

WE ARE NEVER EVER GETTING BACK TOGETHER: DOMESTIC VIOLENCE VICTIMS, DEFENDANTS, AND DUE PROCESS

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* TAYLOR SWIFT, *We Are Never Ever Getting Back Together*, on RED (Big Machine Records 2012).

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INTRODUCTION

In a YouTube video, Christopher Ferguson waves a gun in the air while threatening to shoot his former girlfriend and vowing to “put her face on the dirt until she can’t breathe no more.”¹ At the time he made the video, Mr. Ferguson lived in North Carolina while his former girlfriend, Ms. Rios, resided in Connecticut.² Ms. Rios petitioned for a civil protection order (CPO) in Connecticut.³ The Connecticut trial court found it had personal jurisdiction over the defendant pursuant to the state’s long-arm statute on the basis of his conduct in the YouTube video and granted Ms. Rios protection.⁴ The court reasoned that Mr. Ferguson had committed a tortious act in the state by directing the YouTube video at Ms. Rios while knowing she lived in Connecticut, and consequently the state had authority to enter the CPO against him.⁵

The court resolved the jurisdictional issue presented in the interstate flight domestic violence case of *Rios v. Ferguson* fairly easily.⁶ However, suppose Ms. Rios sees the YouTube video while living in North Carolina and then flees to Connecticut.⁷ The court faces a

¹ *Rios v. Ferguson*, 978 A.2d 592, 595 (Conn. Super. Ct. 2008).

² *Id.*

³ *Id.*

⁴ *Id.* at 594.

⁵ *Id.* at 600–01.

⁶ *Id.*

⁷ Continued references to Connecticut law and cases throughout this Article are solely for purposes of this hypothetical and subsequent hypotheticals. As such, the use of Connecticut in these hypotheticals is relevant only to the extent that Connecticut is a proxy for any state and does not incorporate actual Connecticut law.

conundrum: Does Connecticut have personal jurisdiction over Mr. Ferguson—whose conduct occurred, and whose target was located, in another state?

Most states have not addressed this particular question regarding “interstate flight domestic violence cases”⁸ through their CPO statutes or case law. Lack of clarity in this area of law is highly problematic, chills victims from filing such suits, and leads to inconsistent results in cases that are filed. In the CPO system, most litigants represent themselves, thus state courts should be particularly concerned with promoting clarity and consistency in the law.

Among the minority of states that has reported decisions on this issue, courts have generally taken one of two approaches: Either they have found jurisdiction to exist and entered final CPOs (albeit with some limitations on relief) against men⁹ who may have had no realistic opportunity to appear in the case, or they have determined that jurisdiction does not exist and denied all relief, thereby leaving women without protection from a credible threat of abuse.¹⁰ This Article proposes an intermediate solution that requires neither ignoring nor absolutely prioritizing the interests of nonresident defendants while still offering some protection to victims. Specifically, I propose that all states authorize their trial courts to enter *temporary, renewable* CPOs against nonresident defendants in interstate flight domestic violence cases.

Greater mobility in our society has led to an increased number of interstate flight domestic violence cases as more and more victims flee from one state to another in their efforts to escape abuse. Victims seek protection even after fleeing across state lines because they fear further violence and/or psychological abuse in the new state.¹¹ Victims of domestic violence are in greatest danger of violence from their former intimate partners when they leave an abusive relationship.¹²

⁸ As used in this Article, “interstate flight domestic violence case” refers to a matter in which a victim is abused in State A, then flees to State B, and files for a CPO in State B. The defendant remains in State A and has no contact or attempted contact with the victim in State B that would enable State B to assume personal jurisdiction over the defendant.

⁹ Use throughout this Article of the female pronoun to refer to plaintiffs and/or domestic violence victims and the male pronoun to refer to defendants and/or perpetrators of domestic violence reflects United States Department of Justice statistics indicating that approximately 85% of victims are women and the vast majority of perpetrators of domestic violence against women are male. This usage is not intended in any way to deny or minimize the plight of male victims or the problem of female perpetrators.

¹⁰ Compare *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001), and *Spencer v. Spencer* 191 S.W.3d 14 (Ky. Ct. App. 2006), and *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008), and *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010), with *Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006), and *Anderson v. Deas*, 632 S.E.2d 682 (Ga. Ct. App. 2006).

¹¹ Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827 (2004).

¹² See, e.g., *id.* at 828 & n.2; SCHNEIDER ET AL., *DOMESTIC VIOLENCE AND THE LAW: THEORY & PRACTICE* 68 (Robert C. Clark et al. eds., 3rd ed. 2013).

Psychological abuse can easily continue across state lines through the use of cellular telephones, social media, etc.¹³ As one court noted, a CPO case “is no ordinary suit for money damages, but an action whose result may determine whether plaintiff and her children live or die.”¹⁴

However, CPOs also raise corresponding concerns about the significant direct and indirect consequences for defendants who have a final CPO entered against them in a foreign state. The inherent difficulties of responding to litigation in another state intensify the objections of defendants to the exercise of jurisdiction in domestic violence¹⁵ cases across state lines. In these cases, states must balance the victim’s constitutional right to bodily integrity (an aspect of the right to privacy) and the state’s own interest in protecting domestic violence victims against the constitutional due process rights of nonresident defendants.

A plurality of the states with reported decisions on the issue of whether to enter a CPO against a nonresident defendant based solely on abuse in another state has elected to grant victims a *final* CPO as a “status determination.”¹⁶ A status determination is an exception to the requirement of personal jurisdiction that allows a state court to enter a binding judgment against nonresident defendants in certain types of cases, primarily those involving family relationships, United States citizenship, or lawful residency.¹⁷ The United States Supreme Court first authorized the use of the status exception in divorce cases, reasoning that states had inherent authority to protect and promote the welfare of their citizens in family law matters.¹⁸ Although perhaps not well known outside the context of family law, the status determination has since

¹³ See, e.g., *Caplan*, 879 N.E.2d 117. For example, an abuser may repeatedly call a victim’s friends and family to ask where she is now living though she wishes to keep her new address confidential. In some states, such conduct by an abuser is insufficient to establish minimum contacts with a forum and therefore personal jurisdiction over a nonresident defendant. However, for a victim of domestic violence who has been previously stalked and assaulted by an abuser, it seems fair to assume that the abuser knows these calls will cause the victim to fear further abuse and therefore constitute psychological abuse in and of themselves.

¹⁴ A.R. v. M.R., 799 A.2d 27, 31 (N.J. Super. Ct. App. Div. 2002).

¹⁵ The United States Department of Justice defines domestic violence as a relationship in which one intimate partner seeks to gain/maintain power and control over the other through a range of strategies including, but not limited to, physical abuse. *Domestic Violence*, UNITED STATES DEP’T OF JUSTICE, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Sept. 16 2013).

¹⁶ See, e.g., *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006); *Caplan*, 879 N.E.2d 117; *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

¹⁷ RESTATEMENT (SECOND) OF JUDGMENTS § 7 cmt. b (1982) (“A state may exercise jurisdiction to establish or terminate a status if the status has a sufficient relationship to the state” even in the absence of minimum contacts between the defendant and the state generally required for personal jurisdiction.); the “status determination” is also frequently referred to as the “status exception” to exercise personal jurisdiction.

¹⁸ See, e.g., *Williams v. North Carolina*, 317 U.S. 287 (1942).

been used in a variety of family law case types prior to its recent application in CPO cases in some states.¹⁹

To date, only seven of the fifty states have reported cases explicitly discussing whether to utilize the status determination in CPO cases.²⁰ Four states have adopted the status exception while two states have rejected use of the status determination in CPO cases.²¹ One state found the status determination inapplicable to a particular interstate flight domestic violence case but indicated its willingness to consider employment of the concept in an appropriate CPO case.²² Despite this emerging jurisprudence, courts in at least two states have failed to consider the status exception in interstate flight domestic violence cases and, as a result, have denied plaintiffs any relief.²³ All of these cases were decided in the last eleven years. Finally, two states arguably reject the status exception through their jurisdictional statutes.²⁴ One would anticipate that ongoing increases in societal mobility will create a heightened need for resolution of such jurisdictional questions among all fifty states. The only other scholarship on this issue is a student Comment that rejects the application of the status determination in CPO cases and focuses on recommendations specific to the author's home state.²⁵

This Article proceeds as follows: Part I provides background information on the efficacy of CPOs, the process for obtaining a CPO, and the potential relief available through a CPO. It then reviews the potential collateral consequences for defendants from the entry of CPOs. Considering the respective stakes for the parties in the potential entry of a CPO is important in preparing to evaluate the appropriate duration of the CPO (temporary or final) as well as the specific terms of relief in a CPO, which may be consistent with due process principles in a case involving a nonresident defendant. Some courts have looked to the Violence Against Women Act (VAWA) full faith and credit provisions or the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (UIEDVPOA) to resolve the jurisdictional issues in interstate flight domestic violence cases. However, these laws do not

¹⁹ See, e.g., RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 71, 78, 79 (1971).

²⁰ See, e.g., *Rios v. Ferguson*, 978 A.2d 592 (Conn. Super. Ct. 2008); *T.L. v. W.L.*, 820 A.2d 506 (Del. Fam. Ct. 2003); *Bartsch*, 636 N.W.2d 3; *Spencer*, 191 S.W.3d 14; *Caplan*, 879 N.E.2d 117; *Hemenway*, 992 A.2d 575; *Shah v. Shah*, 875 A.2d 931 (N.J. 2005).

²¹ Compare *Bartsch*, 636 N.W.2d 3, and *Spencer*, 191 S.W.3d 14, and *Caplan*, 879 N.E.2d 117, and *Hemenway*, 992 A.2d 575, with *Rios*, 978 A.2d 592, and *Shah*, 875 A.2d 931.

²² See *T.L.*, 820 A.2d 506.

²³ *Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006); *Anderson v. Deas*, 632 S.E.2d 682 (Ga. Ct. App. 2006).

²⁴ N.D. CENT. CODE § 14.07.1-02 (2013); 23 PA. CONS. STAT. § 6103 (2013).

²⁵ Bevan J. Graybill, Comment, *'Til Death Do Us Part: Why Personal Jurisdiction is Required to Issue Victim Protection Orders Against Nonresident Abusers*, 63 OKLA. L. REV. 821 (2011).

address the problem seen in the *Rios* case nor do they offer an answer to the related hypothetical challenge posed by this Article. Therefore, Part I next endeavors to clarify the coverage offered by these laws and explain the reasons why domestic violence victims who move across state lines need other remedies in many cases.

Part II begins by reviewing grounds for personal jurisdiction with particular resonance in interstate flight domestic violence cases, specifically consent and minimum contacts satisfying a state's long-arm statute and the Due Process Clause. This discussion highlights the reasons why, in many instances, courts will not have personal jurisdiction over nonresident defendants and will need to consider application of the status determination. Part II then details the origins of the status determination and explores how that concept has been applied in other family law cases. Study of the status determination in other contexts suggests the validity of its application, as well as parameters for its use, in CPO cases. Part II next explores the various state approaches to the issue of jurisdiction in interstate flight domestic violence cases with insufficient minimum contacts for personal jurisdiction. I critique the approach of the four states entering a *final* CPO as a status determination (hereinafter the "plurality approach") because it unduly infringes on defendants' due process rights. I also discuss the failure of a number of states to fully consider the status exception in interstate flight domestic violence cases and the resulting denial of any relief to victims in need.

