# Criminal Orders of Protection and *Deleon*

BY KIMBERLY J. FURRER

**Both civil and criminal law practitioners are well versed in the world of civil orders of protection. Unfortunately, civil orders of protection may at times become necessary in a myriad of cases.**

They can be relevant to family law cases when violence, harassment, or abuse is perpetrated by a spouse, co-parent, or other family or household member, in criminal cases involving violence, sexual abuse or stalking, as well as in relation to other instances of harassment between non-family members such as neighbor disputes, school-mates and co-workers, and the like.

Previously, when abuse occurred, the victim's attorneys would petition the Court for a civil order of protection, barring the other party from contacting the victim, perpetuating the abuse, and if applicable, barring contact with any children that may also be impacted by the abuse. In civil orders of protection, the Court also has the ability to order additional remedies including exclusive possession of a residence or other property, financial remedies, counseling, setting parenting time, allocating parental responsibilities, and even custody of animals. All remedies for civil orders of protection are detailed in the Illinois Domestic Violence Act.[1]

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Generally speaking, the proceedings for obtaining and litigating orders of protection follow the Illinois Rules of Civil Procedure. However, civil orders of protection contain some elements unique to these types of proceedings. The clearest difference between orders of protection and other civil proceedings is that emergency orders of protection can be heard on an ex parte basis, without providing notice to the Respondent. Additionally, proceedings on orders of protection are expedited. Continuances will only be granted for good cause and are much shorter in duration.

Despite these streamlined measures, as practitioners can attest, in many cases, order of protection litigation can become very protracted. This litigation can take many court appearances to finalize, involves extensive testimony of the victim, subjects the victim to cross-examination by his or her abuser, can include significant use of evidence such as photographs, videos, text-messages and the like, may at times involve multiple witnesses, and almost always can be a traumatic event in and of itself. When other litigation is also pending between the parties, such as family law litigation, order of protection proceedings generally exacerbate these complexities as overlapping issues become ripe for further litigation, including: the payment of support, limitations on parenting time, and access and allocation of jointly held property, among others.

1 750 ILCS 60/214.



For decades, this civil method for obtaining an order of protection was the exclusive option for victims of abuse. However, a new type of order of protection has been recently enacted by the Illinois legislature. Enacted and effective January 1, 2018, Article 112A of the Illinois Code of Criminal Procedure provides for a criminal order of protection. As stated in the text of the statute, the purpose of the new criminal order of protection is to "minimize the trauma and inconvenience associated with attending separate and multiple civil court proceedings to obtain protective orders." [2]

> Any violation of a criminal order of protection operates under the same legal principles of the violation of a civil order of protection.

Criminal orders of protection under Article 112A are only available in cases in which the abuser is charged with a pending criminal case. They can be entered in conjunction with domestic violence cases, sexual offenses and stalking offenses.[3] The petition for a criminal order of protection can either be entered by the victim personally, by a parent on behalf of a minor victim, or the by the State's Attorney.[4] These petitions are filed directly with the criminal case; however, victims may still obtain their own legal representation with respect to the order of protection should they so desire.[5]

The most significant benefit to filing an order of protection in conjunction with a criminal case rather than as a separate civil proceeding, is that the entry of the order is **mandatory** in cases in which prima facie evidence exists that a crime involving domestic violence, sexual offenses or stalking has occurred.[6] Per the statute, this prima facie evidence is simply the existence of a charging implement including an indictment, information or complaint.[7] Therefore, in granting a criminal order of protection, the Court only needs to review the Court file and charging document to determine whether this prima facie evidence exists. As was intended in the spirit of the statute, victims do not testify in these proceedings and are not subject to cross-examination.

The remedies available to the Petitioner in a criminal order of protection are largely identical to those available to Petitioners under the Illinois Domestic Violence Act. These remedies are detailed in 725 ILCS 112A-13. Any violation of a criminal order of protection operates under the same legal principles of the violation of a civil order of protection. If a party violates either a criminal or civil order of protection, they are subject to criminal charges under 720 ILCS 5/12-3.4.

The only significant difference in the operation of the orders is with respect to duration. A criminal order of protection follows the criminal case. Therefore, if a criminal order of protection is entered during pre-trial release (prior to a finding of guilty or acquittal), the order shall remain in effect until the criminal case is resolved. Therefore, if the charges are dismissed, the order of protection is likewise terminated.[8] However, if the Respondent is found guilty either by plea or by trial, the order of protection shall continue for two years after that final disposition is entered. In cases of imprisonment, the order shall continue for two years following the Respondent's release from parole or other supervised release.[9]

Given that criminal orders of protection are not subject to a hearing, the only way in which a Respondent may combat or challenge a criminal order of protection under Article 112A is to present evidence of a meritorious defense.[10] In this case a Respondent must file a written notice alleging the meritorious defense which must be verified and supported by an affidavit.[11] Once this notice is filed, the Court will set the meritorious defense for hearing. It is only after a hearing, and presentation of evidence of this meritorious defense that the Court *may* decide not to issue the protective order if the Court finds that meritorious defense exists by a preponderance of the evidence.[12]

When Article 112A was enacted in 2018, there was much discussion within the legal community regarding the constitutionality of this statute. Specifically, opponents of the legislation were concerned that the prima

2 725 ILCS 5/112A-1.5.
3 725 ILCS 5/112A-2.5.
4 725 ILCS 5/112A-4.5.
5 725 ILCS 5/112A-4.5(d-5).
6 725 ILCS 5/112A-11.5.
7 725 ILCS 5/112A-11.5(a).
8 725 ILCS 5/112A-20.
9 725 ILCS 5/112A-20(b).
10 725 ILCS 5/112A-11.5(a-5).
11 725 ILCS 5/112A-11.5(a-5).
12 725 ILCS 5/112A-11.5(a-5).

facie nature of the issuance of these orders violates the due process rights of the Respondent (right to confrontation and cross-examination, protection against self-incrimination), as well as shifts the burden from the Petitioner to the Respondent. These issues were recently addressed by the Illinois Supreme Court in *People v. Deleon*, 2020 IL 124744.

