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2015

# Civil Protection Order Duration: Proof, Procedural Issues, and Policy Considerations

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# CIVIL PROTECTION ORDER DURATION: PROOF, PROCEDURAL ISSUES, AND POLICY CONSIDERATIONS

by DANA HARRINGTON CONNER\*

## INTRODUCTION

The civil protection order (“CPO”) is a critical remedy for battered individuals seeking legal protection from abuse.<sup>1</sup> For survivors who are either not interested in, or fearful of, reporting acts of abuse to law enforcement, the CPO provides a remedy, which includes features that the criminal justice system does not afford. The CPO system provides the promise of a lower standard of proof,<sup>2</sup> an expansive definition of abuse,<sup>3</sup> ancillary relief,<sup>4</sup> a curative measure not punitive in nature,<sup>5</sup> and vests the survivor with legal decision-making authority.<sup>6</sup> These special features are consistent with survivor safety, promoting the health and welfare of battered

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\* Associate Professor of Law and Director of the Delaware Civil Law Clinic, Widener University School of Law. This article is based, in part, on the author’s twenty years of experience representing countless battered women seeking civil protection orders and custody of their children. I would like to thank Marina Angel for inviting me to speak at the 20<sup>th</sup> Anniversary of the Violence Against Women Act: Fulfilling the Promise of Safety & Justice Symposium at Temple University Beasley School of Law on November 8, 2014 and for providing me with the opportunity to take part in this important event. I would also like to thank the staff of the Temple Political & Civil Rights Law Review, in particular Evan Correia, Jordan Santo, Emily Kowey, James Glowacki, and Peter Moomjian, for their thoughtful comments and thorough editing of this article.

1. The term civil protection order is defined as: “[A] class of civil remedies that have different labels depending on the jurisdiction, including restraining orders, emergency POs, domestic violence orders, or peace bonds . . . all states have enacted laws authorizing the issuance of general civil protective orders for partner violence although eligibility criteria and specific protection stipulations differ by state . . . as civil orders they have a lower burden of proof and presumably less personal and social cost than there would be for criminal charges.” TK Logan & Robert Walker, *Civil Protective Order Outcomes*, 24 J. INTERPERSONAL VIOLENCE 675, 676 (2009) (citations omitted).

2. *Id.*

3. See *id.* at 680 (noting that the study, covering multiple jurisdictions, identified six separate categories of abuse). This has not necessarily been the case in many jurisdictions, which have followed a more narrow definition of abuse. See *infra* Part III (discussing various jurisdictions’ models for CPO issuance).

4. See Logan & Walker, *supra* note 1, at 676-77 (explaining that in some jurisdictions, vital temporary ancillary relief is also provided; for example, custody, visitation, support, possession of a residence, and other remedies are afforded on a limited basis to secure the safety of the survivor and her children).

5. See *Overview of Criminal vs. Civil Law*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, [www.womenslaw.org/laws\\_state\\_type.php?id=930&state\\_code=DE](http://www.womenslaw.org/laws_state_type.php?id=930&state_code=DE) (last visited Feb. 10, 2015) (contrasting criminal and civil remedies in the context of domestic violence issues).

6. See MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 1 (2014) (asserting that, at least in the civil context, all objectives of the representation are decided by the client).

persons and their children, and responding to the complexities of intimate partner violence (“IPV”).

CPOs generally are an essential remedy in the fight against domestic violence. Yet, order length remains the subject of debate. The dilemma has generated a wide array of suggestions ranging from temporary measures to permanent orders of protection. The debate is fueled by a confusing and complicated national landscape, which has given little consideration to how a particular approach to duration may result in unanticipated health and safety outcomes.

Orders of longer duration tend to be implemented by our legal systems as an extraordinary remedy linked with acts that are criminal in nature. This over-emphasis on the dangerousness of the act has caused our civil protection system to be exclusive, rather than inclusive, in affording safety measures to survivors of intimate partner violence.<sup>7</sup> As a result, in some jurisdictions a select group of domestic abuse victims receive a maximum level of protection at the expense of a larger class of survivors who are in need of safeguards, regardless of how brief.<sup>8</sup> In other jurisdictions, a greater number of individuals receive minimum protections only.<sup>9</sup> The answer may be found in a hybrid approach to duration that affords safety measures to the greatest number of individuals in need, while fashioning a legal remedy that takes into account the totality of the facts and circumstances of individual cases.<sup>10</sup>

The duration of orders generally confounds legislators, judges, lawyers, and advocates. Important questions regarding “how long is long enough?”; “what do survivors want?”; and “what should judges take into consideration when fixing the length of an order?” demand analysis. As a result, this Article considers how duration should be implemented to best promote the welfare of survivors and their children.

There is much to learn from the various state models about how duration, as defined by the law, influences the civil protection system. For that reason, this article analyzes the extent to which duration influences survivor decision-making in the context of out of court negotiations and settlement decisions; the rate at which cases proceed to trial in light of particular state models; and how a specific law may influence judicial deliberation. These issues are important public policy considerations, given the extent to which individuals experiencing domestic abuse are more or less likely to obtain protection based on how the law defines and responds to duration.

In addition, this article explores how partner violence influences survivor well-being, the health benefits that flow from CPOs, and the extent to which duration plays a role in the healthiness of survivors and their children. This analysis will offer tools to assist judges in fixing the length of an order that best meets the

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7. Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL’Y 223, 226 (2011).

8. See *infra* Part III (contrasting New Jersey’s permanent order model with other jurisdictions).

9. *Id.*

10. See *Understanding the Protection From Abuse Process*, DEL. STATE COURTS, <http://courts.state.de.us/Help/PFA/index.stm> (last visited May 26, 2015) (providing an overview of the CPO process in a state maintaining a hybrid-model).

needs of individual cases.

This article recommends an approach to duration that is flexible in nature given the complexities of intimate partner violence, the specific needs of each survivor, and the distinct circumstances of individual cases.

## I. PREVALENCE OF INTIMATE PARTNER VIOLENCE

The occurrence of domestic violence worldwide is staggering. Research indicates that a substantial number of women experience some form of domestic violence during their lifetime.<sup>11</sup> A multi-country study by the World Health Organization (“WHO”) reveals that anywhere from fifteen to seventy-one percent of women experience physical or sexual abuse by an intimate partner.<sup>12</sup> The home country of the survey participant accounted for some of this wide variance in prevalence in the study.<sup>13</sup> For example, only thirteen percent of Japanese participants indicated ever experiencing physical violence at the hands of an intimate partner, compared with sixty-one percent of women in provincial Peru.<sup>14</sup> Women who experienced severe physical violence, “being hit with a fist, kicked, dragged, threatened with a weapon, or having a weapon used against her,” ranged most commonly from thirteen percent to twenty-six percent, depending on the country of origin and survey site location.<sup>15</sup> The reported acts of physical violence were part of a larger course of abusive conduct, not isolated incidents of abuse.<sup>16</sup>

In the United States, women suffer violence at rates similar to those experienced by women worldwide.<sup>17</sup> The Centers for Disease Control (“CDC”) maintains that approximately one in three U.S. women have experienced rape, physical violence, or stalking by a partner at some point in their lifetime.<sup>18</sup> A recent

11. CLAUDIA GARCIA-MORENO ET AL., WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN xii-xiii (2005), *available at* [http://whqlibdoc.who.int/publications/2005/924159358X\\_eng.pdf?ua=1](http://whqlibdoc.who.int/publications/2005/924159358X_eng.pdf?ua=1).

12. *Id.* at xiii (detailing a study that involved 24,000 women in Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand, and the United Republic of Tanzania).

13. *Id.*

14. *Id.* at xii.

15. *See id.* at xii-xiii (“The proportion of ever-partnered women who had ever suffered physical [domestic] violence . . . ranged from 4% of women in Japan to 49% in Peru province, with most sites falling between 23% and 49%.”).

16. *Id.* at xiii (reporting that the vast majority of women who had ever been physically abused by partners experienced acts of violence more than once and sometimes frequently; with the exception of the most severe types of physical violence—choking, burning, and the threatened or actual use of a weapon—in each site, over half of women who had experienced a violent act in the past twelve months had experienced that act more than once).

17. GARCIA-MORENO ET AL., *supra* 11, at 61 (“Canada, New Zealand, the United Kingdom, and the United States . . . have established intimate partner violence as a common cause of injury to women.” (citations omitted)).

18. M.C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 39 (2011), *available at* [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf). Although this article is focused on violence against women, men are also victimized by intimate partners at significant rates. According to the CDC report, one in four men in the United States have experienced intimate partner rape, physical

study by the Verizon Foundation revealed that approximately forty-four percent of the U.S. women participants experienced domestic violence through physical, sexual, emotional, or economic abuse.<sup>19</sup> Moreover, one in four women experienced the most serious forms of abuse at the hands of an intimate partner, such as hitting, choking, slapping, and shoving.<sup>20</sup>

Yet not all acts of intimate partner violence are physical in nature. Some women experience what Dr. Evan Stark defines as coercive control.<sup>21</sup> Stark suggests that although coercive control shares many of the same elements of criminal acts of abuse it “is personalized, extends though social space as well as over time, and is gendered in that it relies for its impact on women’s vulnerability *as women* due to sexual inequality.”<sup>22</sup> Furthermore, the means of establishing control over the woman is through control of material resources, exploitation, entrapment, and micro-regulation of daily behaviors.<sup>23</sup> The harm that coercive control causes is often marginalized, disregarded, or overlooked by policy-makers.

In an effort to protect survivors of partner violence, our justice system has developed a number of ways to identify, stop, and in some cases punish acts of domestic abuse.<sup>24</sup> Data confirms that partner violence is repetitive and recurs over long periods of time.<sup>25</sup> Yet our system often responds to specific incidents of abuse, one at a time, modeling a criminal justice process that is ill-suited to respond properly to the dynamics of intimate partner violence.<sup>26</sup> The result is often the entry of a protection order that is not reflective of the individual circumstances of the protected class member, the history of violence, the nature of the batterer’s specific behavior, or the risk factors of that particular case. The problem and its consequences are broad; accordingly, the response must be broad as well.

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abuse or stalking. *Id.* at 39. Male victims of rape and unwanted sex reported that their perpetrators were predominantly male; approximately half of all male stalking victims reported males as their stalkers; and male victims of other forms of IPV reported that their perpetrators were mostly female. *Id.* at 24.

19. VERIZON FOUND., EXPLORING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND CHRONIC HEALTH CONDITIONS I (2013), available at <http://www.verizon.com/about/sites/default/files/Survey-Results-Domestic-Violence-%26-Chronic-Health.pdf> (explaining “a huge number of women—an alarming 44%—say that they have experienced a form of domestic violence including physical, emotional, sexual and economic abuse”).

20. *Id.* at 2 (revealing that of the 1005 study participants, twenty-one percent indicated they experienced shoving, seventeen percent experienced hitting, sixteen percent experienced slapping, and eleven percent experienced choking).

21. EVAN STARK, COERCIVE CONTROL 5 (2007).

22. *Id.*

23. *Id.*

24. See, e.g., Logan & Walker, *supra* note 1, at 676-77 (discussing domestic abuse and the national response, including CPOs as remedies).

25. BLACK ET AL., *supra* note 18, at 90.

26. See Harrington Connor, *supra* note 7, at 225-26 (discussing the prevalence of non-reporting of domestic abuse and its effect on the judicial system’s view of an incident actually reported and handled in court).