Part III argues for a new approach. Specifically, it proposes that courts employ a status determination to enter a *temporary, renewable* CPO providing only prohibitory relief.²⁶ A *final* CPO inherently requires affirmative relief (e.g., surrender of firearms pursuant to federal law) and therefore violates the traditional due process limitations on status exception orders. In contrast, a *temporary* CPO that is issued pursuant to the status exception would offer victims more relief than explicitly available in most states at the present time while still giving due deference to the constitutional rights of defendants. The balancing of these respective interests will encourage adoption of this proposed approach by state courts and legislatures, thereby promoting just resolutions in interstate flight domestic violence cases as well as greater clarity and uniformity in the law.

²⁶ See, e.g., *Caplan*, 879 N.E.2d. 117 (stating that prohibitory relief in a CPO case generally includes ordering the defendant not to abuse or contact the victim).

I. CIVIL PROTECTION ORDERS

A. *Efficacy of Protection Orders*

All fifty states have legislation authorizing courts to grant a CPO to a survivor of domestic violence.²⁷ Some skeptics claim that protection orders are “just pieces of paper” and do little or nothing to protect survivors of domestic violence. In reality, many studies have indicated that application for a CPO can lead to lower rates of subsequent violence.²⁸ In addition, obtaining a final CPO can lead to significant reductions in psychological abuse rates.²⁹

CPOs improve outcomes in part by simply increasingly the likelihood of a prompt and proactive police response to a violation.³⁰ Many domestic violence victim advocates expressed concern about the future efficacy of CPOs in the aftermath of the Supreme Court’s decision in *Castle Rock v. Gonzales*.³¹ In *Castle Rock*, the Court held that a victim of domestic violence did not have a procedural due process right to the enforcement of her CPO by the police.³² Thus, some advocates feared that law enforcement would not respond as vigorously to CPO violations after the ruling.³³ However, to date there does not seem to be empirical or anecdotal evidence to indicate any dramatic changes in police enforcement of CPOs. Law enforcement officers apparently continue to have incentives to respond quickly and cautiously to calls for assistance regarding CPO violations, including avoiding the public consequences of a domestic violence related homicide in one’s community as well as the inherent human desire to protect others from harm.

One important factor to consider in evaluating the efficacy of CPOs is the research that has shown that defendants are more likely to comply with court orders issued within a system that provides procedural justice.³⁴ If a court enters a CPO in a manner that appears to disregard a defendant’s due process rights, the defendant is less likely to

²⁷ See SCHNEIDER ET AL., *supra* note 12, at 221.

²⁸ See *id.* at 295–96.

²⁹ SCHNEIDER ET AL., *supra* note 12, at 297–98; Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 565–66 (2006); Julia Henderson Gist et. al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women?* 15 AM. J. FAM. L. 59, 67 (2001); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. OF PUB. HEALTH 613, 617 (2004).

³⁰ Barbara Hart, *Civil Protection Orders*, 43 JUV. & FAM. CT. J. 5, 24 (1992).

³¹ See SCHNEIDER ET AL., *supra* note 12, at 223.

³² *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

³³ See SCHNEIDER ET AL., *supra* note 12, at 223.

³⁴ Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1846–47 (2002).

adhere to the terms of the order, thereby reducing victim safety. Domestic violence victim advocates now recognize that a legal system that promotes procedural justice results in a greater likelihood of defendant compliance with court orders, thereby increasing victim safety.³⁵ For this reason, victim advocates, as well as other system actors, have a vested interest in considering the impact on defendants of CPOs, discussed *infra*, and the manner in which courts issue these orders.

B. *Obtaining a Civil Protection Order*

Generally, a victim obtains a temporary CPO by filing a petition at the courthouse or at a police station when the court is closed, on an *ex parte* basis.³⁶ In most states, the victim must allege (1) a relationship with the defendant³⁷ and (2) recent violence or threats creating an imminent risk of future violence.³⁸ A temporary CPO will remain in effect for a relatively short time period (typically one to two weeks) during which time the victim will try to obtain service of process on the defendant via law enforcement or other means, depending on the jurisdiction.³⁹ Defendants in a number of states have mounted constitutional due process challenges in response to various aspects of CPO statutes, primarily to the granting of temporary CPOs on an *ex parte* basis, which courts have uniformly rejected.⁴⁰

³⁵ *Id.*

³⁶ See SCHNEIDER ET AL., *supra* note 12, at 255.

³⁷ See, e.g., N.J. STAT. ANN. § 2C:25-19(d) (West 2013) (defining a victim of domestic violence as “a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present or former household member. ‘Victim of domestic violence’ also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. ‘Victim of domestic violence’ also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship”). *But see* ARIZ. REV. STAT. ANN. § 12-1809 (2013) (allowing a plaintiff to obtain an order against a defendant without any reference to the relationship between them); CAL. CIV. PROC. CODE § 527.6 (West 2013) (allowing any “person” to obtain an injunction against another for “harassment,” which is defined as “unlawful violence, [or] a credible threat of violence . . . that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose”); 740 ILL. COMP. STAT. 22/201 (2013) (Illinois also allows victims of sex crimes to obtain orders of protection regardless of the relationship to the attacker, but they do not contain the same provisions as domestic violence protection orders); MD. CODE ANN., CTS. & JUD. PROC. § 3-1503 (LexisNexis 2013); MASS. GEN. LAWS ch. 258E, § 1-10 (2013).

³⁸ See SCHNEIDER ET AL., *supra* note 12, at 255–57.

³⁹ See, e.g., CTS. & JUD. PROC. § 3-1504; § 2C:25-28; 23 PA. CONS. STAT. § 6107 (2013).

⁴⁰ See *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982); *Crespo v. Crespo*, 972 A.2d 1169 (N.J. Super. Ct. App. Div. 2009) (finding the proper burden of proof was preponderance of the evidence when defendant argued it should be clear and convincing evidence); *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988).

Once the defendant is served with the temporary CPO, the parties return to court for a hearing on the issue of entry of a final CPO. States have differing approaches to situations in which the defendant has not been served and does not appear for the final protection order hearing.⁴¹ Some states provide a limited time frame for additional service attempts and then dismiss the CPO petition without prejudice.⁴² In at least one state, New Jersey, the courts instead enter an “indefinite” temporary CPO, which is in essence a temporary CPO without an expiration date.⁴³

At the final hearing, a victim bears the burden of proof, generally with a preponderance of the evidence standard.⁴⁴ “Final” CPOs vary in length depending upon the state, with typical time frames for final CPOs ranging from one to three years.⁴⁵ States often provide victims the option to seek to renew final CPOs, although standards for extension of the orders vary.⁴⁶

C. Civil Protection Order Remedies

In terms of relief, courts generally adopt a two-tiered approach with limited relief available at the temporary or ex parte stage and broader relief permitted through a final CPO. At the temporary CPO stage, a court will generally, at a minimum, prohibit the defendant from abusing the victim and from contacting her by any means, direct or indirect.⁴⁷ The court will also typically order the defendant to stay away

⁴¹ See FAM. LAW § 4-505(c)(2); New Jersey Prevention of Domestic Violence Act, 1991 N.J. Sess. Law Serv. Ch. 261 (West) (codified as amended at §§ 2C:25-17 to -35); § 6108.3.

⁴² See, e.g., FAM. LAW § 4-505(c)(2) (judge may extend temporary protective order as needed, but not to exceed six months, to effectuate service of the order where necessary to provide protection or for other good cause).

⁴³ §§ 2C:25-17 to -35.

⁴⁴ But see CTS. & JUD. PROC. § 3-1505(c)(1)(ii) (“If the judge finds by clear and convincing evidence that the respondent has committed, and is likely to commit in the future, an act specified in § 3-1503(a) . . . the court may issue a final peace order to protect the petitioner.”).

⁴⁵ See, e.g., 750 ILL. COMP. STAT. 60/220(b) (2013) (two years); FAM. LAW § 4-505(c)(2) (one year); § 6108(d) (three years). But see §§ 2C:25-29 (no expiration date for Final Restraining Orders); UTAH CODE ANN. § 78B-7-106(6) (LexisNexis 2013) (civil part of protective order will expire or be reevaluated by the judge within 150 days; criminal portion of protective order indefinite).

⁴⁶ Ritchie v. Konrad, 10 Cal. Rptr. 3d 387 (Ct. App. 2004) (holding that the judge should grant a requested extension “unless the request is contested and the judge determines the protected party does *not* entertain a ‘reasonable apprehension’ of future abusive conduct” (emphasis in original)); Iamele v. Asselin, 831 N.E.2d 324 (Mass. 2005) (holding that the standard for extension was the same as that for a plaintiff seeking an initial order, which typically means that the plaintiff will need to show by a preponderance of the evidence a reasonable fear of imminent serious physical harm at the time relief is sought).

⁴⁷ Forms of prohibited communication include in person or via telephone, letter, email, social networking media, or through third parties.

from the victim as well as from places she may frequent.⁴⁸ Although not at issue in interstate flight domestic violence cases, if the parties were living together at the time of the filing of the petition, the court does have the authority in many jurisdictions to require the defendant to vacate the residence.⁴⁹ Courts will generally address the issue of custody of children in common at the time of entering a temporary order. However, they will not typically enter visitation orders pending a final CPO hearing.

Many states will also wait until a final CPO hearing to address financial issues including temporary child support, alimony and restitution, or issues related to use and possession of personal property.⁵⁰ Other relief potentially available at a final CPO hearing includes a psychological and/or substance abuse evaluation and/or counseling for the defendant. Pursuant to federal law, the entry of a final CPO in a case involving use of, or a threat to use, a firearm mandates a prohibition on purchase or possession of firearms for the duration of the order.⁵¹ State legislation and appellate courts often encourage trial court judges to award victims of domestic violence any and all necessary relief available pursuant to statute as part of a CPO, since historically courts failed to provide the full panoply of remedies to victims obtaining such orders.⁵² However, reluctance on the part of some trial court judges to award victims all appropriate relief theoretically available to them following the entry of a final CPO continues to be an issue.⁵³

The broader range of relief available at the final versus the temporary CPO hearing is relevant when considering the application of the status exception to CPO cases and specifically whether the status exception enables a court to enter a final CPO or merely a temporary one.

⁴⁸ Prohibited places include the victim's home, work, school, children's schools, and the homes of family members or friends.

⁴⁹ See, e.g., CTS. & JUD. PROC. § 3-1503. In some states, ability to award use and possession of a home may depend on home ownership/named lease status.

⁵⁰ While the CPO case is pending, courts generally allow whichever party has left her former residence to return with law enforcement in order to collect immediately needed personal belongings such as clothing and medications. However, decisions regarding other items of personal property a victim may need in her daily life, including computers and cars, are often reserved until the final CPO hearing.

⁵¹ 18 U.S.C. § 922(g)(8) (2012); see also New Jersey Prevention of Domestic Violence Act, 1991 N.J. Sess. Law Serv. Ch. 261 (West) (codified as amended at N.J. STAT. ANN. §§ 2C:25-17 to -35 (West 2013)).

