly proscribed by an "explicit" order of the court would be sufficient to find that a violation occurred. The Respondent must have violated a clear and explicit order of the court. See, Kuenen. The Court must be "satisfied by competent proof" that the Respondent violated the order. see, Ryan, supra. "Competent proof" invokes a fair preponderance of the evidence standard to be used in a fact-finding hearing. see, FCA§832. The competent proof

standard has been applied to FCA §846-a violation proceedings. In the case at bar, where Respondent is found to have gone to the Petitioner's friend's home with a machete in hand the Court finds Respondent has wilfully violated the Order of Protection See, Lentino v. Lentino, 185 AD 2d 849 (2d Dept. 1992).

The Court's assessment of witness credibility is given great weight in a fact finding hearing to determine if there was a violation of an Order of Protection. A Respondent can violate the "no contact" provision of an Order of Protection by using third parties to establish contact. Even the subject parties' children may be considered third parties for proscribed communication creating a violation of an Order of Protection. see, Eisele v Eisele, 307 AD2d 412 (3d Dept. 2003). In the case at bar, each witness testified that the Respondent came to the Winters residence with an unsheathed machete in hand. P. Winters testified that Respondent admitted that he went to the residence in order to speak with the Petitioner. Since that would clearly violate the stay away provision of the Final Order of Protection the statement Respondent made is against his penal interest. The statement, as an exception to the hearsay rule places the Respondent clearly in violation of the Order's "stay away" and "refrain from communication" provisions. It is corroborated by the rest of the testimony.

Respondent's admission to P. is relevant evidence since it is a declaration against his penal interest. A person does not ordinarily reveal facts contrary to his interest unless they are true therefore absent some other motivation there is an assurance of reliability sufficient to allow the declaration to be admissible. People v. Maerling, 46 NY 2d 289 (1978). The foundation for the exception is that the declarant is unavailable, was aware at the time the statement was against his propriety or penal interest, had knowledge of the facts, no probable motive to misrepresent, and there is some proof independent of the declaration itself, which tends to confirm the truth of the facts asserted in it. See, Richardson on Evidence §8-403 [Prince 11th Edition.] P. was examined by counsel for the Respondent. "A broader standard of admissibility of evidence is available on the dispositional hearing than at the fact-finding hearing, and evidence may be admitted ... including hearsay and other evidence otherwise incompetent." See, V.C. v H.C., 257 AD2d 27(1st Dept. 1999).

The Court finds the evidence submitted supports a finding that the Respondent went to the Winters residence with knowledge that they knew both the Petitioner and the Respondent and that they would certainly inform the Petitioner that he appeared at their house with a machete in hand. This violated the Order of Protection's reasonable condition of behavior that Respondent refrain from any contact or threats or intimidation toward the Petitioner. The Court finds that Rohan W. did appear at the Winter residence in an attempt to contact, threaten and intimidate Petitioner directly or through the Winters. His conduct was corroborated by sworn testimony and is unrefuted by the Respondent. Respondent's actions constitute a clear violation of this Court's Order of Protection in favor of the Petitioner.

In addition, the very same actions constitute a willful violation of a clear and unequivocal mandate of the Court which impeded and prejudiced the rights of the Petitioner and undermined the authority of the Court. See, Judiciary Law § 753 (3).

CONCLUSION

This Court finds that Petitioner sustained her burden of proof by clear and convincing evidence to support the allegations in the Violation Petition. The facts presented by Petitioner were credible. The testimony and documentation provided competent evidence that Respondent appeared at the residence where the parties were both known and that Respondent attempted to contact the Petitioner directly or indirectly to deliver the silent threat of an unsheathed machete in his hand. His non verbal communication expressed his intent. He made an admission to P. Winter that he wanted to contact the Petitioner when he appeared at the residence. The Final Order of Protection stated that Respondent was to stay away from Petitioner, refrain from communication or "any other contact with the Petitioner" and refrain from intimidating or threatening the Petitioner. Respondent did not testify. Although some of the details testified to by the witnesses were inconsistent, the witnesses were credible and their accounts were consistent in describing the Respondent's alarming visit to the Winter residence on April 20, 2005. The Court finds the testimony was consistent with the witnesses' recollection of previous events, appeared truthful and was not tailored for the specific purpose to appear for trial.

Other courts have held that appearing at the home of a Petitioner's mother and engaging in disruptive behavior and kicking over garbage cans, although not a crime or a family offense, were sufficient to sustain a violation petition under FCA §846-a, since it was specifically proscribed by the Order of Protection. See, Leonetti v. Riehl, 154 AD 2d 675, (2d Dept. 1989). If a violation is found the Court has discretion to apply one of the remedies provided. However the sanction for the violation of an order of the court should be proportional to the Respondent's conduct. Kephart v. Kephart, 84 AD 2d 644 (3rd Dept. 1981).