## II. THE LEGAL SYSTEM'S RESPONSE

Although the legal system has responded over time to intimate partner violence in a variety of ways, prosecution and civil protection are the two core areas that receive extensive resources and attention.

The first model attacks the problem from a criminal justice perspective, focusing primarily on the arrest and prosecution of individuals who are accused of committing crimes as defined by the law.<sup>27</sup> This system is ill-suited to effectively respond to all instances of intimate partner violence. It is aimed at holding batterers accountable under a set of circumstances that depends upon the defendant's admission of guilt, plea of no contest, agreement to enter into a first offender's or similar program, or a finding of guilt beyond a reasonable doubt.<sup>28</sup>

There are many challenges to a system that relies upon agreement or conviction of the accused since acts of intimate partner violence often occur under circumstances that do not lend themselves to independent verifiable evidence; a system that has no power or authority to provide relief to the individual experiencing abuse without agreement or conviction of the defendant will seldom provide relief.<sup>29</sup> In addition, even when the criminal justice system has authority to act for the protection of the abused, the relief available is not designed to meet critical personal, financial, and legal needs of those who experience domestic abuse.<sup>30</sup>

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27. See Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 316-17 (2013), available at <http://scholarship.law.wm.edu/wmjowl/vol19/iss2/4> (describing the current national response to domestic abuse in the criminal justice system).

28. See *Victim/Witness and Criminal Justice System Information*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/usao/gan/documents/criminaljusticeoverview.pdf> (last visited Feb. 10, 2015) (describing possible outcomes of a case handled in the criminal justice system).

29. See Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 403-04 (1998) ("Despite such recent American criminal justice system responses, abusers may still escape conviction and punishment (and possibly abuse again) because evidentiary issues arising under the HRE can cause prosecutors to fail to prove abusers' guilt 'beyond a reasonable doubt,' the standard of proof in criminal domestic violence cases . . . . Possible factors influencing low conviction rates include complaining witnesses who contradict their earlier statements or who do not participate in the trial of their abuser and prior bad acts which are inadmissible evidence at such trials. The exclusion of such evidence can create reasonable doubt in the minds of the fact finder, possibly resulting in an acquittal or a not guilty verdict, and ultimately endangering the safety of the women and children involved. These evidentiary problems are significant hurdles for the prosecution of domestic violence crimes because the evidence typically presented in such domestic violence cases centers on the complaining witness' testimony. Indeed, the victim's testimony is usually the most important evidence introduced at trial.").

30. See Satoko Harada, Comment, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing A Victim of Same-Sex Domestic Violence*, 41 U. BALT. L.F. 150, 168 (2011) ("Getting information on the nature and extent of the abuse suffered is not only important in determining the legal remedies that may be available, but is also crucial for detailed safety planning. If the victim suffered financial abuse, they may not have the funds necessary to live outside of the home. Once legal proceedings begin, the victim will need a place to live away from the abuser, and will need a support system that will offer assistance throughout the process.").

In addition, the criminal justice model relies upon participation of the individuals who are victimized by the very people with whom they have a personal relationship. The survivor is likely to be financially dependent upon, have children in common, be married to, and/or share property with the batterer.<sup>31</sup> The survivor's participation in the arrest and prosecution of the accused is often overshadowed by threats of harm, emotional entanglement, financial need, fear, guilt, shame, and even prior experiences with the criminal justice system.<sup>32</sup>

Although criminal prosecution is an important tool in the fight against domestic violence, it is not designed to provide for all of the basic needs a survivor will face at the time of separation. Moreover, the criminal justice model is simply not a viable option for some individuals who experience domestic abuse.

As a result, the civil protection system was imagined as an improved vehicle for properly responding to the needs of battered individuals. Not only should the CPO provide no-contact and stay-away measures, it has the potential to meet requirements that are unique and fundamental to survivors of domestic abuse: support, temporary possession of a residence, custody, and visitation.<sup>33</sup> Although the CPO is an essential remedy, like criminal prosecution, the promise of an ideal response to domestic abuse by way of the civil protection system has not been realized.<sup>34</sup>

Undoubtedly, there is no flawless legal response to most human conditions. Nonetheless, the civil system has the potential to provide enhanced protections to the greatest number of individuals in need. The quality of the relief and the number of class members afforded protection are two important factors.<sup>35</sup> These concerns may, however, be in competition. The extent to which duration influences and is influenced by these two important issues is the focus of this article.

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31. See Sarah M. Bucl, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW, Oct. 1999, at 19, 19-26 (providing a list of reasons why domestic abuse victims stay in abusive relationships, including reasons related to finances, children, and marriage).

32. *Id.*

33. Susan L. Pollet, *Economic Abuse: The Unseen Side of Domestic Violence*, 83 N.Y. ST. B.J. 40, 43 (2011) ("The CPO process is important because it 'provides the woman with an opportunity to restructure how the couple interacts between themselves and with their children, and how they maintain their real and personal property, thereby changing the power dynamics.' Since CPOs have successfully decreased abuse and attacked power imbalances, the argument is that a CPO could 'potentially remediate the harms of emotional, psychological, and economic abuse.'" (citation omitted)).

34. See Jane K. Stocver, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 377 (2011) ("The civil protection order remedy has great potential to take the terror that people experience in their homes seriously and enhance survivors' safety and autonomy, making all the difference in a person's survival. With procedural and substantive law changes and additional commitment and effort by the legislative, judicial, and community advocacy systems, the promise of the protection order can be a reality.").

35. See *id.* at 308-09 ("In fact, the protection order is now the single most commonly used legal remedy for domestic violence, with survivors frequently choosing to use only the civil justice system in their efforts to intervene in and prevent violence. There are also substantial economic benefits to protection orders, with a recent study conservatively estimating that protection orders save the state of Kentucky \$85 million per year. Although the focus on the criminal justice system predominates, heightened attention to protection orders is warranted for these multiple reasons.").

### III. DURATION AND THE NATIONAL LANDSCAPE

In the United States, there is no uniform duration for CPOs.<sup>36</sup> The majority of the jurisdictions that set time limits on the length of an order provide a mechanism for renewal or extension of that order.<sup>37</sup>

The length of time an initial order of protection will remain in effect ranges from as brief as several days to as long as a lifetime.<sup>38</sup> While some states provide protection for two, three, or more years, the most common duration for a civil no contact order is up to one year.<sup>39</sup> A limited number of states such as Alabama, Alaska, Colorado, Delaware, Florida, Louisiana, Montana, New Jersey, Texas, and Washington provide some form of permanent protection.<sup>40</sup> The type of relief provided by long-term orders of protection is generally deterrent in nature, whereas ancillary relief tends to be provided on a shorter-term basis.<sup>41</sup>

Although there are broad variations among the jurisdictions regarding duration, for the purposes of analysis, this article considers the following four approaches to setting duration of CPOs: (A) the discretionary model; (B) the fixed-limited duration model; (C) the permanent order only model; and (D) the hybrid approach.

#### A. The Discretionary Model

North Dakota is a discretionary model jurisdiction. The state's protection order statute is silent as to the length of time a CPO shall remain in effect, and the law provides no guidance to the court as to how determinations should be made regarding the proper length of an order in any given case.<sup>42</sup> As a result, determinations are left to the sole discretion of the court on a case by case basis.

Case law illuminates the lack of predictability for duration outcomes in a jurisdiction that lacks any articulated standard for fixing the length of a protection order. For example, in *Rinas v. Engelhardt*,<sup>43</sup> the Supreme Court of North Dakota considered whether the judicial referee abused its discretion by issuing an order of

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36. Jane K. Stoecker, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1093-98 (2014) (providing a fifty-state survey on CPO length).

37. *Id.*

38. Compare W. VA. CODE § 48-27-505, with DEL. CODE ANN. tit.10, § 1045.

39. See AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) (2014) [hereinafter ABA COMM'N], available at [http://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf); see also Stoecker, *supra* note 36, at 1046 (finding, based on the author's fifty-state survey of CPO statutes, that "the statutory time period for protection orders is as brief as three months in Arkansas and West Virginia, or six months in Michigan, Missouri, New Mexico, South Carolina and Utah. Most commonly, the initial order is effective for up to one year, twenty-two states take this approach").

40. See ABA COMM'N, *supra* note 39.

41. *Id.*

42. N.D. CENT. CODE § 14-07.1-02(4); see also *Rinas v. Engelhardt*, 818 N.W.2d 767, 771 (N.D. 2012) (explaining that the "statute does not provide a time period for which a protection order may be in effect").

43. 818 N.W.2d 767 (N.D. 2012).



protection for a period of twenty years.<sup>44</sup> The high court reasoned that the state legislature must have intended a reasonableness standard, in light of the facts of each case, for determining duration.<sup>45</sup> As justification for this measure, the court made reference to other jurisdictions that use a reasonableness standard to determine duration.<sup>46</sup>

The reviewing court considered the nature of the underlying abuse and findings of the judicial referee to evaluate the reasonableness of the entry of a twenty year civil order of protection.<sup>47</sup> The facts of the case show that the petitioning party applied for a protective order against her abuser alleging dangerous and potentially life-threatening acts of domestic violence.<sup>48</sup> The petitioner testified during the hearing that her abuser threatened to kill her, sent her threatening text messages, and committed physical acts of abuse on multiple occasions.<sup>49</sup> Revealing the heightened level of danger involved, the petitioner asserted that during one of the physical altercations, she was hit and strangled while holding her minor child.<sup>50</sup> The alleged batterer denied committing any physical acts of abuse but admitted to sending text messages in frustration due to denied access to his child.<sup>51</sup> The judicial referee found that domestic violence had occurred and entered the order for twenty years in length.<sup>52</sup>

Although the batterer raised several issues on appeal, he never challenged the judicial referee's findings of domestic abuse.<sup>53</sup> Among his arguments on appeal, he claimed the judicial referee abused its discretion by issuing the protective order for a period of twenty years.<sup>54</sup>

Notwithstanding the articulated reasonableness test and findings of high risk acts of domestic violence by the judicial referee, the reviewing court held that a twenty-year protective order was unreasonable given the facts presented in the case.<sup>55</sup> Although it is standard for the court to remand the matter, in order to alleviate costs the court modified the length of the order from twenty years to five years on appeal.<sup>56</sup> The court failed to articulate a tangible justification for determining that a twenty-year order did not meet the standard of reasonableness; nor did it explain how it came to the conclusion that a five-year order was reasonable in light of the particularized acts of domestic violence which formed the basis for the entry of order. The high court's opinion provides no guidance regarding what factors should be considered or the weight afforded in determining

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44. *Rinas*, 818 N.W.2d at 769.

45. *Id.* at 771.

46. *Id.*

47. *See id.* ("We agree that a twenty-year protection order is unreasonable under the facts presented here.").

48. *Id.* at 769-70.

49. *Id.*

50. *Rinas*, 818 N.W.2d at 769-70.

51. *Id.* at 770.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 771.

56. *Rinas*, 818 N.W.2d at 771.

a “reasonable” duration for a protection order in the State of North Dakota.

Similarly, Hawaii’s domestic abuse statute authorizes a court to enter an order of protection for a “fixed reasonable period as the court deems appropriate.”<sup>57</sup> The statute provides no additional guidance as to what constitutes a reasonable period of time or what weight should be afforded to particular factors in order to establish the duration of a CPO. In *Lite v. McClure*,<sup>58</sup> the appellant appealed a family court decision issuing a ten-year protection order.<sup>59</sup> The appellant argued that a ten-year order of protection was not necessary to prevent abuse or the recurrence of abuse.<sup>60</sup> In a brief opinion, the reviewing court held that the trial court did not abuse its discretion by setting the term of the order at ten years.<sup>61</sup> However, the reviewing court did not specify factors that demonstrated a lack of abuse of discretion by the trial court.<sup>62</sup> By failing to specify factors supporting the court’s determination of the order’s duration, the reviewing court’s decision is devoid of guidance to trial court judges charged with setting the length of CPOs.