⁵² See, e.g., *id.*; *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249 (Md. 2001).

⁵³ See, e.g., *Katsenelenbogen*, 775 A.2d 1249; *J.D. v. M.A.D.*, 56 A.3d 882 (N.J. Super. Ct. App. Div. 2012) (reversing trial court decision that awarded the defendant in a final restraining order case custody of the children and use and possession of the marital home).

D. *Collateral Consequences of Civil Protection Orders for Defendants*

In addition to considering the direct remedies in a CPO case, it is important to also consider the collateral consequences of a temporary or final CPO for the defendant to effectively assess the full impact of the order. To achieve greater clarity in the law, one must build broad support for a uniform approach to the challenge of jurisdiction in interstate flight domestic violence cases. Judges and legislators considering adopting the status exception will likely reflect both on the benefits to victims of domestic violence as well as the consequences for defendants, especially given the ongoing claims of system abuse by the defense bar. The degree to which CPOs negatively impact defendants will have resonance in terms of evaluating whether or not the status exception can and should be utilized to enter a CPO against a nonresident defendant in an interstate flight domestic violence case and, if so, the appropriate duration of any such order.

Although a domestic violence protection order is civil in nature,⁵⁴ the entry of a protection order is in some states included on an abuser's criminal record. Employers may have access to court and law enforcement databases indicating that a current or potential employee has a protection order entered against him. For some types of employment, a protection order may render a defendant ineligible for employment.⁵⁵ In addition, a CPO may lead a defendant's current employer to deny him a promotion, demote him, or terminate his employment.⁵⁶ Similarly, applicants for higher education, including medical school and law school, may be required to disclose the entry of a CPO against them, which may in turn negatively impact defendants' chances of admissions. Defendants subject to a final CPO may also be disqualified from serving as foster parents or kinship caretakers. Finally, as at least one commentator has noted, there is significant social stigma associated with the entry of a CPO against a defendant.⁵⁷

Many acts that are not otherwise criminal offenses become a criminal matter when contrary to a CPO. For example, a defendant ordered to stay away from a victim's place of employment who nonetheless goes to her place of work could face criminal prosecution on the basis of his mere presence at the location. If the defendant assaults the victim at her job, the criminal charges could include both the assault and the violations of the CPO. Similarly, a defendant who

⁵⁴ See Sack, *supra* note 11.

⁵⁵ Common examples include teaching, law enforcement, and day care.

⁵⁶ E-mail from Robert Gardner, Superior Court Judge, New Jersey Courts, to author (Dec. 2012) (on file with author).

⁵⁷ Mary Hutton, *Case Comment: Domestic Violence and Due Process: Crespo v. Crespo and the Need for a Higher Standard of Proof*, 37 NEW ENG. J. ON CRIM & CIV. CONVICTIONS 103, 109 (2011).

calls a victim may be charged with the crime of violation of a protection order regardless of the nature of the communication. If the call involved harassment or terroristic threats, the defendant can be charged with those crimes in addition to the violation of the protection order. Violation of a protection order can lead to jail time and/or fines. However, it is important to note that not all violations of protection order terms lead to criminal prosecutions. For example, failures to pay child support or to attend a counseling program in accordance with the CPO are generally not treated as criminal matters. If and when these types of problems are addressed, they will more likely be the subject of a civil contempt proceeding.⁵⁸

Defendants subject to CPOs may also face restrictions on their travel. In one case, observed in a New Jersey trial court, the defendant claimed to have been detained at the airport when returning from a missionary trip in South America. He was informed that the victim with a CPO against him happened to be traveling at the same time and that he needed to wait until she left the airport in order to avoid any co-travel.⁵⁹

Federal law prohibits defendants in CPO cases from purchasing or possessing firearms during the pendency of the order.⁶⁰ Federal firearms prohibitions may impact defendants in several distinct ways. First, if a defendant who is prohibited from possessing a firearm for the duration of the CPO must carry a weapon in the course of his employment, he may face termination, transfer, and/or demotion. In addition, defendants who enjoy hunting using firearms will be unable to participate in that activity during the pendency of any order prohibiting them from possessing firearms.⁶¹ A defendant who wishes to keep and/or carry a firearm for personal protection will be prohibited from doing so while the CPO remains in effect.⁶² A gun collector will have to turn over his firearms to the local law enforcement authority or, in some states, to an approved third party for sale or safekeeping⁶³ for the pendency of the CPO. After the order expires, the collector must hope that the authorities have taken proper care of his collection in the interim. Law enforcement officers may interpret the prohibitions broadly and remove from the defendant's possession even inoperable antique guns with significant monetary and/or personal value.⁶⁴

⁵⁸ N.J. STAT. ANN. §§ 2C:25-29(9), -30 (West 2013).

⁵⁹ The author personally observed such a situation in New Jersey Superior Court, Essex County in the fall of 2011.

⁶⁰ 18 U.S.C. § 922(g)(8) (2012).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*; 23 PA. CONS. STAT. §§ 6108(a)(7), 6108.2--3 (2013).

⁶⁴ The author personally observed such a situation in New Jersey Superior Court, Union County in the spring of 2012. The Summit, N.J. Police Department seized an antique, inoperable civil war-era gun from the defendant.

Although a defendant could challenge such a removal in court, he may not have the resources to do so or be aware of his rights.

The impact of a CPO on the defendant depends in part on the duration of the order. States vary greatly in terms of the length of time courts may extend a final protection order.⁶⁵ For example, in New Jersey, final CPOs are permanent and last for the lifetime of the victim, whereas in many other states, a final order may only extend for one year.⁶⁶ In states without a permanent CPO, the law generally offers an option for a victim of domestic violence to petition to extend the protection order after its original expiration date for good cause.⁶⁷

Defendants and the defense bar also frequently express concerns regarding the potential impact of the entry of a CPO on all subsequent family law cases between the parties, such as a divorce or child custody matter, discussed *infra*. Defendants and their attorneys are not alone in fearing the misuse of the CPO system to gain advantage in a family law matter. Apprehension regarding system manipulation by alleged domestic violence victims is cited by some judges in denying relief in protection order cases.⁶⁸ In a representative comment in a CPO case, one Delaware Family Court judge opined, “this Court also has concerns that Delaware’s well intended protection from abuse statute could be misused by one party in an attempt to gain a quick and unfair advantage, especially in matters such as custody.”⁶⁹

E. Interstate Enforcement of Civil Protection Orders

In interstate flight domestic violence cases, courts wishing to avoid difficult jurisdictional questions will at times suggest that victims petition for a CPO in their former home states, where the abuse occurred, and then seek to have that order recognized in their state of

⁶⁵ See SCHNEIDER ET AL., *supra* note 12, at 266 (“The duration of a restraining order varies from state to state. A ‘permanent order’ may be in effect only for a specified period of time. For example Connecticut’s orders last for 6 months, with the option to extend. In contrast, New Jersey provides that a final order will last indefinitely.” (internal citation omitted)).

⁶⁶ See, e.g., CONN. GEN. STAT. § 46b-15(d) (2013); MD. CODE ANN., FAM. LAW § 4-506 (LexisNexis 2013) (final protective order effective for period stated in order not to exceed two years); MASS. GEN. LAWS ch. 209A, § 3 (2013); N.H. REV. STAT. ANN. § 173-B:5(VI) (2013).

⁶⁷ FAM. LAW § 4-507(a)(2) (“For good cause shown, a judge may extend the term of the protective order”); see also § 46b-15(d) (“[A]n order may be extended by the court upon motion of the applicant for such additional time as the court deems necessary.”); ch. 209A, § 3 (“[T]he court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order.”); § 173-B:5(VI) (“Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the plaintiff, showing good cause, with notice to the defendant”).

⁶⁸ See, e.g., *Corrente v. Corrente*, 657 A.2d 440 (N.J. Super. Ct. App. Div. 1995).

⁶⁹ *T.L. v. W.L.*, 820 A.2d 506, 513 (Del. Fam. Ct. 2003).

refuge pursuant to VAWA or UIEDVPOA.⁷⁰ Unfortunately, many victims will not be able to obtain relief through VAWA and UIEDVPOA but would benefit from the entry of a CPO pursuant to the status exception. For these reasons, it is helpful to examine the limitations of the protections available through VAWA and UIEDVPOA and the reasons these laws will fail to assist victims in many cases.

1. Limits of VAWA and UIEDVPOA

In interstate flight domestic violence cases, many judges and lawyers look to the 1994 VAWA and its full faith and credit provisions⁷¹ or to UIEDVPOA, adopted in a substantial minority of states, to resolve jurisdictional disputes. Unfortunately, neither the VAWA nor UIEDVPOA provisions address the plight of the many victims who do not seek a protection order *before* fleeing across state lines but only file for protection *after* reaching their state of refuge.

Through VAWA, Congress sought to aid domestic violence victims who already possess a final CPO when they move across state lines by requiring a victim's new home state to grant full faith and credit to a valid CPO issued by a court in the former home state.⁷² In order to receive recognition and enforcement in another state, the CPO must be issued by a court with "jurisdiction over the parties and matter" and provide "reasonable notice and opportunity to be heard" to the defendant.⁷³

The VAWA full faith and credit provisions offer an important safeguard for victims relocating to a new state who wish to maintain their final CPOs. Prior to the enactment of VAWA, some states would not recognize or enforce protection orders from other states.⁷⁴ Even in states in which the law did provide for recognition of out-of-state protection orders, individual police departments and law enforcement officers could be reluctant to enforce the terms of an order from another state.⁷⁵ All fifty states have now adopted legislation requiring their courts and law enforcement agencies to enforce out-of-state protection orders, although the exact terms of the full faith and credit laws in each state vary widely.⁷⁶

⁷⁰ See, e.g., *id.*; *Becker v. Johnson*, 937 So. 2d 1128, 1131–32 (Fla. Dist. Ct. App. 2006).

⁷¹ 18 U.S.C. § 2265 (2012).

⁷² Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)).

⁷³ *Id.*

⁷⁴ See SCHNEIDER ET AL., *supra* note 12, at 250.

⁷⁵ See Sack, *supra* note 11, at 841.

⁷⁶ *Id.* at 844–45 ("Some states vary other components of the VAWA provision. For example, Mississippi's statute states that, when no expiration date appears on the face of the

In 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated UIEDVPOA.⁷⁷ NCCUSL claimed that a uniform act was needed because, in response to VAWA, states had adopted a range of varying legislation that undermined effective interstate enforcement.⁷⁸ Although UIEDVPOA has attempted to address these concerns, it has also been criticized for providing full faith and credit protection more narrowly than VAWA and for actually rendering the “interstate recognition and enforcement of protection orders less uniform.”⁷⁹ To date, eighteen states, mostly in the South, Midwest, and West, have adopted UIEDVPOA, as well as the District of Columbia.⁸⁰

Despite this lack of uniformity in the VAWA full faith and credit provisions and UIEDVPOA as adopted by the states, these laws represent progress for victims who move across state lines with CPOs.⁸¹ However, regardless of the degree to which VAWA and UIEDVPOA may succeed in establishing consistent enforcement of valid CPOs, there remains an important concern with respect to protecting domestic violence victims in interstate cases. Many victims in interstate flight cases do not benefit from the “full faith and credit” provisions because they flee violence prior to obtaining a final CPO.⁸²

Ironically, some state court judges have utilized the VAWA full faith and credit provisions to justify denying relief to domestic violence victims who file in their refuge state.⁸³ Judges in at least two cases have argued that in denying a victim’s petition for protection, they have not left her without a remedy, since she can return to her former home state,

order, it shall be deemed to have expired one year from the date of issuance. While filing of a foreign order is not required for enforcement in Tennessee, it is permitted. The state statute requires a foreign order filed without a specified expiration date to expire one year from the date it was first presented to the Tennessee court. However, VAWA requires that the enforcing state recognize out-of-state orders as valid for the length of time that they would be valid in the issuing state. In many states, protection orders may last far longer than one year.” (internal footnotes omitted)).