“ In 1980, the legislature amended the Family Court Act to provide new focus and direction for more aggressive measures that would protect victims of domestic violence. The statute unequivocally and firmly declares that a proceeding under article 8, "is for the purpose of attempting to stop the violence, end family disruption and obtain protection” (Family Ct Act §812 [2] [b]); ... Private aggrieved parties may petition for protection by way of a violator's incarceration for violation's of Family Court orders under the corresponding punishment section, section 846-a. ” See, Walker v. Walker, 86 NY 2d 624, 628 (1995).

The sanctions for a violation of a Court order issued under Article 8 of the FCA are found under FCA §846-a : imprisonment for up to six months, modification of the original order, referring the case for criminal prosecution, and/or awarding the petitioner reasonable attorney fees incurred in the violation proceeding. Linda D v. Peter D., 152 Misc 2d 564, (Fam Ct., Westchester Co.1991).

However, FCA §841 provides additional remedies:

“At the conclusion of a dispositional hearing under this article, the court may enter an order:

- a) dismissing the petition, if the allegations of the petition are not established; or
- b) suspending judgment for a period not in excess of six months;
- c) placing the respondent on probation for a period not exceeding one year, and requiring respondent to participate in a batterer's education program ... ;or

- d) making an order of protection in accord with section eight hundred forty-two of this part; or
- e) directing payment of restitution in an amount not to exceed ten thousand dollars.”

In the case at bar, the Court finds that the Respondent appeared at the home of the Winters who are friends of the Petitioner with a machete two days after his Petition for Visitation was dismissed by the Court. Respondent knew that the Petitioner made regular visits to that location and sometimes left their child there. This appearance took place shortly after the Petitioner and her son were seen by friends of the Respondent. The eyewitnesses’ testimony corroborated that the Respondent appeared at the location with a machete and that he was looking for something or someone and appeared upset. The location was one that Respondent knew he was likely to encounter the Petitioner. Respondent knew that this appearance would be communicated to the Petitioner by the Winters. There is only one message conveyed by the non verbal communication of appearing at the home of Petitioner’s friend with an unsheathed machete and looking upset.

A Final Order of Protection was in effect when Respondent appeared at the Winters house looking upset and carrying a machete. That Order directed him to: Refrain from communications or **any other contact** by mail, telephone, e-mail, voice mail or **other means** with Anita W. and refrain from assault, stalking, harassment, menacing, reckless endangerment, disorderly contact, **intimidation, threats** or any criminal offense against Anita W.; (emphasis added). He was ordered to observe these conditions since they were necessary to further the protection of Anita W.. According to the testimony of all the witness the action of the Respondent of contacting the Petitioner by appearing at the Winters house with the weapon in hand under the totality of the circumstances violated the Final Order of Protection.

Under FCA § 846-a if a respondent is brought before the court for failure to obey any lawful order issued under this article and if, after hearing, the court is satisfied by competent proof that the Respondent has willfully failed to obey any such order the Court may incarcerate the Respondent for up to six months. The violation of the Order of Protection must have been “willful”. The violation that the Respondent is accused of committing required deliberate action. The order must be clear and explicit. Kuonen, supra.

The hearing court must be satisfied by competent proof and the Respondent must be afforded due process. See, Ryan. In the case at bar, the Respondent was represented by counsel and had the opportunity to testify, cross examine the Petitioner's witnesses and did call a witness.

Competent proof is the standard and a clear and convincing standard should be maintained if the Respondent shall be incarcerated at the dispositional hearing. The sworn testimony of the witnesses was completely consistent in describing how the Respondent appeared with a machete in hand at the Winter residence. Evidence establishing a violation does not require direct verbal communication between the Respondent and the Petitioner. See, Leonetti, supra. Evidence supporting a Petitioner's contention that a Respondent's behavior of spinning his tires in a manner so the Petitioner was struck by small stones supported a finding of a willful violation of an Order of Protection. A court weighed the Petitioner's reaction of being threatened and intimidated and found it was sufficient to support the finding of a violation and imposition of incarceration as a sanction. Julie A.C. v. Michael A.C., 15 AD 3d 1007 (4th Dept. 2005).

The stay away provision of an Order of Protection effectively banishes a person from public places. The prohibition must give adequate notice of what is proscribed and sufficient proof must be submitted before making a finding that a Respondent has violated an Order of Protection. A court must balance the right of an individual with the need to protect a person who has been the target of that individual's intimidation or violent behavior.

Civil contempt arises where the rights of an individual have been harmed by the actor's failure to obey conditions of a court order. Dept. of Environ. Protection of City of N.Y. v. Central Hudson Gas & Elec., 70 NY2d 233, 239 (1987). It is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect, and that the violation occurred with "reasonable certainty" in order to make a finding of either criminal or civil contempt based on an alleged violation of a court order, Id. at 240. "[I]n order to find that contempt has occurred in a given case, it must be determined that a lawful order of the Court clearly expressing an unequivocal mandate was in effect." McCormick v. Axelrod, 59 NY 2d 574, 583 (1983). In the case at bar, the Respondent received an Order of Protection in Court and was informed that it was issued and the contents of the Order clearly

prohibited any contact, threats or intimidation. This is sufficient to put the Respondent on notice as to the prohibited conduct. See, People v. Clark, 95 NY 2d 773 (2000).