*Benson v. Muscari*<sup>63</sup> provides yet another example of the lack of clarity and unpredictability related to the establishment of duration. The Vermont Abuse Prevention Act imposes no set limits on the duration for an order of protection.<sup>64</sup> In *Benson*, the Supreme Court of Vermont considered the reasonableness of the entry of a five-year order of protection.<sup>65</sup> The case involved “particularly violent” behavior.<sup>66</sup> The evidence showed that, nine months after the parties separated, the batterer entered the victim’s residence unannounced, found her with another man, and savagely attacked her.<sup>67</sup> The responding officer testified that he found the victim covered in “blood from head to toe with blood running off her in streams.”<sup>68</sup> In the past, the batterer had threatened to kill the victim if he ever found her with another man.<sup>69</sup> Based on the underlying abuse, the reviewing court found it reasonable to conclude that “only an order of long duration” would minimize the risk of future harm by providing a sufficient cooling off period.<sup>70</sup>

Although a five-year order, at a minimum, seems appropriate in *Benson* given the nature of the violence, the court provided no specific rationale to guide judges in making determinations relating to the proper length of the order given a specific

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57. HAW. REV. STAT. § 586-5.5(a) (2014).

58. No. 29107, 2009 WL 1263099 (Haw. Ct. App. May 8, 2009).

59. *Lite v. McClure*, No. 29107, 2009 WL 1263099, at \*1 (Haw. Ct. App. May 8, 2009).

60. *Id.*

61. *Id.* at \*2.

62. *Id.* at \*1 (finding that the allegations of abuse consisted of a course of conduct that continually “bothered” the victim such as going to his condominium, arguing with him, and calling the police to have him arrested but not finding an abuse of discretion).

63. 769 A.2d 1291 (Vt. 2001).

64. *Benson v. Muscari*, 769 A.2d 1291, 1298 (Vt. 2001); see also VT. STAT. ANN. tit. 15, § 1103(c) (2014) (stating that orders will be granted “for a fixed period . . . necessary to protect the plaintiff” but specifying no limit on the duration).

65. *Benson*, 769 A.2d at 1298.

66. *Id.* at 1299.

67. *Id.* at 1293.

68. *Id.* (internal quotations omitted).

69. *Id.* at 1293-94.

70. *Id.* at 1299.

set of circumstances. This lack of rationale was of paramount concern to the dissent, which found that the length of the order was extraordinary.<sup>71</sup> Both the majority and dissenting opinions highlight the lack of predictability in civil protection cases when a standard for establishing the length of a CPO is not articulated.<sup>72</sup>

An articulated standard for setting duration, upon which judges and parties can reasonably rely, is critical. Otherwise, as these cases underscore, abused individuals will have little confidence in our system of justice, will lack the critical information necessary to engage in settlement negotiations, and will be unable to act with reasonable assurances as to the length of time an order may last.

Flexibility in setting order length may be beneficial for survivors in need of longer-term orders as compared with the set minimum time limits that many jurisdictions follow. However, the current reasonableness tests that jurisdictions use for determining the length of an order result in disparities in duration and unpredictability for those seeking protection.<sup>73</sup> The more we allow human emotion to dictate decision making, the more likely we are to have errors.<sup>74</sup>

Although imperfect, guidelines can reduce unpredictability. Moreover, failure to provide some form of criteria for determining outcomes leads to a diminished ability to cure unsatisfactory results on appeal.<sup>75</sup> This is due in part to current standards for reviewing trial court determinations that defer to the finder of fact based on the longstanding notion that the trial judge is in the best position to assess the weight of the evidence and credibility of the witnesses.<sup>76</sup>

### *B. The Fixed Limited-Duration Model*

Arizona follows a fixed limited-duration model. Orders of protection issued by Arizona courts are limited to a length of one year.<sup>77</sup> Duration of an order is not subject to judicial discretion because there is only one option available for CPO

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71. *Benson*, 769 A.2d at 1300-01 (Doolcy, J., dissenting) (“We see enough orders of this type to observe that a duration of five years is unusual. In order to protect plaintiff and her child, the order imposes substantial limits on defendant’s mobility. . . . We should require the court to explain why it imposes an order of this length. . . . It takes little time to tell defendant directly why his conduct was so outrageous that extraordinary protections are required.”).

72. *See, e.g., Lite*, 2009 WL 1263099 at \*2 (stating that the Hawaii protection from abuse statute have a duration for a “fixed reasonable period as the court deems appropriate” and appellate court’s defer to the trial court’s discretion); *Rinas*, 818 N.W.2d at 771 (stating, without any guidance or standards, that twenty years was unreasonable and changing the protection order to five years in duration).

73. *See Stoecker, supra* note 36 at 1083-85 (arguing that leaving the duration of protection orders to the complete discretion of judges is problematic because judges may fail to comprehend the serious nature of domestic violence).

74. *Id.*

75. *See, e.g., Hanneman v. Nygaard*, 784 N.W.2d 117, 124 (N.D. 2010) (stating that a court must make findings of fact sufficient to enable an appellate court to understand the factual determinations made by the lower court and the basis for its conclusions of law).

76. *See id.* (stating that a district court’s finding of domestic violence, a finding of fact, is a question that cannot be overturned on appeal unless it is clearly erroneous).

77. ARIZ. REV. STAT. ANN. § 13-3602(k) (2014) (“An order expires one year after service on the defendant.”).

cases in Arizona.<sup>78</sup> This model does not take into consideration the particularized circumstances of individual cases. Moreover, there is no flexibility related to fashioning the length of an order beyond one year regardless of the facts of a particular case. The only option for an individual in need of civil protection beyond the time specified is to file a new petition for protection for an additional year.<sup>79</sup>

The “one-year-only” approach to protection is less than ideal for protected class members for a variety of reasons. First, the fixed limited-duration model fails to provide options to survivors of domestic violence regardless of their circumstances, needs, or wishes. For example, experts maintain that it can take an average seven attempts before a survivor is able to break free from the violent relationship.<sup>80</sup> As a result, the initial request for protection in some cases takes place after many years of high risk acts of abuse that demand a long-term order at the time of the first request for assistance.<sup>81</sup> As the advisory Bench Book by the Judicial College of Arizona maintains, battered women have varied and reasoned responses to the violence they experience that change over time.<sup>82</sup> Survivors “often engage in a process of staying, leaving and returning . . . . They leave for short periods in order to escape the violence . . . . In the beginning they are generally not trying to end the relationship.”<sup>83</sup> By the time some survivors seek assistance from the court, there may be a lengthy history of abuse demanding a long-term order of protection.

Although there is no limit on the number of times a protected class member is permitted to seek civil protection in Arizona,<sup>84</sup> this model ignores the reality that a system demanding reengagement exposes survivors to increased risks as the total number of court filings and appearances increase.<sup>85</sup> Although exposure to risk can be decreased with procedural safeguards, such as video appearances for protected

78. See *Know the Laws: Arizona: Domestic Violence Orders of Protection*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, [http://www.womenslaw.org/laws\\_state\\_type.php?id=11326&state\\_code=AZ#content-7687](http://www.womenslaw.org/laws_state_type.php?id=11326&state_code=AZ#content-7687) (last updated July 29, 2013) (indicating that “permanent” orders of protection in Arizona last for one year, even if the order is modified during the one-year period).

79. See THE COMM. ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS & THE DOMESTIC VIOLENCE BENCHBOOK WORKGROUP, DOMESTIC VIOLENCE BENCHBOOK 17 (2006) [hereinafter BENCHBOOK 2006] (“There is no limit on the number of times a party may request a protective order.”).

80. See *People v. Navarro*, H039681, 2014 WL 3952492, at \*2 (Cal. Ct. App. 2014) (“Victims of domestic violence return to their abusers an average of seven times.”); see also *In the Matter of A.C., J.C., & H.C.*, 2 A.3d 1138, 1146 (N.J. Super. App. Div. 2010) (explaining that “victims of domestic violence leave their abusers an average of seven times before they are able to leave permanently”); *People v. Basulto*, No. B159993, 2003 WL 22456800, at \*4 n.3 (Cal. Ct. App. 2003) (“[T]he average domestic violence victim leaves and returns to their relationship five times.”).

81. See *Navarro*, 2014 WL 3952492, at \*2 (“Batterers control their victims by isolating them from their families and friends, exerting economic control, or by threatening them. Many victims tend to report things late, not at all, or minimize.” (internal quotation marks omitted)).

82. JUDICIAL COLL. OF ARIZ., THE COMM. ON THE IMPACT OF DOMESTIC VIOLENCE AND THE COURTS & THE DOMESTIC VIOLENCE BENCHBOOK WORKGROUP, DOMESTIC VIOLENCE BENCHBOOK 10 (2013) [hereinafter BENCHBOOK 2013].

83. *Id.* at 10.

84. See BENCHBOOK 2006, *supra* note 79, at 17 (explaining that “[t]here is no limit on the number of times a party may request a protective order”).

85. Stoeve, *supra* note 36, at 1026-27.

class members,<sup>86</sup> the fixed limited-duration model increases the likelihood that a survivor will simply give up when the remedy requires multiple requests for the same relief over and over again, even when the original facts of a case warrant long-term protection.

In fact, Arizona recognizes that some cases of domestic violence necessitate long-term protection.<sup>87</sup> As a result, Arizona law does not require that a protected party provide new evidence of abuse for a subsequent one year order.<sup>88</sup> Yet, that protected class member does not have the option in Arizona to seek an order of longer duration at the first point of entry into the civil protection system, regardless of the circumstances.<sup>89</sup>

The emotional toll of such a system on the battered person who seeks a greater level of protection is difficult to measure. A survivor who seeks protection on a repeated basis will have to remember and re-experience the acts of abuse from which she may be attempting to recover. She will likely seek the assistance of a lawyer and either struggle to pay the legal fees or risk being denied free legal services due to the agency's limited resources. Moreover, the survivor will need to re-engage with a legal system that she knows offers an insufficient legal remedy despite her requirements. Although some survivors will choose to seek a short-term order for personal reasons, the heightened anxiety and trauma this model creates decreases the likelihood that some survivors will seek legal redress. This may be true even when it is essential to her own protection.

### C. The Permanent-Order-Only Model

New Jersey has moved to a permanent-order-only model for all final restraining orders ("FRO").<sup>90</sup> After the temporary restraining order ("TRO") stage, generally ten to thirty days,<sup>91</sup> the protected class member either receives a permanent order or nothing at all.<sup>92</sup> Hearing officers in New Jersey do not engage in judicial deliberation related to duration, only decision-making related to whether

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86. See, e.g., OHIO REV. CODE ANN. § 2919.251 (West 2014) (providing for video appearances for defendants in domestic violence cases); CAL. PENAL CODE § 977 (West 2015) (allowing for the defendant to appear via two-way video for various aspects of a trial).

87. ARIZ. REV. STAT. ANN. § 13-3602E (2013).

88. BENCHBOOK 2006, *supra* note 79, at 44 ("The plaintiff does not have to provide new evidence in the subsequent petition; the Judicial Officer may review any other pleadings on file and any evidence offered by the plaintiff.").