⁷⁷ *Why States Should Adopt UIEDVPOA*, UNIF. LAW COMM’N, [http://uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UIEDVPOA](http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UIEDVPOA) (last visited Sept. 16, 2013).

⁷⁸ *Id.*

⁷⁹ See Sack, *supra* note 11.

⁸⁰ *Interstate Enforcement of Domestic Violence Protection Orders Act*, UNIF. LAW COMM’N, [http://uniformlaws.org/Act.aspx?title=Interstate Enforcement of Domestic Violence Protection Orders Act](http://uniformlaws.org/Act.aspx?title=Interstate%20Enforcement%20of%20Domestic%20Violence%20Protection%20Orders%20Act) (last visited Sept. 16, 2013).

⁸¹ *Why States Should Adopt UIEDVPOA*, *supra* note 77.

⁸² Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)); *Why States Should Adopt UIEDVPOA*, *supra* note 77.

⁸³ See *T.L. v. W.L.*, 820 A.2d. 506 (Del. Fam. Ct. 2003); *Becker v. Johnson*, 937 So. 2d 1128, 1131-32 (Fla. Dist. Ct. App. 2006) (stating its holding “does not mean that victims of domestic violence are without a remedy when they cross state lines” and suggesting the plaintiff could have returned to her former home state of Maryland to obtain a final CPO and then sought recognition and enforcement of that order in Florida).

obtain a CPO, and then seek to have it enforced in the refuge state.⁸⁴ Such judicial recommendations fail to recognize the realities that cause many domestic violence victims to flee first and file for protection later, which are discussed in detail in the following Section.⁸⁵ There is no reason to believe that Congress intended for the VAWA full faith and credit provisions to limit a victim's choice of forum.⁸⁶ Through VAWA, Congress intended to expand the relief available to domestic violence victims who cross state lines and to suggest that the full faith and credit provisions—that restrict a victim's options in terms of filing for a CPO—undermine that intent.⁸⁷

2. VAWA and UIEDVPOA Often Inapposite

In the aftermath of an incident of domestic violence, victims could, in theory and as suggested by some state court judges, file first in their home state for a CPO and then seek shelter in another state and rely on the new state's specific full faith and credit provisions to enforce their CPO. However, in reality many victims flee first and file later for many reasons discussed below, and this number is likely to increase as societal mobility continues to increase.

For some victims, safety or other practical considerations, such as transportation and/or child-care arrangements, may make immediate departure imperative. The process of filing for a temporary protection order, even though done on an *ex parte* basis, requires a significant amount of time in most cases.⁸⁸ Victims routinely wait for hours and often must spend an entire day at the courthouse in order to obtain the initial order. Victims who seek to file after hours at a police station in jurisdictions with provisions in place for a hearing officer or judge to consider petitions for protection “24/7” may nonetheless be advised to “come back tomorrow” or “come back on Monday” by an officer either unaware of the option or uninterested in performing the additional work required to aid a plaintiff in filing.⁸⁹

Victims may also hope that moving across state lines will lessen the danger and render protection through the courts unnecessary. They may also hope to keep their new state of residence confidential.

⁸⁴ See *T.L.*, 820 A.2d. 506; Becker, 937 So. 2d at 1131–32.

⁸⁵ See *infra* Part I.E.2.

⁸⁶ Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)).

⁸⁷ *Id.*

⁸⁸ See *id.* at 255–56.

⁸⁹ See Alexi Friedman, *Mother of Baby Thrown off Bridge Says East Orange Police Rebuffed Restraining Order*, THE STAR-LEDGER (Feb. 22, 2010, 5:08 PM), http://www.nj.com/news/index.ssf/2010/02/lawyer_for_mother_of_missing_b.html.

Even for those victims who do file for a CPO in their former home state before fleeing across state lines, the costs associated with returning to resolve the matter may lead them to withdraw their complaint or fail to appear in court, which results in dismissal of the case. Travel to return to court in a former home state may be cost prohibitive. Costs include not merely transportation but also potentially food, lodging, child care, and lost work time. Since domestic violence often involves economic control and dependency, many victims will also be constrained by a lack of financial resources from litigating in a former home state. Travel to a place and at a time known to the alleged abuser also creates an obvious safety risk, which may seem to outweigh the potential benefit of a CPO. Unless a victim has substantial flexibility, the alleged abuser will be aware of the approximate arrival time at the ultimate destination. The frequency of adjournments of final protection order hearings compounds these problems. Many cases involve several final CPO hearing dates over the course of weeks or even months to proceed to resolution.⁹⁰

For these reasons, states must look beyond VAWA and UIEDVPOA in domestic violence cases with interstate elements for ways to effectuate public policy to protect victims.⁹¹ Courts must evaluate the degree to which states can, consistent with due process principles, exercise jurisdiction over nonresident defendants in CPO cases.

II. PERSONAL JURISDICTION AND THE STATUS EXCEPTION

This Part first considers the two primary means of establishing personal jurisdiction over a nonresident defendant in an interstate flight domestic violence case, namely consent and minimum contacts pursuant to a state's long-arm statute. The potential grounds for establishing long-arm personal jurisdiction in CPO cases consist of: (1) tortious and/or criminal contact by the nonresident defendant with the victim in the proposed forum (new state) and/or (2) effects of the out-of-state abuse that the victim experiences in the new state. This Section next explores the factual ambiguities in many cases involving alleged tortious or criminal contact that challenge courts evaluating the

⁹⁰ Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 31 (2006); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 544 n.64 (2007); Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 565, 711 (2000).

⁹¹ Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)); *Why States Should Adopt UIEDVPOA*, *supra* note 77.

applicability of their state's long-arm statute. With respect to the effects test, I discuss the limitations in many state statutes on the use of this potential ground of long-arm jurisdiction. These limitations and the lack of CPO cases decided on this basis suggest that the effects test is unlikely to prove useful in resolving jurisdictional challenges in interstate flight domestic violence cases.

This Part then discusses the origins of the status exception and its application in divorce, legal separation, child custody, and child welfare cases. In these types of status determination cases, courts have typically limited remedies to those not requiring personal jurisdiction, and this restriction offers guidance to courts in status determination CPO cases on the appropriate scope of remedies.⁹² I follow with a review of the various approaches adopted by states with reported CPO cases or statutes potentially implicating the status exception. First, the plurality approach of issuing a final CPO with "prohibitory relief only" as a status exception is presented. Next, I review the states with cases or statutes rejecting, or failing to consider and perhaps implicitly rejecting, application of the status exception in CPO cases. The final Section in this Part covers the unique approach adopted by New Jersey. Understanding the various approaches to jurisdiction in interstate flight domestic violence cases taken by states to date provides the basis to consider my proposal for a temporary, renewable CPO with limited relief pursuant to the status exception.

A. *Potential Bases of Personal Jurisdiction in CPO Cases*

Although a few jurisdictional challenges in interstate flight domestic violence cases relate to subject matter jurisdiction, the vast majority of jurisdictional disputes in such cases deal primarily or exclusively with personal jurisdiction.⁹³ Personal jurisdiction addresses

⁹² See, e.g., *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Spencer v. Spencer*, 191 S.W.3d. 14 (Ky. Ct. App. 2006); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

⁹³ The two primary reasons subject matter jurisdiction may be contested in an interstate flight CPO case are 1) the residency status of the alleged victim in the forum state and 2) the situs of the claimed act of domestic violence. With regard to residency, some states provide relief to CPO plaintiffs when they are refugees or temporary residents of the state. See, e.g., *Spencer*, 191 S.W.3d. 14; *Shah v. Shah*, 875 A.2d 931 (N.J. 2005). However, in order to obtain relief under the CPO statute, other states do require plaintiffs to be domiciled in the forum state when all violence has occurred in another jurisdiction. See, e.g., *T.L. v. W.L.*, 820 A.2d 506, 513 (Del. Fam. Ct. 2003). While a divorce pursuant to the status exception does require domicile of the plaintiff in state, as discussed *infra*, a custody order in accordance with the UCCJEA temporary emergency jurisdiction provision, which implicitly utilizes the status exception, does not require domicile of the plaintiff in state. Given the emergent nature of domestic violence and public policy consensus nationwide to provide protection for victims, the status exception should be applied in CPO cases as in emergency custody cases, and therefore states should provide relief to all victims within their borders, even those only sheltered in the state.

the power of the court to enter a binding judgment over the parties to a dispute.⁹⁴ The Due Process Clause of the Fourteenth Amendment limits the authority of states to enter binding judgments affecting the rights of nonresident defendants.⁹⁵ In particular, due process requires that a state have personal jurisdiction over a defendant in order to enter “a valid judgment imposing a personal obligation or duty in favor of the plaintiff.”⁹⁶ The United States Supreme Court articulated the constitutional standard for determining whether a state has personal jurisdiction over a nonresident defendant in *International Shoe Co. v. Washington*.⁹⁷ In that case, the Court stated that, as a prerequisite to personal jurisdiction, a defendant must have “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁹⁸

A state can establish personal jurisdiction over a nonresident defendant in a number of different ways. In CPO cases, common means of obtaining personal jurisdiction over an out-of-state defendant include consent or a qualifying act under the state’s long-arm statute.⁹⁹ First, the defendant may agree to submit to the jurisdiction of the court hearing the case. When a plaintiff flees to a neighboring state and the defendant suffers relatively minor inconvenience from the fact that he must appear in court in another state, the defendant may not object to the court having personal jurisdiction over him. For example, if Ms. Rios fled from Charlotte, North Carolina, to Greenville, South Carolina, a distance of approximately 100 miles, and then filed for protection in South Carolina, Mr. Ferguson might decide to focus his resources on litigating the merits of the case rather than challenging the South Carolina court’s personal jurisdiction over him.

Second, personal jurisdiction may be established over a nonresident defendant on the basis of the defendant’s minimum contacts with the state that meet one of the grounds for personal jurisdiction in the state’s long-arm statute.¹⁰⁰ Most state long-arm

⁹⁴ General jurisdiction arises from extensive contacts with the proposed forum state and allows that state to address all contested matters between the parties, not only the matters that relate to the defendant’s contacts with the forum state. *See, e.g., Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945).

⁹⁵ *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978) (citing *Shaffer v. Heitner*, 433 U.S. 186, 198–200 (1977)).

⁹⁶ *Id.* (citing *Int’l Shoe*, 325 U.S. at 316; *Pennoyer v. Neff*, 95 U.S. 714, 732–33 (1878)).