An awareness of the court order which is being violated is a necessary element upon which a finding of contempt may be made. The Petition alleged that the Respondent failed to observe these conditions on his behavior: “ full stay away from the Petitioner, no contact whatsoever, and refrain stalking, harassment, assault and menacing.” Additionally the Court reserves the power to hold the Respondent in contempt for his actions toward the Petitioner. By going to a third party’s home with a machete, looking around outside the property and not speaking to the residents of the house constitute contempt of the Order of protection in addition to a violation of the Order.

In the case at bar, the intention of the Respondent is clear even without his admission and the intended effect of his actions was clear although he did not speak when he went to the Winter residence. He chose to take a machete to the home of the good friends of his estranged wife two days after his Visitation Petition was dismissed in Court. He went there and made it plain to the eyewitnesses that he was upset. The Court finds that Respondent Rohan W. went to the Winter home with a machete, looked around and communicated to the witnesses that he was upset. His “knit of face” and his silence to people who knew him on April 20, 2005 was a prohibited contact of the Petitioner. In addition, the nature of the communication even though it was through third parties was a threatening and intimidating contact with Anita W. which was prohibited by the Order of Protection. The fact that the Petitioner was not present at the location is not dispositive of the question whether there was a violation of the Order of Protection. After the course of the fact finding it is clear that the Petitioner received the Respondent’s communication almost immediately and it had the desired effect of frightening the Petitioner and having her avoid places that she would normally visit. She had already been forced to relocate and to live in fear for her life and the life of her child.

In the case, In the Matter of Jason MM, 245 AD 2d 892, 893 (3rd Dept. 1997), a neglect proceeding, the court clearly explained the terms and conditions of an Order of Protection to a Respondent, clarifying that he was prohibited from harassing or intimidating

the Petitioner and indicated that he must avoid contact with his children arranging for visitation with them only by telephone. The appellate court affirmed a sentence of six months incarceration for violating the Order and found that the “stay away” was sufficiently clear that Respondent’s presence in the area around the children’s school violated the stay away condition of behavior that had been imposed. In the case at bar, regardless of the characterization of the Respondent’s action: as a violation of the condition of behavior that Respondent refrain from any other contact or refrain from communication or refrain from intimidating or threatening the Petitioner the Respondent’s actions were a contempt of the Court’s Final Order of Protection. The Respondent wilfully violated the clear and unequivocal mandate contained in the Order of Protection.

In the Matter of Barbara O., 252 AD 2d 761 (3rd Dept. 1998), a neglect proceeding, the appellate court affirmed the Family Court’s determination that found Respondent in violation of an order of protection which prohibited him from having contact with his twelve year old daughter. The Respondent violated an order of protection on three occasions. The third violation occurred when he attended a party at which his children were present. The Respondent did not know that his daughter would be there, and he had no direct contact with his daughter at the party but the court found his presence at the party was a violation of the order and that a six month sentence of incarceration with the last five months suspended was not unduly harsh.

The court was concerned with protecting a vulnerable Petitioner and believed that even though there was no direct communication the Order of Protection was violated and the Respondent needed to be incarcerated for the violation. The Respondent’s many excuses, “[n]one of which justify the continued emotional torment to this child by the Respondent’s mere presence.”, did not dissuade the court from incarcerating the Respondent for his violation of the Order of Protection. Id., at 763.

In the case at bar, the Respondent gave no explanation for his presence at the Winter residence. He did not contradict P. Winter’s testimony that he said to her that he went to the residence in order to talk to Anita W. on April 20, 2005. The behavior that the Respondent engaged in would lead a reasonable person to conclude that Respondent violated the Order of

protection in order to contact, intimidate or threaten the Petitioner. The Order contained clear conditions of behavior that the Respondent was to obey. The Respondent was aware of the conditions and was represented by counsel when they were given to him in court. The competent evidence clearly and convincingly proves that Respondent wilfully failed to obey the clear and lawful Order of this Court. His failure to obey the reasonable conditions on his behavior contained in the Order caused the Petitioner to be intimidated and threatened.

The Court hereby finds that Respondent Rohan W. violated the February 22, 2005 Final Order of Protection by his actions on April 20, 2005. The Court hereby finds the Respondent in contempt of this Court's Final Order of Protection dated February 22, 2005. A dispositional hearing is scheduled for September 19, 2006 at 2:30 p. m. This constitutes the Decision and Order of the Court.

ENTER,

Esther M. Morgenstern, J.S.C.