89. See *id.* at 5 ("OP is valid for one year after service of the original OP.").

90. See SUPREME COURT OF NEW JERSEY, DOMESTIC VIOLENCE PROCEDURES MANUAL 1-2 (amended Oct. 2008), available at <http://www.judiciary.state.nj.us/family/dvpreman.pdf> ("1.10 'Final Restraining Order' or FRO—A civil order . . . entered after a hearing . . . remains in effect until further order of the court . . ."); *id.* at IV-14 ("4.13.1 Following a final hearing, the court should either enter an FRO with appropriate relief upon a finding of domestic violence, or admission of an act of domestic violence by the defendant; or, dismiss the Complaint/TRO and dissolve all restraints if domestic violence has not been established; or, if appropriate, adjourn the final hearing and continue the restraints on an interim basis until a final determination can be made.").

91. See, e.g., *id.* at IV-13 (describing the typical length of the TRO stage as ten days).

92. *Id.* at IV-14 ("4.13.1 Following a final hearing, the court should either enter an FRO with appropriate relief upon a finding of domestic violence . . . or, dismiss the Complaint/TRO and dissolve all restraints if domestic violence has not been established.").

an order shall be entered. The trial court must make the following two determinations before entering a final restraining order: (1) whether the plaintiff proved the occurrence of a domestic violence act as defined by law; and (2) whether a restraining order is necessary to protect the plaintiff.<sup>93</sup> This system is fairly straightforward and affords protection for the maximum length of time available. Yet, potential weaknesses surface when this model is compared with other examples.

The procedure that New Jersey currently follows does not permit a court to enter a FRO by agreement of the parties.<sup>94</sup> As a result, unless the alleged batterer agrees not to contest the allegations of domestic violence, a protected class member who seeks a final restraining order must prove abuse at the hearing stage.<sup>95</sup> This model is noticeably similar to the criminal justice system's prosecution paradigm.<sup>96</sup>

Furthermore, the criminal and civil systems in New Jersey define domestic violence similarly. Domestic violence is narrowly defined by the New Jersey Prevention of Domestic Violence Act, which includes acts that constitute criminal conduct, such as homicide, assault, terroristic threats, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass, harassment, and stalking.<sup>97</sup>

There are, however, differences between the criminal and civil system including a lower standard of proof in civil cases and a remedy that is exceptionally protective in the civil context when an order is entered.<sup>98</sup> Yet, given the narrow definition of abuse and the procedure followed by the New Jersey civil protection system, the likelihood that an individual in need of protection will, in fact, obtain an order is reduced. This standard fails to provide a civil protection system that is responsive to survivors who suffer abuse that is not criminal in nature.<sup>99</sup>

Given the civil protection procedure followed by New Jersey Courts, a higher percentage of requests for civil protection are subject to judicial determination compared to jurisdictions that allow the court to enter orders by stipulation of the parties.<sup>100</sup> This practice results in a higher percentage of court dismissals in New

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93. M.D. v. B.P., No. FV-12-2010-12, 2014 WL 3928519 at \*6 (N.J. Super. Ct. App. Div., Aug. 13, 2014).

94. SUPREME COURT OF NEW JERSEY, *supra* note 90, at IV-14-15 (listing the allowable remedies following an FRO hearing).

95. *Id.*

96. *Id.* at III-1-20.

97. N.J. STAT. ANN. § 2C: 25-19(a).

98. See, e.g., Apple Sulit-Peralejo, *Is a Civil Restraining Order the Same as a Domestic Violence Final Restraining Order?*, NJ FAMILY LEGAL BLOG: PERTINENT INFORMATION AS IT RELATES TO NEW JERSEY FAMILY LAWS (Sept. 16, 2009), <http://njfamilylaw.foxrothschild.com/2009/09/articles/domestic-violence/is-a-civil-restraining-order-the-same-as-a-domestic-violence-final-restraining-order/> (describing the process for obtaining a restraining order in New Jersey).

99. See SUPREME COURT OF NEW JERSEY, *supra* note 90, at IV-1-29 (explaining promises of civil protection).

100. For example, in Delaware in the year 2013, 62 % were entered by agreement of the parties and 37% were entered by the court after a hearing. Email from Eleanor Torres, Executive Director, Domestic Violence Coordinating Council, to author (Nov. 3, 2014, 2:59 PM) (on file with author). Similarly, in 2012, in Pennsylvania 56.4% of all orders were entered by agreement of the parties and 43.6% were entered by the court after a hearing. UNIFIED JUDICIAL SYS. OF PA.: ADMIN. OFFICE OF PA. COURTS,

Jersey compared to states that permit consent agreements. For example, 24.7% of all petitions filed in the State of New Jersey were dismissed by the court after a hearing, (15.5% at the FRO hearing stage, and 9.2% at the TRO stage).<sup>101</sup> This is in comparison to a 7% court dismissal rate in Delaware,<sup>102</sup> and 11.6% court dismissal rate in Pennsylvania.<sup>103</sup>

Overall, a larger percentage of petitions for civil protection filed in jurisdictions that permit settlements result in the entry of a CPO, as compared with the New Jersey Model. For example, in Delaware, fifty percent of all filings resulted in the entry of an order of protection.<sup>104</sup> In Pennsylvania, thirty-five percent of all filings resulted in an order of protection;<sup>105</sup> but only 18.6% of all petitions in New Jersey resulted in a final restraining order.<sup>106</sup> Additionally, another 11.2 % of all filings in New Jersey resulted in an indefinite extension of the temporary restraining order when attempts to serve the defendant proved unsuccessful.<sup>107</sup> The rate of petitions dismissed at the request of the petitioning party or as a result of her or his failure to appear is relatively consistent across the three jurisdictions.<sup>108</sup>

This foregoing data supports the conclusion that of those individuals who pursue relief from the court, beyond a temporary order, a higher percentage are not receiving requested protection in the State of New Jersey than in comparison to other jurisdictions. This may be due to a higher percentage of cases overall that are subject to judicial determination and the challenges those survivors face in proving acts of domestic violence at court hearings.<sup>109</sup> In addition, New Jersey's narrow definition of abuse<sup>110</sup> and the possibility that permanent protection is viewed as an extraordinary remedy may also influence outcomes.<sup>111</sup>

NEWS & STATISTICS: RESEARCH & STATISTICS: PROTECTION FROM ABUSE (PFA) CASES (2012) [hereinafter PA. PFA CASES], available at [www.pacourts.us/news-and-statistics/research-and-statistics/protection-from-abuse](http://www.pacourts.us/news-and-statistics/research-and-statistics/protection-from-abuse).

101. N.J. FAMILY PRACTICE DIV. ADMIN. OFFICE OF THE COURTS, REPORT ON THE PREVENTION OF DOMESTIC VIOLENCE ACT JANUARY 1, 2010 – DECEMBER 31, 2010 14-16 (2011), available at <http://www.judiciary.state.nj.us/family/dvrreport2010.pdf>.

102. DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, ANNUAL REPORT & FATAL INCIDENT REVIEW TEAM REPORT, 15 (2014) [hereinafter DEL. ANNUAL REPORT], available at <http://www.dvcc.delaware.gov/pdf/2014AnnualReportFinalCopy.pdf>.

103. See PA. PFA CASES, *supra* note 100 (reporting, in 2012, 41,485 total cases disposed, with 1358 final orders denied after hearing, 2298 temporary orders dismissed, and 1156 temporary orders denied).

104. Email from Mary Crabbe, Director of Case Processing, Del. Family Court, to author (Nov. 7, 2014, 20:42 EST) (on file with author).

105. PA. PFA CASES, *supra* note 100.

106. N.J. FAMILY PRACTICE DIV. ADMIN. OFFICE OF THE COURTS, *supra* note 101, at 16.

107. *Id.* at 15.

108. See *id.* (describing rates in New Jersey); PA. PFA CASES, *supra* note 100 (describing rates in Pennsylvania); DEL. ANNUAL REPORT, *supra* note 102 (describing rates in Delaware).

109. Margaret F. Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271, 276 (Apr. 2014) (maintaining that victims of domestic violence have difficulties proving abuse occurred).

110. N.J. STAT. ANN. § 2C:25-19(a) (defining domestic violence narrowly, including only acts that would also constitute crimes such as homicide, assault, terroristic threats, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass, harassment and stalking).

111. *Injunction*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/injunction> (last visited Feb. 12,

Regardless of the nature of the abuse—physical, threatening, or coercive—battered persons often lack independent evidence to support their testimony that abuse actually occurred.<sup>112</sup> Even with a lower standard of proof, a hearing on the merits presents risks not associated with case settlement. As a result, when a survivor's only option for protection involves litigation in a courtroom, their odds of obtaining protection are unpredictable given the evidentiary challenges of proving that domestic abuse has taken place. In contrast, settlement agreements guarantee an agreed upon level of protection, avoiding the risks inherent to litigation.

The procedural process followed by New Jersey's permanent order only model, although well-intended, interferes with survivor autonomy by limiting the opportunity to resolve the case through settlement agreement. The model serves as a reminder of the need for caution and analysis when developing any response to intimate partner violence. A change in process allowing protected class members the ability to enter into settlement agreements with the option to negotiate the length of their order would afford greater flexibility, autonomy, and protection.

#### *D. The Hybrid Approach*

Delaware represents a jurisdiction that follows a hybrid approach to duration. Not only does the Delaware Protection From Abuse Act provide CPOs of varying length, including permanent orders of protection, it also maintains a multi-level system of duration linked to abuse type.<sup>113</sup> In July of 2010, the Delaware general assembly passed House Bill 336, which amended the State's Protection from Abuse Act extending the duration of the civil protection from a maximum of one year to two years in length.<sup>114</sup> In addition, where aggravating circumstances exist, the court is authorized to enter an order of protection for as long as necessary, including the entry of a permanent order.<sup>115</sup>

The Delaware Act maintains an expanded definition of abuse that includes acts that are criminal in nature, as well as acts that are not punishable as crimes.<sup>116</sup> For example, a course of conduct, "which is likely to cause fear or emotional distress or to provoke a violent or disorderly response,"<sup>117</sup> and "any conduct which a reasonable person under the circumstances would find threatening or harmful" are prescribed acts of domestic violence.<sup>118</sup>

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2015).

112. See Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 56-62 (2000-2001) (providing a discussion of the difficulties of producing evidence and actually utilizing it in court).

113. DEL. DOMESTIC VIOLENCE COORDINATING COUNCIL, 20 YEAR REPORT (2014) [hereinafter DEL. 20 YEAR REPORT], available at [www.dvcc.delaware.gov/documents/20YearReportSinglePage.pdf](http://www.dvcc.delaware.gov/documents/20YearReportSinglePage.pdf).

114. *Id.* at 18.

115. *Id.*

116. DEL. CODE tit.10, §§ 1041(1)(a)-(c), (e)-(g).

117. *Id.* § 1041(1)(d).

118. *Id.* § 1041(1)(h).