⁹⁷ 326 U.S. 310.

⁹⁸ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁹⁹ For examples of qualifying acts, see *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. Ct. App. 2007); *Brown v. Bumb*, 2003-1563 (La. App. 3 Cir. 3/31/04); 871 So. 2d; *Beckers v. Seck*, 14 S.W.3d 139 (Mo. Ct. App. 2000); *Susan L. v. Steven L.*, 742 N.W.2d 734 (Neb. 2007); *McNair v. McNair*, 856 A.2d 5 (N.H. 2004).

¹⁰⁰ *See, e.g., Bissell*, 236 S.W.3d 24; *Brown*, 871 So. 2d 1201; *Beckers*, 14 S.W.3d 139; *Susan L.*, 742 N.W.2d 734; *McNair*, 856 A.2d 5.

statutes permit courts to exercise jurisdiction over a nonresident defendant who commits a tortious or criminal act in the state.¹⁰¹ The plaintiff may allege commission of an act of domestic violence by the defendant in the forum state. The act may be one committed by the defendant while temporarily in the state or it could consist of a communication crossing state lines which the victim alleges is harassing or threatening. Even if the defendant has not committed any act in the state, the plaintiff may argue she suffers, while living in the forum state, from the effects of an out-of-state act of domestic violence by the defendant. The United States Supreme Court applied the “effects test” in the case of *Calder v. Jones* and provided that a court could exercise personal jurisdiction over an out-of-state defendant who had allegedly committed an intentional tort that caused an injury in the forum state.¹⁰² As discussed in reference to specific cases *infra*, not all state long-arm statutes provide, or have been interpreted via case law to provide, for personal jurisdiction over nonresident defendants in CPO cases solely on the basis of the “effects test,” but it is an option in some states.¹⁰³ Thus, in some interstate flight domestic violence cases, courts in the plaintiff’s new home state will have personal jurisdiction over the defendant on the basis of either consent or minimum contacts pursuant to a long-arm statute.

However, in the absence of the effects test, cases with no criminal/tortious contact by a defendant with a victim in the new home state create the greatest tension between protecting the due process rights of defendants and protecting domestic violence victims, and offer no easy solution due to the inability to obtain personal jurisdiction over the nonresident defendant. For example, assume in the *Rios v. Ferguson* case that Ms. Rios saw the YouTube video only while in North Carolina and Mr. Ferguson made no attempt to pursue or contact Ms. Rios once she fled to Connecticut. Mr. Ferguson has never been to Connecticut, has no financial ties to Connecticut, and does not consent to jurisdiction. Further, although Connecticut recognizes an effects test ground for personal jurisdiction, Connecticut courts have narrowly construed the test such that it will not apply in this case. In this scenario, Mr. Ferguson clearly has no minimum contacts with Connecticut and thus Connecticut has no personal jurisdiction over him. Connecticut cannot grant Ms. Rios a final CPO unless it utilizes the status exception to personal jurisdiction. As discussed *supra*, a status determination allows a state court to enter a binding order against a nonresident defendant in certain types of cases despite a lack of minimum contacts

¹⁰¹ See, e.g., *Bissell*, 236 S.W.3d 24; *Brown*, 871 So. 2d 1201; *Beckers*, 14 S.W.3d 139; *Susan L.*, 742 N.W.2d 734; *McNair*, 856 A.2d 5.

¹⁰² *Calder v. Jones*, 465 U.S. 783 (1984).

¹⁰³ See *Hughes v. Cole*, 572 N.W.2d 747 (Minn. Ct. App. 1997).

sufficient to establish personal jurisdiction.¹⁰⁴ The Connecticut court may be motivated to adopt the status exception approach because otherwise, “[t]he victim would have to wait, in fear, for the alleged abuser to commit an additional act of domestic violence, this time in [Connecticut], before having recourse to the law and to the courts of [Connecticut].”¹⁰⁵

On the other hand, from the perspective of a nonresident defendant in a CPO case, the status determination may appear extremely suspect and contrary to a system based on procedural justice. If a status determination provides an exception to the requirement of personal jurisdiction, in the absence of a realistic ability to appear in court, it may hamper a defendant’s ability to oppose the entry of an order against him and undermine his confidence in the neutrality of the court. As one dissenter to the use of the status exception in the divorce context commented, “settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill.”¹⁰⁶

1. Personal Jurisdiction Based on Contact with Victim

The question of whether personal jurisdiction in a CPO case can be established by a defendant’s contact, or attempted contact, with a victim across state lines after she has fled to a new state is by no means easily answered in all cases. Examination of such cases highlights the fact that courts will often need to consider the status exception as an alternative grounds for jurisdiction even in cases involving some interstate communication. In general, courts must determine if a defendant has sufficient contacts with the forum state such that the exercise of personal jurisdiction over him does not “offend traditional notions of fair play and substantial justice.”¹⁰⁷ In some cases, the defendant physically follows the plaintiff into her state of refuge and commits an act of domestic violence.¹⁰⁸ In other cases, the plaintiff seeks protection on the basis of communications from the defendant across state lines. A defendant may directly attempt to contact a victim via telephone calls and text-messaging, email, social networking, or traditional mail. If the contacts clearly meet the elements of a statutory act of domestic violence, such as threats or harassment, and are directed at a person known by the defendant to be in the forum state, the trial court’s

¹⁰⁴ RESTATEMENT (SECOND) OF JUDGMENTS § 7 cmt. b (1982).

¹⁰⁵ J.N. v. D.S., 693 A.2d 571, 573 (N.J. Super. Ct. Ch. Div. 1996).

¹⁰⁶ Williams v. North Carolina, 317 U.S. 287, 316 (1942) (Jackson, J., dissenting).

¹⁰⁷ Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945).

¹⁰⁸ See State v. Reyes, 796 A.2d 879, 881–82 (N.J. 2002).

decision to exercise personal jurisdiction over the nonresident defendant in the forum state may not be a difficult one.

However, in many cases ambiguities exist that complicate the analysis of whether or not a court has personal jurisdiction over a nonresident defendant. In particular, the explosion of communication via technology leads to many interesting issues concerning the creation of a basis for personal jurisdiction.¹⁰⁹ First, the defendant may claim he did not realize that the plaintiff was in the forum state.¹¹⁰ An interesting example of this situation is the Florida case of *Becker v. Johnson*.¹¹¹ In this case, the plaintiff left Maryland for Florida after her boyfriend “busted out [her] car window with a crowbar as [she] was sitting inside” and then threatened to kill her if she ever took their daughter away from him.¹¹² The plaintiff filed for a CPO in Florida after the defendant called and texted her cell phone repeatedly, stating that he was looking for her.¹¹³ The defendant argued that he did not realize that the plaintiff was in Florida when he called and tried to contact her on her Maryland cellular telephone number.¹¹⁴ The court ruled that the plaintiff had not met her burden of proving that the defendant “purposefully established minimum contacts with the state of Florida.”¹¹⁵ This case also highlights the difficulty of determining “purposeful availment” in high-tech communication cases at a time when many people do not change cellular telephone numbers following a move and, of course, email addresses and social networking sites follow us everywhere.¹¹⁶

Second, the defendant may argue that he did not intend for the communication in question to reach the plaintiff at all.¹¹⁷ Again, in a world dominated by communications via technology, determining whether a defendant intended to communicate with a victim in particular, as opposed to other individuals, may be challenging. In a recent Ohio case, a defendant subject to a final CPO faced contempt charges as a result of comments he posted on his Facebook page regarding his former wife, the plaintiff in the CPO matter.¹¹⁸ On his Facebook page, the defendant called his former wife an “evil, vindictive woman” and implied that she had lied about the domestic violence in order to obtain a CPO so she could cut him off from all contact with

¹⁰⁹ See *Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006).

¹¹⁰ *Id.* at 1131.

¹¹¹ *Id.*

¹¹² *Id.* at 1129–30.

¹¹³ *Id.* at 1129.

¹¹⁴ *Id.* at 1130.

¹¹⁵ *Id.* at 1131.

¹¹⁶ *Id.*

¹¹⁷ Kimball Perry, *Judge: Jail or Facebook Apology*, CINCINNATI.COM (Feb. 22, 2012), <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20120222/NEWS/302220184>.

¹¹⁸ *Id.*

their son.¹¹⁹ The defendant had blocked his former wife from his Facebook page prior to making these comments, which she learned of through friends, raising the issue of whether or not he intended to communicate with her through his comments.¹²⁰ One can imagine many such scenarios occurring on an increasingly frequent basis as defendants post comments on social media sites about a victim.

The lack of a uniform approach to personal jurisdiction in cases involving Internet communication generally¹²¹ only exacerbates the difficulty in assessing purposeful availment in domestic violence cases with interstate communications. Nor does the recent United States Supreme Court case on personal jurisdiction, *McIntyre v. Nicastro*, provide meaningful guidance on the manner in which high-tech communications across state lines might be evaluated in domestic violence cases in order to answer jurisdictional questions.¹²² *McIntyre* generated three non-majority opinions with a majority of the justices rejecting New Jersey's assertion of personal jurisdiction over the defendant corporation for varying reasons.¹²³ The concurrence by Justice Breyer objected to announcing a broad rule in a case not touching upon changes in communication and commerce.¹²⁴

The inquiries in these cases will often be extremely fact sensitive and depend upon the relative credibility of the parties and any witnesses. As a result, trial courts will have substantial latitude in determining when communications constitute grounds to exercise personal jurisdiction over nonresident defendants, since review of factual determinations is generally subject to an abuse of discretion standard.¹²⁵ In this context, any inherent biases towards either plaintiffs or defendants in domestic violence cases may influence the jurisdictional determinations. Discrimination against women in the state court system and its detrimental impact on victims of domestic violence was well documented before the United States Senate Judiciary Committee during the course of hearings on the Violence Against Women Act.¹²⁶ Courts should closely scrutinize the extent and nature of any communications by the defendant with the plaintiff in light of any history of abuse as well as with an understanding of the dynamics of domestic violence. In so doing, judges will better discern the intent and

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Recent Case, *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), 122 HARV. L. REV. 1014 (2009).

¹²² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Calder v. Jones*, 465 U.S. 783 (1984).

¹²³ *McIntyre*, 131 S. Ct. 2780.

¹²⁴ *Id.* at 2791 (Breyer, J., concurring).

¹²⁵ See, e.g., *Parish v. Parish*, 988 A.2d 1180, 1200 (N.J. Super. Ct. App. Div. 2010).

¹²⁶ See Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 50-51 (2000).

meaning of ambiguous comments by a defendant. In an example of this approach, the New Jersey Appellate Division held in the case of *A.R. v. M.R.* that defendant's telephone calls to New Jersey in an effort to locate the plaintiff constituted grounds for personal jurisdiction in the CPO case in light of the history of physical abuse and threats between the parties.¹²⁷ "Although the content of the telephone calls in the subject case could not be categorized as violations of the Act, in the context of the relationship between these parties, they could not have been placed without defendant's full awareness of their frightening effect on plaintiff in New Jersey."¹²⁸

However, in sum, even in cases involving contacts between a defendant and a victim in the proposed forum state, there will be many instances in which interstate communications do not provide a clear basis for a court to exercise personal jurisdiction over a nonresident defendant. In those circumstances, judges will need to consider whether jurisdiction may be established pursuant to the effects test or whether the only option would be the status determination approach.