In *Deleon*, the Defendant/Respondent was charged with four counts of criminal sexual assault.[13] The State's Attorney in that case filed a petition for order of protection pursuant to 725 ILCS 5/112A.[14] The circuit court orally pronounced that Section 112A-11.5 was unconstitutional both on its face and as applied in that particular case.[15] The circuit court found that not requiring the victim to testify was a violation of due process, and requiring the defendant to present evidence of a meritorious defense violates the defendant's right against self-incrimination.[16] Additionally, the circuit court found that "the statute improperly shifts the burden of persuasion to the defendant."[17]

Earlier this year, the Illinois Supreme Court reversed the findings of the circuit court in *Deleon*. In reaching this conclusion, the Court relied upon due process analyses from United States Supreme Court cases: *Medina v. California*,[18] and *Mathews v. Eldridge*[19].

As described by the Court in *Deleon*, *Medina* stands for the proposition that criminal proceedings are within the power of the State to regulate, and the Court will "generally [decline] to find a due process violation unless the procedure in question 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[20] The Court in *Deleon* applied this proposition to the prima facie issuance of criminal orders of protection in Article 112A. The *Deleon* Court focused on the fact that the determination of probable cause by "a neutral and disinterested party" could satisfy constitutional protections as it did in *Gerstein v. Pugh*.[21]

In *Gerstein*, the Court examined and balanced a Defendant's right to liberty and the State's duty to control crime.[22] The *Gerstein* Court held that the fourth amendment requires a judicial determination of probably cause as a prerequisite to restraint of liberty.[23] The Court in *Deleon* used similar reasoning. The *Deleon* Court held that since an independent determination of probable cause is sufficient to physically detail a Defendant in pre-trial proceedings, likewise it must be a sufficient safeguard to enter an order of protection which is "unquestionably a less restrictive constraint on liberty."[24]

The second due process principal used by the *Deleon* Court was from the *Mathews* case. In *Mathews*, the due process analysis hinges upon the balance of interests at play. In balancing interests, the *Deleon* Court found that the government has a substantial interest in protecting victims and minimizing the number of times the "victim is subject to adversarial proceedings prior to trial."[25] Comparatively, the Defendant "does not have a significant interest in associating with his [or her] alleged victim."[26] Ultimately, the *Deleon* Court found that the "conditions of the no-contact order were relatively limited and largely identical to the restraints imposed as conditions of defendant's pretrial bond release."[27]

The Court also did not find that the procedures in Article 112A violated the principles of confrontation and cross-examination. Specifically, the Court relied on the fact that criminal orders of protection are not a question of whether a criminal defendant is "guilty beyond a reasonable doubt" of the charge faced; and therefore, that type of adversarial process is "far less useful."[28]

Finally, the Illinois Supreme Court held that "meritorious defense" remedy and procedure does not constitute burden shifting.[29] On this point, the Court held that while a Respondent **may** present evidence of a meritorious defense, he is not forced or compelled to do so.[30] Because the choice to present evidence of a meritorious defense is entirely voluntary and not compulsory, it does not violate Respondent's constitutional protection against self-incrimination.[31]

Based upon the Court's holding in *Deleon*, it appears that criminal orders of protection are here to stay. While these orders may not be applicable in every case of abuse, they are certainly a substantial asset for victims where the defendant's conduct constituted a crime and he or she was charged with a criminal offense. Additionally, victims' attorneys and other civil counsel may also find that these orders are significant tools in their civil litigation tool box. For example, if a party in a family law case is charged with domestic battery or another qualifying offense under Article 112A, it may be prudent to explore the issuance of a criminal order of protection rather than seek a civil order in conjunction with the pending civil litigation. By utilizing a criminal order, civil litigators can avoid the trauma of their clients confronting their abusers and testifying in Court, as well as remove the litigation of the order itself from the civil proceedings, narrowing the issues before the civil court and simplifying those proceedings.

13 *Deleon*, 2020 IL 124744, ¶3.
14 *Id.*
15 *Id.* at ¶4.
16 *Id.*
17 *Id.*
18 505 U.S. 437.
19 424 U.S. 319.
20 *Deleon* at ¶14, citing *Medina*, 505 U.S. 437, 445.
21 *Deleon* at ¶16.
22 *Gerstein v. Pugh*, 420 U.S. 103, 112.
23 *Id.* at 114.
24 *Deleon* at ¶ 20.
25 *Deleon* at ¶ 29.
26 *Id.* at ¶ 31.
27 *Id.* at ¶ 33.
28 *Deleon* at ¶ 34.
29 *Deleon* at ¶ 39.
30 *Id.*
31 *Id.*