The Delaware Protection from Abuse Act authorizes the court to enter an order up to two years in length for any enumerated act, or if aggravating circumstances exist the court may enter an order for as long as reasonably necessary, including a lifetime order.<sup>119</sup> Aggravating circumstances include: (1) physical injury or serious physical injury; (2) use of a deadly weapon or dangerous instrument against the petitioner by the respondent; (3) repeated violations of prior protective orders; (4) prior convictions for crimes against the petitioner; (5) the exposure of any member of the petitioner's family or household to physical injury or serious physical injury by the respondent; or (6) any other acts of abuse which constitute an immediate and ongoing danger to the petitioner or any member of the petitioner's family or household.<sup>120</sup>

The statute neglects to provide guidance for determining how long is "reasonably necessary," when aggravating circumstances are present.<sup>121</sup> As a result, petitioners and legal advocates alike have little guidance as to what, if any, set of circumstances mandate anything less than a permanent order in cases involving aggravating circumstances. Additionally, the statute provides catch-all language to the list of aggravating circumstances that includes any other acts of abuse that would constitute an "immediate and ongoing danger."<sup>122</sup> This catch-all provision provides no examples. Moreover, no Delaware case has tested this exception to date.

Although the Delaware statute is a good beginning, there are specific factors not included in the definition of aggravating circumstances that indicate risk of harm or ongoing danger to a petitioner. Stalking, for example, has a strong association with intimate partner homicide, recidivism, and protective order violations.<sup>123</sup> According to a Kentucky study on protective orders, perpetrators who stalk their partners prior to the entry of a protective order are more likely to violate the order after its entry.<sup>124</sup>

In addition, since 2011—the first full year after Delaware amended the Act to provide for permanent civil protection—the state average for lifetime orders entered ranged from slightly over 3.2% to 3.9% of all orders entered by the court.<sup>125</sup> This small percentage of permanent orders entered may be attributable to a lack of public awareness about the new remedy for permanent relief, the elevated threshold for aggravating circumstances, or the high settlement rate for CPOs in the State of

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119. *Id.* § 1045(f).

120. *Id.*

121. *Id.* (providing that orders may range from two years to permanent relief, yet gives no basis to determine a specific length of time for such orders).

122. DEL. CODE tit.10, § 1045(f).

123. See *Domestic Violence Statistics*, AM. BAR ASS'N, [http://www.americanbar.org/groups/domestic\\_violence/resources/statistics.html](http://www.americanbar.org/groups/domestic_violence/resources/statistics.html) (last visited Jan. 28, 2015) (providing statistics regarding stalking and domestic violence).

124. See TK LOGAN ET AL., UNIV. OF KY., *THE KENTUCKY CIVIL PROTECTIVE ORDER STUDY: A RURAL AND URBAN MULTIPLE PERSPECTIVE STUDY OF PROTECTIVE ORDER VIOLATION CONSEQUENCES, RESPONSES, AND COSTS* 11 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228350.pdf> (according to the report "stalking before the PO was obtained was significantly associated with" violations of the order subsequently to its entry).

125. E-Mail from Mary Crabbe, *supra* note 104.

Delaware.<sup>126</sup> If the overall rate of permanent orders entered does not increase, Delaware should engage in public awareness efforts related to the new provisions of the law. In addition, advocates should study negotiation and mediation practices to ensure that stipulations are not causing an overabundance of limited duration orders in cases that demand longer-term protection when aggravating circumstances exist.

Delaware's model provides protection for varying lengths of time depending on the nature of the acts of abuse as well as the type of relief requested.<sup>127</sup> Although no-abuse, no-contact, stay-away, and firearm restrictions continue indefinitely if a permanent order is entered in the State of Delaware, relief in the form of custody, support, possession of a residence, personal property, or other ancillary relief is available for a maximum of twelve months regardless of the nature of the violence.<sup>128</sup> Strict limits on the duration for ancillary relief present problems for protected class members who want to weigh their options before making significant decisions about pursuing divorce, support, or custody.<sup>129</sup>

A protected class member may want to give the abusive partner time to seek and successfully receive treatment services. Counseling services and safety planning may take priority over other legal actions. Moreover, it can take an extended period of time for the court to schedule and adjudicate separate petitions for ancillary relief following the entry of a CPO.

Although there are some disadvantages to the Delaware hybrid model, the system has resulted in a greater percentage of orders entered overall for protected class members who seek to follow through with the protection process. The outcomes in Delaware may result from the high rate at which orders are entered by agreement of the parties, greatly diminishing the number of cases that result in a hearing. This outcome, in turn, has resulted in a smaller percentage of cases overall that are dismissed by courts. For example, sixty-two percent of all CPOs entered by the Delaware Family Court were entered by consent agreement of the parties.<sup>130</sup> The data also indicates that thirty-eight percent of all orders entered were by judicial determination after a hearing on the merits of the case.<sup>131</sup> This data confirms that a large majority of CPO matters in the State of Delaware are resolved by the petitioner's power to decide and not by court determination. Moreover, in the State of Delaware, a protection order entered by agreement of the parties is a fully enforceable court order with the same force and effect as an order entered

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126. E-Mail from Eleanor Torres, Exec. Dir., Domestic Violence Coordinating Council, to Dana Harrington Conner, Associate Professor of Law and Director of Delaware Civil Clinic, Widener School of Law, Delaware Campus (Nov. 3, 2014) (on file with the DVCC and author) (showing that of all the orders entered by the court in 2013, sixty-two percent were entered by agreement of the parties).

127. See DEL. CODE tit. 10, § 1045(b) (describing the duration of relief available with respect to the type of relief sought).

128. *Id.*

129. Based on the author's twenty-one years of experience representing survivors of domestic violence.

130. E-mail from Eleanor Torres, *supra* note 126.

131. This percentage is derived from the 778 court adjudications resulting in dismissal, orders entered after trial or by default.

after a hearing and finding of domestic violence.<sup>132</sup> Thus, there is little downside to entering into a consent agreement for protection in the State of Delaware.

The various state duration models highlight the ways in which certain practices and procedures encourage or limit protection. Before an improved model can be articulated, the connections between civil protection, duration, and victim safety must be explored.

#### IV. THE PROMISE OF CIVIL PROTECTION

##### A. Underlying Principles

The civil protection system provides individuals who experience domestic abuse the promise of a process and legal remedy that is tremendously different from the criminal justice model. The focal point of civil protection is survivor safety, not punishment of the alleged perpetrator.<sup>133</sup> As a result, a lower standard of proof and an expansive definition of abuse are equitable.

This approach to protection should be comprehensive in nature, affording both injunctive and ancillary relief that best meets the safety needs of the survivor and child. The meaning of protection should be broadly construed.<sup>134</sup> In addition to no-contact, stay-away, and no-abuse provisions, the civil system recognizes that ancillary relief in the form of support, custody, possession of a residence, or other remedies increase survivor safety and reduce the likelihood that an individual who experiences domestic abuse will ultimately acquiesce to the abuser's attempts at reconciliation due to fear,<sup>135</sup> financial necessity,<sup>136</sup> or legal tactics.<sup>137</sup>

132. See DEL. CODE tit. 10, § 1043(c) (describing that a court will grant relief when it finds that abuse has occurred or when a respondent consents to a protective order).

133. See Stoecker, *supra* note 36, at 1041-43 (discussing the history and purpose of civil domestic protection orders).

134. Yet, many jurisdictions maintain narrow definitions of abuse, which include acts of physical abuse, threats of harm or acts that are criminal in nature. For example, New Jersey defines abuse as "homicide, assault, terroristic threats, kidnapping, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass, harassment, stalking." N.J. Stat. Ann. § 2C:25-19(a); see also ABA COMM'N, *supra* note 39 (outlining that the majority of jurisdictions maintain similar definitions of abuse to the New Jersey statute).

135. See Sharon L. Gold, *Why are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 940 (2003) (maintaining that batterers are more likely to increase their level of dangerous behavior after the victim leaves in an effort to regain power over them).

136. See Dana Harrington Conner, *Financial Freedom: Women, Money & Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 340-41 (2014) ("Economic instability is a link that binds a woman to the abuser. Regardless of the interventions in her case—law enforcement, family, or friends—as long as she remains financially dependent upon her abuser it is exceedingly difficult for a woman who experiences intimate partner violence to put a stop to the batterer's control over her. Arrest of the perpetrator, incarceration for a period of time, entry of a criminal no-contact order, or the provision of a civil protection order are all appropriate responses to intimate partner violence. Yet, without ensuring the survivor of domestic violence has food security, housing stability, healthcare, childcare, adequate transportation, as well as reasonable assurances of continuing resources or a guarantee of enforcement of any court ordered relief, a batterer will continue to maintain his power to abuse and control.").

137. Experts agree that batterers use the legal system in a variety of ways to exert control over their

In addition, the civil system has the potential to best promote survivor autonomy by vesting the decision-making authority in the petitioning party as opposed to a state prosecutor. Vesting the battered individual with the authority to make decisions about legal recourse and personal necessities empowers her to choose to file for protection, negotiate a settlement agreement, take her case to trial, or dismiss the legal action. An order can be fashioned to meet the individual needs of the petitioning party as to the type of relief afforded, as well as the length of time an order will last up to the maximum duration available.

Yet the models evaluated in this article suggest that the law and procedure of a particular jurisdiction can constrain a survivor's power to decide the type of relief afforded, how long that relief will last, and whether that relief will even be provided.<sup>138</sup> These issues are particularly important given the risks associated with intimate partner violence, as well as the curative power of civil protection in general.<sup>139</sup>

### *B. Health Implications*

The link between intimate partner violence and health risks is alarming. According to the World Health Organization (WHO), intimate partner violence "is a major contributor to the ill-health of women."<sup>140</sup> Moreover, the Centers for Disease Control and Prevention (CDC) and the WHO maintain that partner violence is a major public health problem,<sup>141</sup> confirming the link between domestic violence and problems related to both physical and mental health.<sup>142</sup> Not only are women at risk of physical injury,<sup>143</sup> researchers are now finding that women who experience any kind of domestic violence are more likely to have chronic health problems than women who have never experienced partner violence.<sup>144</sup>

Research suggests that survivors experience negative health outcomes for a variety of reasons that are both directly and indirectly related to the abuse. Victims may suffer physical injury due to a particular act of violence; develop health-risk coping behaviors such as drinking, smoking, or taking drugs; or experience harmful

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former partners. See LUNDY BANCROFT & JAY G. SILVERMAN, *THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS* 114 (2002) ("For some batterers, custody litigation is an important arena through which they seek to re-impose the control and domination that the end of the adult relationship has weakened." (citation omitted)).

138. See ABA COMM'N, *supra* note 39 (comparing the different CPO models state-by-state).

139. Lee Jong-Wook, *Preface* to GARCIA-MORENO ET AL., *supra* note 11, at vi; see Felton v. Felton, 679 N.E.2d 672, 677 (Ohio 1997) (stating that protection orders "are the more appropriate and [effective] method to prevent future domestic violence").

140. Lee Jong-Wook, *Preface* to GARCIA-MORENO ET AL., *supra* note 11, at vi.

141. BLACK ET AL., *supra* note 18, at 1.

142. See GARCIA-MORENO ET AL., *supra* note 11, at 3-4 (utilizing a study to solidify recognition of domestic violence as a health issue).

143. See GARCIA-MORENO ET AL., *supra* note 11, at 57 ("Although the majority of ever-injured women reported minor injuries (bruises, abrasions, cuts, punctures, and bites), in some sites more serious injuries were relatively common.").