2. Personal Jurisdiction Based on the Effects Test

Review of case law suggests that the effects test will not offer a viable solution to issues of personal jurisdiction in most interstate flight domestic violence cases. Only one state has utilized the effects test, incorporated into its state long-arm statutes, to find personal jurisdiction in the context of a family violence case for the entry of a final CPO against a nonresident defendant.¹²⁹ Specifically, in the 1997 case of *Hughs v. Cole*, a mother with physical custody of the parties' son, residing in Minnesota, filed a petition for a CPO on the son's behalf against his father who lived in Pennsylvania.¹³⁰ The mother alleged that the father and his new wife had repeatedly physically abused the boy during his summer visits with them in Pennsylvania where the father lived.¹³¹ She further claimed that their son had suffered psychological harm, which manifested itself in his home state of Minnesota as a result of the abuse in Pennsylvania.¹³² The Minnesota Court of Appeals upheld the trial court's exercise of personal jurisdiction over the father finding the emotional distress the son experienced in Minnesota sufficient to satisfy the state's long-arm statute.¹³³

¹²⁷ *A.R. v. M.R.*, 799 A.2d 27, 28 (N.J. Super. Ct. App. Div. 2002).

¹²⁸ *Id.* at 32.

¹²⁹ See *Hughs v. Cole*, 572 N.W.2d 747 (Minn. Ct. App. 1997).

¹³⁰ *Id.* at 748-49.

¹³¹ *Id.*

¹³² *Id.* at 749-50.

¹³³ *Id.* at 751 (finding the abuse by the father caused harm in Minnesota and gave the state specific jurisdiction over the father pursuant to the state's long-arm statute, and the father's

To date, no other states have reported cases in which they have adopted the effects test as a potential means of resolving issues of personal jurisdiction in CPO cases. Furthermore, since the Minnesota case involved child abuse rather than intimate partner violence, it seems possible that the court used the effects test to extend jurisdiction further than it would have done on behalf of an adult victim. The Minnesota Court of Appeals judges may have shared the opinion of Justice Frankfurter who stated in his concurrence in *May v. Anderson* that “[c]hildren have a very special place in life which law should reflect.”¹³⁴

One potential explanation for the non-use of the effects test in interstate flight domestic violence cases outside of Minnesota is that the effects test is inherently circumscribed by the boundaries of each state’s long-arm statute. Some states do not utilize the effects test at all or do not choose to extend long-arm jurisdiction to the full extent authorized by the Due Process Clause. For example, in the interstate flight domestic violence case of *Caplan v. Donovan*, the Massachusetts Supreme Judicial Court specifically referenced the effects test and its use by the Minnesota Court of Appeals in *Hughs v. Cole* but declined to follow the reasoning in that decision.¹³⁵ In rejecting the application of the effects test in *Caplan*, the court explained that Massachusetts case law interpreting the effects provision of its long-arm statute had resulted in narrower definitions of “injury in this commonwealth” than those applicable in Minnesota.¹³⁶ Similarly, in Georgia, the narrowly tailored language of the state’s long-arm statute led the court to find it had no jurisdiction over the nonresident defendant in two recent domestic violence cases involving interstate communications between victim and defendant.¹³⁷ In fact, the Massachusetts Supreme Judicial Court noted that it had not found any other state that had premised personal jurisdiction solely on emotional injury in the forum state based on a wrongful act in another state.¹³⁸ The *Shah* court also briefly mentioned the effects test argument for personal jurisdiction, raised by an amicus, but failed to specifically address this argument on the merits; however, it implicitly rejected the

repeated telephone calls to his son in Minnesota satisfied the Due Process Clause’s requirements for minimum contacts).

¹³⁴ *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

¹³⁵ *Caplan v. Donovan*, 879 N.E.2d 117, 121–22 n.5 (Mass. 2008) (citing *Hughs*, 572 N.W.2d at 752).

¹³⁶ *Id.*

¹³⁷ *Huggins v. Boyd*, 697 S.E.2d 253, 255 (Ga. Ct. App. 2010) (finding that the “course of conduct” by defendant occurred at the South Carolina location where he typed his emails and therefore did not constitute in-state action sufficient to invoke personal jurisdiction over the defendant pursuant to the state’s long-arm statute); *Anderson v. Deas*, 632 S.E.2d 682, 683–84 (Ga. Ct. App. 2006) (rejecting plaintiff’s argument that the telephone calls at issue constituted a “persistent course of conduct” in the state, as required by statute, because the court deemed the telephone calls to be conduct that occurred at the place the calls originated, which was outside the state).

¹³⁸ *Caplan*, 879 N.E.2d at 121 n.5.

reasoning in determining that New Jersey did not have personal jurisdiction over the defendant.¹³⁹ Since several family courts in the state of New York have addressed this issue in dicta and have reached different conclusions, use of the effects test remains a possibility in New York.¹⁴⁰

Even if all states adopted long-arm statutes with effects test provisions and employed them to allow exercise of personal jurisdiction to the outmost limits of the Constitution, many domestic violence victims who flee abuse in one state and file for protection in another would not be able meet the requirements of this test. As discussed *supra*, personal jurisdiction requires a finding of purposeful availment by a defendant with respect to a particular forum state.¹⁴¹ Purposeful availment in turn requires that a defendant be able to foresee that his out-of-state activity would result in contact with the forum state. In domestic violence cases, the foreseeability of a victim fleeing out-of-state at all, much less to the particular forum state in question, may often be strongly contested.

For example, imagine Ms. Rios was living with Mr. Ferguson in North Carolina, but they separated and she moved out to live with family of her own in North Carolina. Mr. Ferguson then made the YouTube video that Ms. Rios saw, and she decided she was not safe in North Carolina so went to stay with a friend in Connecticut. Mr. Ferguson may claim he had no idea that Ms. Rios would leave to stay with a friend in Connecticut. He may state that he did not even know that she had a friend in Connecticut or that the friends were close enough that she would go to live with this friend. He may have thought that even if she were frightened by the video, although that was not his intent, she would go to stay with relatives on the other side of the state or in a confidential shelter. A system in which establishment of jurisdiction relies on a determination of whether or not a defendant could reasonably anticipate a victim's future actions seems problematic and rife with opportunities for inconsistency of outcome, which may in turn decrease a court's willingness to enter an order. In such murky cases in which a final CPO is nonetheless entered, defendants may perceive an absence of procedural justice, which could then reduce their levels of compliance with the orders.

For these reasons relating to perceptions of procedural justice, as well as because many state long-arm statutes and jurisprudence will not enable courts to utilize the effects test to address victim needs, it is

¹³⁹ Shah v. Shah, 875 A.2d 931, 937 (N.J. 2005).

¹⁴⁰ E.H. v. D.B., 2008 N.Y. Misc. LEXIS 4966 (Fam. Ct. 2008); J.A. v. J.C., 2001 N.Y. Misc. LEXIS 1364 (Fam. Ct. 2001); M.P. v. M.S., 715 N.Y.S.2d 831 (Fam. Ct. 2000).

¹⁴¹ See *supra* Part II.A.1.

important to consider other mechanisms to resolve jurisdictional challenges in CPO cases and in particular the status exception.

B. *Origin of the Status Determination*

The status exception initially developed as a result of the federal courts' respect for state police powers in the area of family law, first in the context of divorce cases.¹⁴² In the seminal case of *Pennoyer v. Neff*, the United States Supreme Court set limits on the power of state courts to issue binding judgments but, in explaining the parameters of personal jurisdiction, specifically acknowledged that decisions related to the status of state citizens did not require personal jurisdiction over nonresident defendants.¹⁴³ The Court affirmed as separate and distinct “[t]he jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants.”¹⁴⁴ The Court highlighted the relevance of the status determination in the family context, reasoning that “[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”¹⁴⁵

The *Pennoyer* Court discussed, as an example of the need for this status exception, a situation in which a plaintiff sought a divorce on fault grounds, permissible in the plaintiff's home state, against a spouse living in another state that did not permit divorce under any circumstances.¹⁴⁶ The Court reasoned that the plaintiff's state of residence must be able to provide the plaintiff with relief, otherwise “the injured citizen would be without redress” since she could not simply proceed with an action in the defendant's home state.¹⁴⁷ Through these comments, the *Pennoyer* Court endorsed the view of some lower courts in previous decisions that divorce cases should be handled in a manner akin to actions in rem,¹⁴⁸ with jurisdiction based on domicile.¹⁴⁹ Therefore, from the beginning of our modern court system, the Court recognized that family law matters would require a different approach with respect to issues of personal jurisdiction given the importance of these concerns to state governments in a mobile society with diverse state laws.¹⁵⁰ Over time, the Court has also acknowledged that many

¹⁴² See *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878).

¹⁴³ *Id.* at 734.

¹⁴⁴ *Id.* (emphasis in original).

¹⁴⁵ *Id.* at 734–35.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 735.

¹⁴⁸ *Id.*

¹⁴⁹ Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL OF RTS. J. 381, 386 (2007).

¹⁵⁰ See *id.*

family law issues implicate aspects of the fundamental right to privacy and therefore require a specialized balancing of state and litigant interests in their resolution.

In the absence of a defendant spouse from the forum state and therefore a lack of in personam jurisdiction, courts may have authority to adjudicate a divorce case on the grounds of the status exception.¹⁵¹ The status exception¹⁵² to the requirement of personal jurisdiction is sometimes spoken of as being “essentially in rem,” with the status subject to adjudication constituting the res or property at issue.¹⁵³ However, “[t]he Supreme Court has not defined status jurisdiction or explicitly recognized its application to any type of case other than divorce.”¹⁵⁴ The origins of the status determination indicate that it was initially a somewhat poorly defined concept.¹⁵⁵ A certain degree of ambiguity continues to surround the status determination despite its use on a daily basis in divorce and other family law matters in all fifty states. Even among family law attorneys and trial court judges, the concept is not necessarily a familiar one. This lack of clarity has contributed to the disagreement regarding the application of the concept in protection order cases. However, consideration of other uses of the exception suggests its application in CPO cases is warranted so long as courts respect the traditional limits on its use.

C. *Status Exception in Other Family Law Contexts*

1. Divorce Cases

Although referenced in 1878 by the United States Supreme Court in *Pennoyer v. Neff*,¹⁵⁶ the Court did not specifically apply the status exception until the 1942 case of *Williams v. North Carolina*.¹⁵⁷ The *Williams* case occurred as rising mobility in our society was leading to increasingly frequent conflict of law issues in cases involving family disputes.¹⁵⁸ Problems arose as spouses separated and moved to different states and then petitioned for divorce in their new states’ courts.¹⁵⁹ As a

¹⁵¹ See *Williams v. North Carolina*, 317 U.S. 287 (1942); *Pennoyer*, 95 U.S. at 734.

¹⁵² See *Pennoyer*, 95 U.S. at 734. The status exception is more commonly referred to as a status determination in the context of CPO and other family law cases.

¹⁵³ *Id.*

¹⁵⁴ *In re R.W.*, 2011 VT 124, ¶ 26, 39 A.3d 682, 691.

