

MEMO

From: Robert Dean, Chair, Committee on Mandated Representation

To: T. Andrew Brown, NYSBA President

Date: April 18, 2022

Re: Recommendation: The New York State Bar Should Endorse PromPT Stability Act S. 2832B & A.4558B

The New York State Bar Association's Committee on Mandated Representation (CMR) studies issues relevant to providing mandated representation of people in New York Criminal and Family Courts and recommends how to improve the quality of that representation.

After careful consideration, CMR supports the PromPT Stability Act, S2832B, (Sponsor: Senator Jessica Ramos) & A4558B (Sponsor: Assembly Member Dan Quart) and recommends that the New York State Bar endorse this legislation. This proposed legislation would authorize evidentiary hearings where local criminal courts issue temporary orders of protection, ensuring that these pretrial orders do not needlessly destabilize people's lives. Additionally, the Act empowers superior courts to review local criminal court determinations denying requests to modify or limit a temporary order of protection. If the PromPT Stability Act is passed, courts would receive much needed and uniform guidance on the form and standards employed at these hearings.

The Committee on Mandated Representation of the New York State Bar Association supports A4558-B/S2832-B and urges its enactment. The bill provides necessary clarity regarding the procedures for issuing and reviewing orders of protection and how to challenge them pursuant to Crawford v. Ally¹ ruling.

The purpose of an order of protection is to eliminate the risk of danger or intimidation to a witness or complainant, in both familial and non-familial contexts.² However, until recently, orders of protection were issued by Criminal Courts as a matter of course – without inquiry into the necessity of the order or regard for their practical effects. Oversight of this process was minimal, resulting in tens of thousands of New Yorkers needlessly suffering significant and irrevocable harm, including homelessness, family separation, and interruption of educational and employment opportunities.

In one such case, Ms. Shamika Crawford was left homeless and separated from her children for 88 days based on an order of protection issued in favor of her live-in boyfriend.³ A vaguely worded misdemeanor assault complaint was enough to upend her life. She was forced to continue to pay for an apartment where she could not reside, or risk losing her home permanently. No court would modify the order, or hold a proper hearing on its necessity, despite evidence indicating that her boyfriend had been aggressive toward Ms. Crawford on multiple occasions and was living in her apartment without paying rent.

Ms. Crawford’s circumstances, and similar widespread harms faced by many New Yorkers, were addressed in part by the Appellate Division, First Department, in Crawford v. Ally⁴. There the Court recognized that, where an order of protection infringes on a significant liberty or property interest, due process requires an enhanced inquiry into the need for the order and its conditions. Specifically, the Criminal Court must conduct a “prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued.” Id.

Since this decision was issued, courts across New York began holding such proceedings. However, the Crawford decision does not extend to all cases in which a person’s life is unduly interrupted by an order of protection, just those where the court believes that the deprivation caused by the order are sufficiently “significant.” Thus, whether a hearing is ordered at all varies wildly.

Moreover, the Appellate Division did not articulate a form that these inquiries should take, highlighting the need for legislative guidance. “Crawford” hearings have been inconsistent in both form and substance differently, even in the same court and by the same judge. The burden of proof, standard applied, and evidentiary formality differ between courts and boroughs. However, most often, courts place undue burdens on defendants seeking to challenge the need

¹ 197 A.D.3d 27 (1st Dept. 2021)

² See CPL §§ 530.12, 530.13

³ Newman, Andy, Barred from her own Home: How A Tool for Fighting Domestic Abuse Fails, *New York Times* (June 17, 2021) <https://www.nytimes.com/2021/06/17/nyregion/order-of-protection-domestic-violence-abuse.html>

⁴ 197 A.D.3d 27 (1st Dept. 2021)

for orders of protection that infringe on basic rights. Review of the procedures employed by the courts and the decisions rendered still elude litigants

Accordingly, A4558-B/S2832-B codifies the spirit of the *Crawford* decision, and sets out specific procedures for courts to employ upon issuance of a temporary order of protection. A prompt hearing is triggered upon a defendant's application, without need to establish a severe deprivation. Under the proposed procedures, and in line with the existing statutes⁵ and caselaw⁶, the bill places the burden of proof on the prosecution to show by clear and convincing evidence (including the testimony of live witnesses) that the order of protection is the least restrictive means of protection a designated witness from intimidation or injury. In determining the appropriate relief, the court must state its reasoning on the record or in writing.

The bill also guarantees reviews of orders of protection when necessary, enabling review of both the merits of the issue and the procedures utilized by the court that issued the order of protection. Use of this review power will help prevent erroneous deprivations and guarantee due process for all New Yorkers.

Finally, it is important to note that the bill addresses criminal courts only. The omission of Family Court Act amendments here is not intended to diminish the need to ensure due process for respondents served with an order obtained *ex parte*. There are currently no provisions in the FCA establishing limits, nor uniform statewide procedures, to prevent unconstitutional deprivations of their liberty interests in family and property. This should be addressed promptly through amendments or other actions within the Family Court Act.

For the above reasons, the New York State Bar Association's Mandated Representation Committee SUPPORTS this legislation.

⁵ The bill echoes language throughout CPL Article 510 and 530, where the court must set the "least restrictive means" of ensuring a principal's return to court, bringing orders of protection into the same category as other portions of routine securing orders.

⁶ See *People v. Forman*, 145 Misc.2d 115 (Crim Ct. NY Co. 1989) (detailing what due process requires when an order of protection infringes on a property interest, placing the burden on the people by competent evidence at an evidentiary hearing); *Matter of F.W.*, 183 A.D.3d 276 (1st Dept. 2020) (noting what due process requires in the face of a deprivation of the right to associate with one's family).