144. VERIZON FOUND., *supra* note 19, at 2; see also GARCIA-MORENO ET AL., *supra* note 11, at 15 (describing that survivors are "significantly more likely to report poor or very poor health than women who had never experienced partner violence").

biological responses to chronic stress associated with intimate partner violence.<sup>145</sup> Although any one of these outcomes will negatively impact the health of the survivor, the piling on effect of two or more impacts can be devastating. Common physical health problems, such as high blood pressure,<sup>146</sup> difficulty sleeping,<sup>147</sup> headaches,<sup>148</sup> lower back pain,<sup>149</sup> chronic pain,<sup>150</sup> and various reproductive health issues (such as sexually transmitted diseases, miscarriages, and induced abortions) are experienced by survivors.<sup>151</sup>

The ill effects of intimate partner violence on the mental health of women are considerable as well. Study participants report experiencing depression, anxiety, post-traumatic stress disorder, general emotional distress, thoughts of suicide, fatigue, crying easily, and an inability to enjoy life.<sup>152</sup> Moreover, the extent and magnitude of the problem is wide-ranging, with experts reporting that over half of women utilizing mental health services today have experienced some form of past or present partner violence.<sup>153</sup> Exposure to partner violence has been linked to the development or worsening of psychiatric disorders.<sup>154</sup> The CDC finds that, of the women who have experienced some form of intimate partner violence, approximately eighty-percent report at least one significant impact.<sup>155</sup> For example, survivors report distress, safety concerns, symptoms of post-traumatic stress disorder, and medical treatment needs.<sup>156</sup>

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145. BLACK ET AL., *supra* note 18, at 61.

146. *Id.* at 61-63.

147. *Id.*

148. *Id.*

149. VERIZON FOUND., *supra* note 19, at 2.

150. See BLACK ET AL., *supra* note 18, at 3 (explaining that the health consequences of intimate partner violence included "frequent headaches, chronic pain, difficulty sleeping, activity limitations, poor physical health and poor mental health . . .").

151. See GARCIA-MORENO ET AL., *supra* note 11, at 63 ("In the majority of settings, ever-pregnant women who had experienced physical or sexual partner violence, or both, reported more induced abortions miscarriages than women who had never experienced partner violence.").

152. See GARCIA-MORENO ET AL., *supra* note 11, at 55 ("In all settings, women who had ever experienced physical or sexual partner violence, or both, reported significantly higher levels of emotional distress and were more likely to have thought of suicide or to have attempted suicide, than were women who had never experienced partner violence."); see also Carolc Warshaw et al., *Mental Health Consequences of Intimate Partner Violence*, in INTIMATE PARTNER VIOLENCE: A HEALTH-BASED PERSPECTIVE 151-52 (Connie Mitchell & Deirdre Anglin, eds., Oxford Univ. Press 2009) (explaining that women who experience abuse are at greater risk for mental illness).

153. See Warshaw et al., *supra* note 152, at 152 ("Both random population studies and studies conducted in clinical settings indicate that victimization by an intimate partner places women at significantly higher risk for depression, anxiety, post-traumatic stress disorder, somatization, medical problems, substance abuse and suicide attempts, whether or not they have suffered physical injury and more generally for reporting unmet mental health needs. In a meta-analysis of mental health conditions experienced by survivors of intimate partner violence, the weighted mean prevalence across settings was 50% for depression, 61% for PTSD and 20.3% for suicidality. Rates of depression were highest among women in intimate partner violence shelters (63.8%) and court-involved women (73.7%), PTSD rates were highest for women in shelters (66.9%) and drug treatment programs (58.1[%]) and rates of suicide attempts were highest among women seen in psychiatric settings (53.6%).") (citations omitted)).

154. *Id.*

155. BLACK ET AL., *supra* note 18, at 56.

156. *Id.*

Although physical injury can be directly attributed to acts of abuse, the link between intimate partner violence and chronic diseases is less clear.<sup>157</sup> Experts maintain that the body's responses to long-term stress may be the link between intimate partner violence and certain diseases,<sup>158</sup> as the causal connection "between violence, stress, and somatic disorders . . . has been well established."<sup>159</sup>

Without proper intervention, partner violence can lead to negative health consequences that span a lifetime.<sup>160</sup> The safety and welfare of survivors of intimate partner violence is of paramount concern, and protective orders provide a multitude of benefits.<sup>161</sup> Research indicates that the entry of a protection order reduces the rate of recidivism,<sup>162</sup> may reduce the risk of domestic homicide,<sup>163</sup> and has a positive influence on the health and safety of children.<sup>164</sup> As a result, affording this protection to the greatest number of individuals in need should be a significant public policy concern.

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157. See *id.* at 10 (describing acts of abuse that cause physical injury).

158. CDC, ADVERSE HEALTH CONDITIONS AND HEALTH RISK BEHAVIORS ASSOCIATED WITH INTIMATE PARTNER VIOLENCE—UNITED STATES, 2005 MORBIDITY AND MORTALITY WEEKLY REPORT 116 (2008).

159. *Id.* ("[O]ne underlying mechanism that might link IPV and chronic diseases is the biologic response to long-term or ongoing stress. For example, the link between violence, stress, and somatic disorders (e.g., fibromyalgia, chronic fatigue syndrome, temporomandibular disorder, and irritable bowel syndrome) has been well established. These same stress responses also have been linked to various chronic diseases, including cardiovascular disease, asthma, diabetes, and gastrointestinal disorders.").

160. BLACK ET AL., *supra* note 18, at 4.

161. See LOGAN ET AL., *supra* note 124, at iii (explaining a study showing that half of the victim participants experienced considerably less abuse and fear of abuse in the months after obtaining a protection order).

162. See *id.* (providing that protective orders deter further violence, increase victim safety, save money, improve victims' quality of life, and remain beneficial in rural and urban communities).

163. See K.A. Vittes & S.B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, 14 INJURY PREVENTION 191, 194 (2008) ("Most (88.8%) female victims of IPH [intimate partner homicide] in California were not under the protection of a domestic violence restraining order when they were murdered. Although a higher proportion of victims of non-fatal intimate partner violence have sought protection through a restraining order, as with IPH victims, most (66.2–83.1%) have not. There are at least five potential reasons why a lower proportion of victims of fatal (versus non-fatal) intimate partner violence had a restraining order. First, women with a severely controlling and otherwise abusive partner may be less able to access the court system. Second, if able to access the courts yet having a homicidal or severely abusive partner, she may not believe that a restraining order would protect her or otherwise believe that the courts would not be useful in her situation and, thus, not seek protection through the courts. Third, victims of fatal violence may seek restraining orders at the same rate as victims of non-fatal violence but not be granted the order by the judge or commissioner. Fourth, victims and assailants in non-fatal violence may be qualitatively different from victims and assailants in fatal violence. And, finally, domestic violence restraining orders may effectively prevent IPH.").

164. See LOGAN ET AL., *supra* note 124, at 16 ("[B]etween 35% and 95% of women filing protective orders have children. Thus, protective orders not only potentially provide relief from long term, severe violence but also may help protect children living in these families.").

### C. Benefits of Civil Protection Orders

#### 1. Increased Safety

Although separation is believed to be one of the most dangerous times for a victim of intimate partner violence,<sup>165</sup> experts agree that CPOs are one of the most effective methods of ensuring survivor safety.<sup>166</sup>

In fact, research indicates that in some cases, all it takes to stop the violence is the entry of an order of protection. In two separate studies, one involving 750 women and the other 213 women, the entry of an order of protection alone stopped the violence for approximately half the participants.<sup>167</sup> For the other half of the participants, in one study, the level and frequency of abuse was greatly reduced by the entry of the order alone.<sup>168</sup> This research indicates that orders of limited duration may provide sufficient protection for some survivors, depending on their individual circumstances.<sup>169</sup>

For individuals who seek and obtain longer-term orders, studies suggest having a CPO in place for the twelve months following a domestic call to law enforcement was associated with a decreased risk of re-assault.<sup>170</sup> Researchers found that victims who kept an order in place experienced a decrease in recidivism, suggesting that maintenance of the order is a significant factor for some survivors.<sup>171</sup> For example, in “a 12-month follow-up, having a permanent CPO in place was associated with a reduction in police-reported physical violence” by eighty percent as compared with individuals who did not have a CPO.<sup>172</sup>

Yet, a batterer’s perceived loss of control over the victim may result in an escalation of violence in some cases.<sup>173</sup> Thus, separation is not always the safest

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165. See STARK, *supra* note 21, at 115 (“[T]he risk of severe or fatal injury increases with separation. Almost half the males on death row for domestic homicide killed in retaliation for a wife or lover leaving them.”); see also Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 NAT’L INST. JUST. J. Nov. 2003, at 20, 23, available at <https://www.ncjrs.gov/pdffiles1/jr000250f.pdf> (“The risk of intimate partner homicide is highest when a victim of domestic violence tries to leave the relationship.”).

166. *Walters v. Walters*, 780 N.E.2d 1032, 1035 (Ohio Ct. App. 2002) (“[A] CPO is appropriate and the most efficacious method of preventing domestic violence even when another court order, such as a divorce decree, already prohibits the parties from harassing each other.” (citing *Felton*, 679 N.E.2d at 677)).

167. TK Logan & Robert Walker, *Civil Protection Orders Effective in Stopping or Reducing Partner Violence: Challenges Remain in Rural Areas with Access and Enforcement*, 18 CARSEY INST. 2, 4 (2011), available at <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1130&context=carsey>.

168. *Id.*

169. See Logan & Walker, *supra* note 1, at 688 (“[I]n some cases all it takes is a PO to stop the violence . . .”).

170. See Victoria Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 AM. J. PREV. MED. 16, 16 (2003) (“[H]aving a permanent CPO during the first 12 months following a police-reported incident [is] associated with a significantly decreased risk of new episodes of police-reported physical abuse.”).

171. *Id.* at 19.

172. *Id.* at 20.

173. See Richard M. Ogle & Caroline M. Clements, *A Comparison of Batterers to Nonbatterers on Behavioral and Self-Reports Measures of Control*, 37 J. APPL. SOC. PSYCHOL. 2688, 2688 (2007)

alternative for all individuals experiencing partner violence.<sup>174</sup> The potential for an increased risk of harm to the victim calls for careful consideration, individualized attention, and a remedy crafted for the specific needs of the particular survivor who seeks legal intervention.<sup>175</sup> The timing of legal action, safety planning, and risk assessment are important factors for consideration in these cases.

A reduction in the severity of violence is also a beneficial outcome of CPOs.<sup>176</sup> Preventing the escalation of violence improves the health and welfare of both the victim and the child.<sup>177</sup> According to the Supreme Court of Vermont in *Benson*, one fundamental reason for civil protection relates to the idea that these orders “prohibit what otherwise may be viewed as inoffensive contact before it matures into further incidents of abuse.”<sup>178</sup>

## 2. Improved Quality of Life

It is difficult to estimate the extended personal and social costs of daily fear, survival strategies, and other effects of violence on the woman’s capacity to provide child care, to work, and to be effective in her many social roles. There is also the question of the cost of a miserable existence and lost potential future opportunities. . . . [I]t is critically important to account in some way for the impact on an individual’s quality of life and the potential change on quality of life due to a justice system intervention.<sup>179</sup>

Experts agree that quality of life improvements flowing from a CPO are difficult to measure.<sup>180</sup> Yet, there is little question that safeguarding the emotional well-being of those who experience intimate partner violence is a significant public policy concern.

For some survivors of intimate partner violence, the entry of a protection order can reduce fear, anxiety, sleeplessness, and overall stress levels.<sup>181</sup> In addition, for some individuals, the time and attention spent on survival and coping strategies associated with abuse, access, and control, can be greatly reduced by way of civil

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(finding that batterers appear to respond to a loss of control with negative affect, which may be a factor contributing to abuse perpetration).