¹⁵⁵ *Williams*, 317 U.S. at 297–98 (stating that viewing a status determination as in rem was not particularly helpful in analyzing the matter, and that such a view had been rejected in a prior case).

¹⁵⁶ 95 U.S. at 734.

¹⁵⁷ 317 U.S. at 303–04.

¹⁵⁸ See *Estin*, *supra* note 149, at 382.

¹⁵⁹ See, e.g., *Williams*, 317 U.S. at 303–04.

result, state courts increasingly struggled with decisions related to recognition of out-of-state divorce judgments. The difficulties were exacerbated by the fact that state divorce laws varied widely, as some states severely restricted access to divorce while states at the other end of the legal spectrum competed for the migratory divorce trade.¹⁶⁰

In the *Williams case*, the Supreme Court addressed the Full Faith and Credit Clause issue raised by these ex parte divorce decrees in reviewing the bigamy convictions of two North Carolina residents who had obtained Nevada divorces in the absence of personal jurisdiction over their respective spouses and then remarried.¹⁶¹ The Supreme Court held that states must grant full faith and credit to divorce decrees entered on behalf of persons domiciled in sister states, assuming compliance with the requirements of procedural due process.¹⁶² The Court reasoned that “[e]ach state . . . has a rightful and legitimate concern in the marital status of persons domiciled within its borders” because marriage “creates problems of large social importance.”¹⁶³ In addition to “[t]he reality of a sentence to prison” for bigamy, which was at issue in the *Williams case*, the Court expressed concern that “[c]hildren of the second marriage would be bastards in one state but legitimate in the other.”¹⁶⁴ Thus, the *Williams* Court, on the grounds of the status exception, required states to give full faith and credit to a divorce judgment of another state entered without personal jurisdiction over the defendant.¹⁶⁵ The use of the status exception in divorce and legal separation cases has since been acknowledged in the Restatement Second Conflict of Laws.¹⁶⁶ However, having ruled directly that the status exception to personal jurisdiction authorized a divorce against a nonresident spouse, the United States Supreme Court still needed to address ancillary relief incident to a divorce, including custody and financial issues.

The United States Supreme Court addressed the financial incidents of divorce in the cases of *Estin v. Estin*¹⁶⁷ and *Vanderbilt v. Vanderbilt*.¹⁶⁸ In the *Estin* and *Vanderbilt* cases, the Court grappled with the parameters of the Court’s authority in a status determination case and created the “divisible divorce.”¹⁶⁹ This framework resonates in the CPO

¹⁶⁰ See *Estin*, *supra* note 149, at 385 and 404.

¹⁶¹ *Williams*, 317 U.S. at 303.

¹⁶² *Id.*

¹⁶³ *Id.* at 298.

¹⁶⁴ *Id.* at 299–300.

¹⁶⁵ *Id.* But see *Williams v. North Carolina*, 325 U.S. 226 (1945) (holding that North Carolina could reexamine the issue of defendants’ domicile in determining whether to give full faith and credit recognition to the Nevada divorce decrees). This case is often referred to as *Williams II*.

¹⁶⁶ RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 75, 77 (1971).

¹⁶⁷ *Estin v. Estin*, 334 U.S. 541, 548–49 (1948).

¹⁶⁸ *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418–19 (1957).

¹⁶⁹ *Vanderbilt*, 354 U.S. at 418–19; *Estin*, 334 U.S. at 549.

court decisions that issue only prohibitory relief and refuse to grant affirmative relief.¹⁷⁰ The divisible divorce is a concept whereby a divorce decree against a nonresident defendant is entitled to full faith and credit as to the dissolution of the marriage as a status determination, but any attempted resolution of financial issues between the parties without personal jurisdiction is *not* entitled to full faith and credit.¹⁷¹ Issues such as alimony traditionally required personal jurisdiction over both parties.¹⁷² In *Estin*, the Court stated that “[t]he result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony.”¹⁷³

Child support matters also require personal jurisdiction over the defendant for entry of an order and may not proceed pursuant to the status determination approach.¹⁷⁴ In this way, child support is treated as a traditional suit for money damages in which a court may only enter an order if it has personal jurisdiction over the defendant.

The “divisible divorce” solution presages the “prohibitory relief only” approach in CPO cases by allowing a court to grant a person in-state partial relief pursuant to the status exception so long as that relief is not of the type traditionally requiring personal jurisdiction over a nonresident defendant.¹⁷⁵ The idea of divisible divorce represented accommodations between full faith and credit principles, the ultimate desire to permit status determinations for reasons related to individual rights, and respect for due process principles necessitating personal jurisdiction based on minimum contacts to impose and enforce financial obligations.¹⁷⁶ Since *Williams*, the status exception has been utilized implicitly and explicitly in other family law matters to enable parties living in different states to obtain redress with respect to their dispute. Most recently, some state courts have extended the status exception to CPO cases because states have “rightful and legitimate concern” regarding the prevention of domestic violence, another problem “of large social importance” that justifies use of the status determination to enter orders against nonresident defendants in appropriate cases.¹⁷⁷

¹⁷⁰ *Vanderbilt*, 354 U.S. at 418–19.

¹⁷¹ See *id.*; *Estin*, 334 U.S. at 549.

¹⁷² *Estin*, 334 U.S. at 549. (holding that a Nevada divorce decree entered on behalf of the husband against his wife, who resided in New York, did not extinguish a prior New York court order granting the wife alimony).

¹⁷³ *Id.*

¹⁷⁴ *Kulko v. Superior Court*, 436 U.S. 84, 89 (1978).

¹⁷⁵ *Estin*, 334 U.S. at 549.

¹⁷⁶ *Id.*

¹⁷⁷ *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

2. Custody and Child Welfare Cases

In the area of custody and visitation, the status exception has been implicitly adopted as the basis for jurisdiction in interstate custody cases in which courts have no personal jurisdiction over nonresident defendants. All states, with the exception of Massachusetts, have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) promulgated by NCCUSL in 1997.¹⁷⁸ As with the initial utilization of the status exception in the divorce context, the UCCJEA aimed to reduce conflicting state child custody and visitation orders and forum shopping, which plagued the United States prior to the enactment of the UCCJEA and its predecessor the Uniform Child Custody Jurisdiction Act (UCCJA).¹⁷⁹

The UCCJEA provides that “personal jurisdiction over[] a party or a child is not necessary or sufficient to make a child-custody determination.”¹⁸⁰ The comments to section 201 of the UCCJEA, which set out the grounds for subject matter jurisdiction, state that “[t]he requirements of this section, plus the notice and hearing provisions of the Act, are all that is necessary to satisfy due process.”¹⁸¹ NCCUSL then cites the concurrence of Justice Frankfurter in the 1953 United States Supreme Court case of *May v. Anderson* as the basis for this Act.¹⁸² In the plurality opinion in *May v. Anderson*, the Court seemed to reject the status exception and require personal jurisdiction in custody cases in order for judgments to be entitled to full faith and credit. However, Justice Frankfurter’s concurrence left open the question of the application of the status exception in custody cases. He stated that the Due Process Clause would not have been offended by the granting of full faith and credit to another state’s custody order in this case, despite the absence of personal jurisdiction over the defendant, and that the plurality decision merely indicated that the custody order in question did not necessarily warrant full faith and credit recognition under the circumstances.¹⁸³

¹⁷⁸ *Child Custody Jurisdiction and Enforcement Act*, UNIF. LAW COMM’N, <http://uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Sept. 17, 2013). Massachusetts law on child custody currently tracks the UCCJA, predecessor to the UCCJEA, and the state has not enacted the UCCJEA. Fern L. Frolin *Uniform Child Custody Jurisdiction Enforcement Act: A Better Child Custody Jurisdiction Law for Massachusetts*, 6 SEC. REV. MASS. BAR ASS’N 17 (2004).

¹⁷⁹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 204 cmt. (1997) (citing Parental Kidnapping Prevention Act of 1980, Pub L. No. 96-611, 94 Stat. 3566 (1980) (codified as amended at 28 U.S.C. § 1738A (2012)) and its failure to address significant domestic violence problems).

¹⁸⁰ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201(c).

¹⁸¹ *Id.* § 201 cmt. 2.

¹⁸² *Id.*

¹⁸³ *May v. Anderson*, 345 U.S. 528, 535–36 (1953) (Frankfurter, J., concurring).

In a comment representative of the current view of *May v. Anderson*, the Vermont Supreme Court noted in 1981 that “[g]iven the fragmented nature of the Court’s reasoning, the holding of *May* has been viewed as limited to the reasoning of Frankfurter’s concurrence and not as a bar to exercising status jurisdiction in custody cases.”¹⁸⁴ The Supreme Court of Tennessee stated, even more bluntly, “[a]s many courts and commentators have noted, [the *May v. Anderson*] ruling by the United States Supreme Court has largely been ignored.”¹⁸⁵ The implicit rather than explicit adoption of the status exception in the UCCJEA does not seem to have impeded the law’s effective functioning in interstate custody cases. However, greater clarity with respect to the fact that the exercise of jurisdiction pursuant to the UCCJEA in custody cases relies upon the status exception would aid in the broader awareness and understanding of the status exception concept in the legal community.

In analyzing the potential grounds for jurisdiction under the UCCJEA, the “emergency jurisdiction” provision offers the most apropos point of comparison for the use of the status exception in CPO cases.¹⁸⁶ “Emergency jurisdiction” requires only the presence of the child in-state and exigent circumstances.¹⁸⁷ The relevant section provides that a court may have jurisdiction to determine custody and/or visitation “if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.”¹⁸⁸ Significantly, emergency jurisdiction permits entry of only a temporary custody order although the state with emergency jurisdiction may later become the child’s home state and at that time enter a more long-term custody order on that basis.¹⁸⁹ However, the underlying rationale of allowing a state to adjudicate the status of a relationship in a limited manner to protect vulnerable persons within its borders in the context of family law remains the same.

In child welfare cases, the applicability of the status exception depends upon individual state courts given the lack of Supreme Court precedent on point.¹⁹⁰ Many state courts faced with the issue of

¹⁸⁴ *In re R.W.*, 2011 VT 124, ¶ 28, 39 A.3d 682, 692 (citing *In re Marriage of Leonard*, 175 Cal. Rptr. 903, 907–08 (Ct. App. 1981)).

¹⁸⁵ *Brown v. Brown*, 847 S.W.2d 496, 499 n.2 (Tenn. 1993); see also Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449 (1998).

¹⁸⁶ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 204.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* § 204(a).

¹⁸⁹ *Id.*

¹⁹⁰ Most child welfare cases addressing the status exception involve termination of parental rights rather than abuse and neglect or juvenile delinquency proceedings, as one might anticipate given the higher stakes involved in the former. However, the reasoning that leads

jurisdiction over a nonresident defendant in termination of parental rights cases have held that the status exception applies.¹⁹¹ In applying the status determination to termination of parental rights cases, the Wisconsin Supreme Court reasoned that “[r]equiring minimum contacts would often make termination of parental rights and the subsequent adoption proceedings impractical or impossible.”¹⁹² The status exception may also be available in adoption cases to facilitate adoptions when, for example, the child and person having legal custody of the child live in different states.¹⁹³ Similarly, the challenges facing domestic violence victims in returning to their former home states to litigate CPO cases, discussed *supra*, limits relief to cases in which the court can obtain personal jurisdiction over an out-of-state defendant, and thus results in many victims failing to obtain relief.