174. *Id.*

175. Melanie F. Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 159 (1995) (“[T]he need to address specific concerns of battered women has increased. Such need is evidenced by increased calls to domestic violence hotlines, growing dockets in family courts and other forums designed to combat spousal abuse, and the existence of domestic violence task forces in local police precincts, specifically created to handle the increased number of domestic violence calls.”).

176. Logan & Walker, *supra* note 167, at 2 (finding an elimination or reduction in violence following the implementation of a protective order).

177. See LOGAN ET AL., *supra* note 124, at 16 (discussing that a large percentage of women filing for CPOs have children).

178. *Benson*, 769 A.2d at 1294.

179. LOGAN ET AL., *supra* note 124, at 20.

180. *Id.*

181. See *id.* at 134 (explaining that costs associated with quality were significantly reduced after the issuance of a domestic violence order).



protection.<sup>182</sup>

Courts have recognized that protection orders provide survivors of intimate partner violence with a measure of "emotional security," or safeguard from a fear of future abusive conduct.<sup>183</sup> Increasing the emotional security of adult victims of domestic violence is positively correlated with improved mental and physical health outcomes.<sup>184</sup> In turn, improved health outcomes increase the overall well-being of the family unit.

Research indicates that CPOs may improve the overall quality of a survivor's life. For example, a study conducted by the Carsey Institute found that women who obtained an order of protection experienced a significant reduction in fear of future harm.<sup>185</sup> The study also indicated that the number of days women experienced distress or sleep loss due to intimate partner violence drastically decreased once they obtained an order of protection.<sup>186</sup> Interestingly, the outcomes for rural women differed from women who lived in urban areas. Rural women were found to experience significantly more sleep loss and days of distress than women living in urban areas after obtaining a CPO.<sup>187</sup> Improvements in the overall well-being of survivors appear to be linked to the existence of an order, as well as the legal system's enforcement of that order. The study indicated that a charge was documented in the court records of only six percent of all rural offenders who were reported to have violated their orders of protection as compared to fifty-six percent of urban offenders who were reported.<sup>188</sup> Consequently, duration alone will not ensure the safety and well-being of survivors, as many facets of the civil protection system are relevant to fashioning an order that meets the particularized needs of individuals who experience abuse.

## V. RELIEF AS A RELEVANT FACTOR

Much of the discussion about duration has generally focused on length of time to the exclusion of the extent to which the type of relief afforded should also drive policy. Relief available pursuant to a CPO can be broken down into two broad categories: (A) restrictions on behavior and (B) ancillary relief.

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182. See *id.* (providing that the number of days that victims report stress, anxiety, or depression was reduced by thirty-six percent after the issuance of a domestic violence order).

183. *Benson*, 769 A.2d at 1294 ("[O]ne purpose of restraint on abuser's conduct is to preserve 'the mental and emotional health of the vulnerable.'" (quoting *State v. Hauge*, 547 N.W.2d 173, 176 (S.D. 1996))).

184. *Logan & Walker*, *supra* note 167, at 3 (finding improved quality of life after the implementation of a protective order).

185. See *id.* at 1, 3 (demonstrating that women in both urban and rural areas experienced a decrease in fear of future harm after obtaining a protective order).

186. *Id.* at 3.

187. *Id.*

188. *Id.*

### A. Restrictions on Behavior

No-contact, stay-away, and no-abuse provisions, as well as firearms restrictions are examples of restrictive relief pursuant to a civil protection from abuse order.<sup>189</sup> These mandates are aimed directly at limiting conduct in an effort to eliminate abuse, power, control, and opportunity.<sup>190</sup> There are a variety of reasons why restrictions on a batterer's conduct enhances the safety of victims.<sup>191</sup> These measures greatly diminish a victim's overall exposure to abuse.<sup>192</sup> If the batterer is not permitted to have physical access to the victim on a daily basis, his prospects of committing acts of violence against her are diminished.<sup>193</sup> No-contact orders that prohibit any form of communication with the victim restrict the batterer's ability to create conflict, intimidate the victim, or make threats of harm.<sup>194</sup>

Determining how long restrictions on behavior should remain in effect is complicated by several issues. First, it is difficult to predict risk of future harm.<sup>195</sup> Second, it is nearly impossible to determine when risk will cease to exist.<sup>196</sup> Because relief in the form of civil no-contact, no-abuse, and stay-away provisions is not typically available through the filing of separate actions, the opportunity to obtain longer-term protection should be made available pursuant to a CPO. Ancillary relief, on the other hand, is usually temporary in nature and is available through the filing of separate civil actions for a longer-term remedy, such as custody, divorce and support actions, as well as property division.<sup>197</sup> Extended duration may be particularly important in relation to restrictive measures, in particular, because these types of relief are directly aimed at curtailing batterers' behavior, increasing victim safety, and reducing escalations of violence.<sup>198</sup>

### B. Ancillary Relief

In addition to restraining remedies, some jurisdictions provide ancillary relief as part of the CPO.<sup>199</sup> Ancillary relief in the form of custody, visitation, child and spousal support, and possession of the residence or other personal property are

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189. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1507 (2008).

190. *Id.* at 1519.

191. *Id.* at 1507.

192. *Id.* at 1519 (providing the example that no-contact and stay-away provisions decrease a batterer's opportunities for violence).

193. *Id.*

194. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 929 (1993).

195. *Id.* at 1086-87 ("Courts cannot presume that a batterer's attempts to control and injure the abuse victim will end in a month, a year, or ten years.").

196. *Id.*

197. *See id.* at 881-92 (exploring jurisdictional differences in the relationship between CPOs and other ancillary relief for domestic violence victims).

198. *Id.* at 1086-87 (suggesting that increasing the duration of CPOs would be ideal because the courts cannot presume to know when the risk of violence would end, and that evidence has shown that batterers have continued to harass victims for even twenty-five years after the victims left them).

199. *See* ABA COMM'N, *supra* note 39 (listing the requirements for CPOs and what CPOs can cover for each state).

critical measures which increase the likelihood that the victim is able to remain free from abuse and less vulnerable to the reengagement efforts of the batterer.<sup>200</sup> Without ancillary relief, the victim may be forced to communicate and collaborate with a former partner placing her at risk of further physical or emotion harm.<sup>201</sup> Furthermore, interim residential placement and restrictions on visitation are often critical to the treatment and recovery of children exposed to intimate partner violence.<sup>202</sup> Moreover, the negative consequences of intimate partner violence can be more fully considered before visitation orders are decisively established.<sup>203</sup> This is true for financial relief as well.<sup>204</sup> By allowing the court to enter a temporary child or spousal support award, which is ultimately replaced by a fully adjudicated order, the survivor is not forced to return to an abusive relationship due to the poverty which often follows separation from an abusive relationship.<sup>205</sup>

To avoid many of the problems related to fixing the duration of ancillary relief pursuant to a CPO, several options could be made available to petitioning parties. For petitioners who may need additional time to decide what future legal action they want to take, the option to request ancillary relief pursuant to the CPO must be available. This relief should be in effect for a minimum of eighteen months.<sup>206</sup> This duration provides the protected person with time to develop a safety plan, seek legal advice, and decide whether to seek a more permanent order from the court on matters of custody, visitation, support, divorce, and property division.<sup>207</sup>

For petitioners who, at the time of the CPO filing or hearing, want the court to address ancillary issues on a more permanent basis, they could file separate petitions for custody, visitation, support, or divorce. At the time of the CPO hearing, the court should be required to enter temporary relief pursuant to the CPO that would remain in place until a further order of the court. The court would also be required to schedule the matters for trial within six to eight months. As a result, ancillary issues could be fully addressed through other civil proceedings, subsequent to the entry of the CPO. For example, if a petitioner seeks temporary custody pursuant to a CPO, the entry of temporary custody or visitation pursuant to the CPO would trigger a trial date within six to eight months of the entry of the CPO.

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200. See Klein & Orloff, *supra* note 194, at 1087 (“Custody, visitation, and child support provisions contained in civil protection orders should also remain in effect until they are modified by a subsequent court proceeding or until the children reach the age of majority. This approach has the advantage of minimizing the need for parties in domestic violence cases to continually meet in court under circumstances fraught with conflict.”).

201. *Id.*

202. See Allie Meiers, Comment, *Civil Orders of Protection: A Tool to Keep Children Safe*, 19 J. AM. ACAD. MATRIMONIAL LAW. 373, 383 (2005) (exploring the effects of various housing arrangements on abused children and their relation to civil orders of protection).

203. See *id.* (discussing the benefits of “stay away” provisions).

204. *Id.* at 383.

205. See *id.* at 389-90 (discussing the correlation between poverty and domestic abuse).

206. See Stoecker, *supra* note 36, at 1046-47 (explaining that nine state statutes allow protective orders to be effective for at least eighteen months).

207. See *id.* at 1066 (discussing social scientists’ findings that lengthier orders produce more substantial safety outcomes for the victim).

## VI. ESTABLISHING DURATION

Affording relief to the greatest number of individuals who are in need of, and desire, civil protection promotes the overall health and welfare of our community. In keeping with this important public policy goal, a system must be created that is responsive to individual circumstances.<sup>208</sup> This requires making options available regarding the duration of an order as well as the relief to be afforded.<sup>209</sup> Given the complex nature of such a system, general guidelines are useful for making determinations as to the appropriate length of a CPO according to a particular set of facts.

Intimate partner violence affects a diverse group of individuals.<sup>210</sup> Each survivor is unique and mandates a personalized approach to protection.<sup>211</sup> Although the civil protection system is not a viable option for all survivors,<sup>212</sup> in an effort to provide better protections for those who choose to engage with the civil protection system, a broad range of options must be made available that reflect the unique circumstances of battered persons.<sup>213</sup> A menu of options related to both relief and duration provides the flexibility necessary to tailor CPOs according to the totality of the circumstances of specific cases.<sup>214</sup> Pre-conceptions about what is best for all survivors of domestic violence present safety risks, conflict with survivor autonomy, and run contrary to the civil system of protection.<sup>215</sup>

A system created to empower survivors must be responsive to the specific and distinct needs of those individuals. A "one size fits all" model is contrary to the promise of civil protection and fails to appreciate the risks of an inflexible paradigm.<sup>216</sup> Experts must continue to make assessments about the type of relief

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208. See Brenner, *supra* note 27, at 301 ("Despite the actual variance in these laws, however, there remains a problematic uniformity that is characteristic of the current approach: many of the existing laws, policies, and practices tend to impose a 'one size fits all' solution to a problem that is incredibly complex. The current singular approach might be necessary as a matter of practicality and public welfare, but it does not adequately respond to all of a particular victim's needs or to the needs of all victims.").

209. See Goldfarb, *supra* note 189, at 1507 (explaining that CPOs are intended to be tailored to the needs of each victim so that typically, the process of entering a protection order starts with a form or checklist that can be filled in with specific types of relief designed to suit the individual case; however, some judges do not take advantage of the ability to customize the order, instead relying on general provisions in the standard form).

210. See *Who Is Affected By Domestic Violence*, DEL. COAL. AGAINST DOMESTIC VIOLENCE, <http://www.dcadv.org/who-affected-domestic-violence> (last visited Jan. 29, 2015) ("Domestic violence occurs in every culture, country and age group. It affects people from all socioeconomic, educational, and religious backgrounds and happened in both same-sex and heterosexual relationships.").

211. Brenner, *supra* note 27, at 301.

212. See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 8 (2012) ("The current legal response to domestic violence serves some women well. But it serves many women poorly, and some women not at all.").

213. See Goldfarb, *supra* note 189, at 1507 (explaining that although some judges do not use the tailored approach to CPOs, it is available in order to meet the victim's specific needs).

214. *Id.*

215. *Id.*

216. See Brenner, *supra* note 27, at 301 (explaining that a one size fits all approach is inappropriate for the complex issues domestic violence victims face).

that best protects survivors, provide those remedies as options, and offer advice accordingly.<sup>217</sup>

Survivors should be afforded options that allow them to choose the length of their order and the relief necessary to best promote their autonomy as well as their health and safety needs.<sup>218</sup> States must afford the broadest range of duration options available, including limited and permanent protection orders.<sup>219</sup> Policy-makers may need to acknowledge that not all options will be made available to every member of the protected class in all cases. This is a difficult task for policy-makers, as it requires creativity and flexibility.

A multi-level approach to civil protection could make an eighteen-month order available to all protected class members, with permanent protection available in cases that have aggravating factors.<sup>220</sup> All relief, ancillary and restraining, should be available for eighteen months, unless the petitioning party seeks a shorter duration. Eighteen months should provide the protected party sufficient time to create a safety plan and file separate petitions for custody, support, or divorce. A violation of an order of limited duration would trigger the automatic extension of that order to permanent status, unless the protected party requests an extension of a more limited duration.

The aggravating factors that should trigger the entry of an order of permanent duration include circumstances that indicate an increased risk of harm or recidivism.<sup>221</sup> Harm includes circumstances that decrease the overall health, welfare, and safety of survivors of intimate partner violence and their children.<sup>222</sup> These circumstances include the following: (1) stalking; (2) strangulation; (3) sexual violence; (4) any act of domestic abuse against a pregnant petitioner; (5) physical abuse or threat of harm to the petitioner, petitioner's children, or other family member; (6) use of any instrument in a deadly or dangerous manner; (7) commission of a physical act of abuse or threat of harm in the presence of a child or other family member of the petitioner; (8) a threat of suicide by the respondent; (9) violation of a civil protection or criminal no-contact order; (10) the petitioning party has minor children; or (11) any other domestic abuse which constitutes an ongoing risk of emotional or physical harm to the petitioner or any member of the

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217. See Harrington Conner, *supra* note 136, at 381 ("Lawyers who do not spend time and attention on spousal or child support matters pretrial fail to meet their duty of competence as required by the rules of professional conduct.").

218. See Goldfarb, 189 note 189, at 1508 ("Civil protection orders offer battered women a greater opportunity to exercise their autonomy because civil proceedings are initiated and directed by the victim for her own benefit.").

219. See Stoecker, *supra* note 36, at 1087 (proposing that making long-term, and even indefinite, orders available can serve multiple goals including protecting domestic violence survivors from further harm).

220. See DEL. 20 YEAR REPORT, *supra* note 113, at 18 (explaining that where aggravating circumstances exist, the court may order no contact for as long as it deems necessary to prevent further abuse, including the entry of a permanent order).

221. See DEL. CODE ANN. tit. 10, § 1045(f) (2015) (describing aggravating factors as those that "constitute an immediate and ongoing danger to the petitioner or any other member of the petitioner's family or household").

222. *Id.*

petitioner's household.<sup>223</sup> Any one of the foregoing aggravating factors in connection with an act of domestic violence trigger the entry of a permanent protection order restricting contact and abusive behavior, unless the petitioning party seeks a limited order of protection. All ancillary relief pursuant to a civil no-contact order, permanent or limited, remains in effect for eighteen months, unless the petitioning party seeks a shorter period of time.

Many of the foregoing aggravating factors are self-explanatory and require no additional analysis as to why permanent protection should be afforded when the factor exists. Additional analysis, however, is valuable for the following two factors: (A) stalking and (B) a victim with minor children.

#### *A. Stalking*

Experts maintain that stalking is one of the most reliable predictors of increased risk and recidivism in the area of intimate partner violence.<sup>224</sup> According to a 2010 report by the CDC, one in six women and one in nineteen men experience stalking at some point in a lifetime.<sup>225</sup> According to the report, an intimate partner stalked sixty-six percent of all female stalking victims, while men were stalked by an intimate partner at a rate of approximately forty-one percent.<sup>226</sup> Stalking is known to produce greater levels of fear and anxiety in those who experience this type of abuse as opposed to those that do not and is also associated with lower perceptions of CPO effectiveness.<sup>227</sup>

Regrettably, research indicates that stalking tends to be one of the most unrecognized areas of abuse.<sup>228</sup> Stalking is often undetected because many of the behaviors associated with this type of abuse, viewed in isolation, appear low-risk.<sup>229</sup> Telephone calls, cards, text messages, e-mails, and visits to an individual's home or work are all activities in which people regularly engage on a daily basis. In fact, the most common stalking behavior is making repeated and unwanted calls and sending repeated and unwanted text messages.<sup>230</sup> More than half of female stalking

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223. See, e.g., DEL. 20 YEAR REPORT, *supra* note 113, at 5-7 (discussing the variety of ways that victims of domestic violence can be harmed, including strangulation, stalking, and firearms and providing ways to enhance victim safety and protection).

224. See LOGAN ET AL., *supra* note 124, at 116 ("Stalking was significantly associated with violations even after controlling for a variety of factors, such as severity of physical and sexual violence 6 months before the DVO [Domestic Violence Order] was issued, involvement of the PO [Protective Order] partner in the criminal justice system 6 months before the DVO was issued, number of days in the relationship during the follow-up period, and other relevant factors.").

225. BLACK ET AL., *supra* note 18, at 2.

226. *Id.*

227. See LOGAN ET AL., *supra* note 124, at 116 ("Being stalked was also associated with more fear of future harm and with lower perceptions of DVO effectiveness. At the same time that stalking wreaks havoc on the victims' lives, the criminal justice system does not seem to be acknowledging it as a serious issue, as evidenced by few to no charges of stalking and the lack of differences in arrest or charges for victims who experienced violations but no stalking and victims who experienced violations plus stalking.").

228. *Id.*

229. See DEL. 20 YEAR REPORT, *supra* note 113, at 6 ("Stalking is a distinctive form of criminal activity composed of a series of actions that, if taken individually, might constitute legal behavior.").

230. BLACK ET AL., *supra* note 18, at 2.

victims report being approached at their home, work, or other location and one-third report being watched, followed, or tracked by their stalker.<sup>231</sup> Responders, however, often look for more obvious acts of abuse when evaluating intimate partner violence, despite the connection between stalking and a heightened risk for other partner violence, including homicide.<sup>232</sup>

Stalking is a relatively new area of the law. In fact, the first criminal stalking law was not passed until 1990.<sup>233</sup> Advancements in technology, such as e-mail, texting, the internet, tracking devices, and global positioning systems, enable an abuser to easily observe, monitor, and locate his target.<sup>234</sup> These new forms of stalking behaviors are more likely to go undetected, which only increases the risk of harm and creates greater challenges for our legal system.<sup>235</sup> As a result, the presence of any stalking behavior in a civil protection case should be treated as an aggravating factor that warrants longer-term or permanent protection.

### *B. The Victim with Minor Children*

The assumption that permanent protection is not appropriate in cases involving a common child is at odds with available data. Research indicates that single women with children are at an elevated risk of intimate partner violence as compared with any other class of individuals.<sup>236</sup> According to a recent special report by the U.S. Department of Justice, single females living with children experienced intimate partner violence at rates ten times higher than married adults and six times higher than women without children.<sup>237</sup> The rates at which single female victims living with children are abused are so statistically significant that they demand particularized consideration by policy-makers.<sup>238</sup>

The reasons why single women with children are at an increased risk for violence are wide-ranging. According to Lundy Bancroft, an author and consultant on domestic violence, and Jay G. Silverman, a researcher who specializes in understanding and preventing gender-based violence against women, batterers tend to view their children and former partners as possessions.<sup>239</sup> The batterer's extreme possessive tendency can result in increased threats to the former partner, psychological pressure on the children, child abuse, and litigation.<sup>240</sup> The children

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231. *Id.* at 32.

232. See LOGAN ET AL., *supra* note 124, at 10 (reporting that stalking victims rarely reported violations because they felt there was no point or no proof that victim service representatives would acknowledge).

233. U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, THE OFFICE ON VIOLENCE AGAINST WOMEN'S GRANT FUNDS USED TO ADDRESS STALKING: 2012 REPORT TO CONGRESS 4 (2012), available at <http://www.justice.gov/sites/default/files/ovw/legacy/2013/04/22/2012-stalking-rpt.pdf>.

234. *Id.* at 5.

235. *Id.* at 25.

236. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2010 I (Nov. 2012), available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf>.

237. *Id.* at 7.

238. *Id.*

239. BANCROFT & SILVERMAN, *supra* note 137, at 13.

240. *Id.* at 13.

are the batterer's justification for continuing his campaign of control, intimidation, and abuse.<sup>241</sup> Moreover, children become the ideal vehicle to carry out the batterer's harmful behavior.<sup>242</sup> The children may be used to covertly transmit threats to the abused partner.<sup>243</sup> For example, a former client of Bancroft and Silverman told "his wife prior to separation, 'I love you, and that's for life. If I can't have you, no one else will, and we're going to die together.' After separation, he said to the children, 'Tell your mother I will always love her.'"<sup>244</sup> As these experts maintain, the children have no understanding of the significance of the messages they convey or the harm these messages cause.<sup>245</sup>

The batterer's intense feelings of ownership raise the level of dangerous behavior, increasing the risk to a woman and her children. After separation, batterers often seek reunification, retaliation, or control over their victims.<sup>246</sup> When these efforts prove unsuccessful, the batterer, given his intense feelings of entitlement, may respond by increasing his abusive behavior.<sup>247</sup> Experts explain that the batterer's feelings of entitlement may be the primary characteristic that leads to his belief that he is justified in the use of abuse to "protect his special status."<sup>248</sup>

### CONCLUSION

A temporary order of protection may be all that is necessary to stop the violence in some domestic violence cases. Yet, it is not the ideal remedy for all individuals who experience intimate partner violence. Correspondingly, the promotion of maximum duration in all cases for all survivors may only yield maximum protection for some survivors at the expense of a larger class of individuals who experience domestic abuse.

A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. Yet, use of the same remedy for all survivors in all cases is not only impractical, it is risky. This approach fails to take into consideration the complicated nature of intimate partner violence, risk assessment, family dynamics, and human emotion.

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241. *Id.* at 75.

242. *Id.* at 75-76 ("Batterers can use children as vehicles for communicating with their former partners, a tactic that becomes particularly important if the woman has obtained a restraining order . . .").

243. *Id.* at 76.

244. *Id.* (citation omitted).

245. BANCROFT & SILVERMAN, *supra* note 137, at 76.

246. *Id.* at 75-76.

247. *Id.* at 76.

248. *See id.* at 7 ("The overarching attitudinal characteristic of batterers is entitlement. Entitlement may be the single most critical concept in understanding the batterer's mentality . . . Entitlement is the belief that one has special rights and privileges without accompanying reciprocal responsibilities. . . . The batterer's entitlement leads him to feel justified in taking steps to protect his special status, including the use of physical intimidation when he considers it necessary. The belief that violence toward a partner can be justified is a strong predictor of which men will batter . . .").



Furthermore, the notion that judges alone engage in decision-making when it comes to civil protection fails to take into account what happens outside of the courtroom. In order to achieve the promise of civil protection, the system must be flexible, offering a hybrid approach to duration of the order that affords the greatest level of protection available to the abused individual in light of her or his particular circumstances.