D. CPO Cases: Plurality Approach to Status Exception

Before exploring the application of the status exception to CPO cases, examination of the application of state long-arm statutes to resolve challenges on the grounds of personal jurisdiction will provide insight into the many reasons that these laws may not resolve jurisdictional disputes in interstate flight domestic violence cases. The plurality of states that have decided no contact interstate flight domestic violence cases have employed the status exception to the general requirement of personal jurisdiction.¹⁹⁴ On that basis, Iowa, Kentucky,

states to adopt this approach in these proceedings would presumably apply equally to termination and dependency cases.

¹⁹¹ See *S.B. v. State*, 61 P.3d 6, 14–15 (Alaska 2002) (holding that parent’s due process rights are not violated by exercise of status jurisdiction over termination proceeding); *In re M.L.K.*, 768 P.2d 316, 319 (Kan. Ct. App. 1989) (holding that status jurisdiction applies to termination proceeding); *Div. of Youth & Fam. Servs. v. M.Y.J.P.* 823 A.2d 817, 836 (N.J. Super. Ct. App. Div. 2003) (concluding that New Jersey had jurisdiction to terminate parental rights of mother living in Haiti to child brought to state by father); *Copeland v. Copeland*, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000) (holding that termination proceeding involves an adjudication of status and does not require minimum contacts over the parents); *State ex rel D.A. v. State*, 2002 UT 127, ¶¶ 21–32, 63 P.3d 607, 614–17 (holding that status jurisdiction applies to termination cases); *In re R.W.*, 2011 VT 124, ¶ 32, 39 A.3d 682, 693 (citing *J.D. v. Tuscaloosa Cnty. Dep’t of Human Res.*, 923 So. 2d 303, 310 (Ala. Civ. App. 2005) (holding that “status exception to the requirement that the defendant have minimum contacts with the forum state applies to termination-of-parental-rights proceedings”)); *In re Termination of Parental Rights to Thomas J.R.*, 2003 WI 61, ¶¶ 32–40, 663 N.W.2d 734, 743–44 (holding that status jurisdiction applies in all custody cases including termination).

¹⁹² *Thomas J.R.*, 2003 WI 61, ¶ 39, 663 N.W.2d at 744.

¹⁹³ RESTATEMENT (SECOND) CONFLICT OF LAWS § 78 (1971).

¹⁹⁴ Compare *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001), and *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006), and *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008), and *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010), with *Rios v. Ferguson*, 978 A.2d 592 (Conn. Super. Ct. 2008), and *Shah v. Shah*, 875 A.2d 931 (N.J. 2005).

Massachusetts, and New Hampshire have granted qualifying plaintiffs final CPOs with prohibitory relief only.¹⁹⁵

Prohibitory relief has generally included orders to stay away from the victim and to have no contact with her.¹⁹⁶ In contrast, affirmative remedies that are typically available in a protection order case, like child support, alimony, and use and possession of marital property, will not be addressed by a court awarding only prohibitory relief.¹⁹⁷ Affirmative relief would include provisions requiring the defendant to pay compensatory and/or punitive damages, to surrender firearms, to submit to a psychological, psychiatric, and/or substance abuse evaluation, to participate in a domestic violence and/or substance abuse treatment program or other type of counseling, and to give the victim use and possession of personal and/or real property currently in the defendant's control.¹⁹⁸ It might also include requiring a defendant to pay fees and/or fines.¹⁹⁹ Generally, an order to pay child support and/or alimony would also qualify as affirmative relief unless an alternative ground for jurisdiction applied pursuant to the Uniform Interstate Family Support Act (UIFSA).²⁰⁰ Custody and visitation issues could presumably be addressed, since in order to qualify for even a temporary order, the victim would need to allege facts that would also satisfy the UCCJEA emergency jurisdiction provision.²⁰¹

Iowa, in the case of *Bartsch v. Bartsch*, decided in 2001, was the first state to employ the status exception to permit entry of a final CPO against a nonresident defendant.²⁰² Relying on United States Supreme Court precedent with respect to divorce and a myriad of state cases on the related issue of child custody, the court found that the status exception firmly established in these precedents should extend to domestic violence cases.²⁰³ The *Bartsch* majority reasoned that “[t]he greater and more immediate risk of harm from domestic violence” renders the use of the status exception principle “even more compelling” in CPO cases than in divorce matters in which the historically identified potential harms included bigamy and illegitimate offspring.²⁰⁴ The state's interest in adjudicating CPO cases equals or exceeds its interest in addressing child custody matters since “it involves

¹⁹⁵ See *Bartsch*, 636 N.W.2d 3; *Spencer*, 191 S.W.3d. 14; *Caplan*, 879 N.E.2d 117; *Hemenway*, 992 A.2d 575.

¹⁹⁶ *Caplan*, 879 N.E.2d. at 123.

¹⁹⁷ *Id.* at 122; UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 102(14) (1997) (defining “physical custody”).

¹⁹⁸ See, e.g., *Spencer*, 191 S.W.3d. at 19; *Caplan*, 879 N.E.2d at 125.

¹⁹⁹ See, e.g., *Shah*, 875 A.2d at 933.

²⁰⁰ UNIF. INTERSTATE FAMILY SUPPORT ACT (2008).

²⁰¹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 204.

²⁰² *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001).

²⁰³ *Id.*

²⁰⁴ *Id.* at 9.

the safety of the protected parties.”²⁰⁵ “If a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did here—enter an order protecting a resident Iowa family from abuse.”²⁰⁶ The court specifically noted “[t]he interstate nature of many abusive relationships, and the concomitant need for protection extend[] beyond the borders of a particular state”²⁰⁷

In *Caplan v. Donovan*, the Massachusetts Supreme Judicial Court also held that the trial court had authority to enter a final CPO, despite a lack of personal jurisdiction over the nonresident defendant, as a status determination.²⁰⁸ The court relied in similar fashion on the importance of protection of victims from further abuse and the reality that escaping from domestic violence often requires flight across state lines.²⁰⁹ In *Caplan*, the court explained that the relevant “status” at issue is that of the alleged victim of domestic violence as a protected person and declared that protection from domestic violence is a “fundamental human right.”²¹⁰ The court eloquently noted that to deny all relief to a victim seeking a CPO against a nonresident defendant would result in a situation in which:

[T]he unpalatable choices remaining are either to require the victim of abuse to return to the State in which the abuse occurred in order to obtain an effective abuse prevention order or, alternatively, to wait for the abuser to follow the victim to the Commonwealth and, in the event of a new incident of abuse, [for the victim to] seek an order from a Massachusetts court. In neither alternative will a court be able to provide protection to those within its borders.²¹¹

In the 2006 case of *Spencer v. Spencer*, the Court of Appeals of Kentucky entered a final CPO on behalf of a plaintiff who fled to her friend’s home in Kentucky against a nonresident defendant in the absence of personal jurisdiction.²¹² The *Spencer* court alluded to the status exception discussions in the Iowa *Bartsch* decision and the Delaware *T.L. v. W.L.* case but did not explicitly adopt the status exception.²¹³ The Kentucky court instead purported to rely on the New Jersey *Shah*²¹⁴ case.²¹⁵ However, unlike the *Shah* court, the Kentucky court entered a *final* CPO, thus in fact aligning with the approach of the

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 9.

²⁰⁸ *Caplan v. Donovan*, 879 N.E.2d 117, 122–23 (Mass. 2008).

²⁰⁹ *Id.* at 123.

²¹⁰ *Id.*

²¹¹ *Id.* at 123.

²¹² *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006).

²¹³ *Id.* at 17–18.

²¹⁴ *Shah v. Shah*, 875 A.2d 931 (N.J. 2005).

²¹⁵ *Spencer*, 191 S.W.3d at 19.

“status exception” plurality rather than the New Jersey approach of a temporary CPO.²¹⁶

In the 2003 case of *T.L. v. W.L.*, a Delaware family court mentioned the status exception argument in an interstate flight domestic violence case involving a nonresident defendant.²¹⁷ However, the court ultimately did not rule on whether or not it would utilize the status exception in Delaware CPO cases.²¹⁸ Instead, the court decided the matter on the grounds of subject matter jurisdiction, holding that the plaintiff did not qualify as a person entitled to relief because she was not a “*bona fide* resident[]” of the state, having just fled to Delaware two days prior to filing for protection.²¹⁹

In the most recent case applying the status exception in the context of domestic violence, *Hemenway v. Hemenway*, the New Hampshire Supreme Court upheld the entry of a final CPO against a nonresident defendant in the absence of personal jurisdiction.²²⁰ *Hemenway* cites the decisions and reasoning in the *Bartsch*, *Shah*, *Spencer*, and *Caplan* cases as persuasive authority in reaching its own holding.²²¹ However, like the Court of Appeals of Kentucky in *Spencer*, the New Hampshire Supreme Court in *Hemenway* failed to acknowledge the distinction between the indefinite temporary CPO awarded in *Shah* and the final CPOs awarded in the other cited state cases, or to acknowledge that the *Shah* decision specifically rejected the status exception.²²²

To date, at least one state has proactively addressed the issue of personal jurisdiction over nonresident defendants in interstate flight domestic violence cases but did not clearly adopt or reject the status exception. North Dakota’s CPO statute allows a court to grant a victim living in the state a temporary or final CPO against a nonresident defendant based upon domestic violence that “occurred exclusively outside the state.”²²³ The statute notes that the nonresident defendant will become subject to the personal jurisdiction of the court upon entry into the state and that relief will be limited to prohibitory terms, such as those barring abuse of a victim or contact with a victim.²²⁴ This approach sounds initially similar to that of New Jersey in allowing the presence of the defendant in-state to impact the effect of the order. However, the North Dakota statute does not clarify the effect of the CPO, if any, prior to the nonresident defendant’s entry into the state,

²¹⁶ Compare *id.* at 16, 19, with *Shah*, 875 A.2d 931.

²¹⁷ *T.L. v. W.L.*, 820 A.2d 506, 512–13 (Del. Fam. Ct. 2003).

²¹⁸ *Id.*

²¹⁹ *Id.* at 514.

²²⁰ *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

²²¹ *Id.* at 581.

²²² *Id.*; see also *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006); *Shah v. Shah*, 875 A.2d 931 (2005).

²²³ N.D. CENT. CODE § 14-07.1-02(9) (2013).

²²⁴ *Id.*

and there are no reported cases on point.²²⁵ Furthermore, the North Dakota statute appears to provide for entry of a *final* CPO even in the absence of minimum contacts with the forum state, contrary to the New Jersey approach and seemingly more in keeping with a status determination and the plurality approach. However, neither the statute itself nor the accompanying notes explicitly discuss the status exception.²²⁶ This statute provides another example of the confusion and the need for greater clarity in this area of the law.

E. CPO Cases: States Without Status Exception

In the absence of legislative guidance, some states have failed to consider the application of the status exception in interstate flight domestic violence cases.²²⁷ This failure could be a purposeful decision not to act in the absence of an explicit statutory directive. However, the lack of a specific ruling on the status exception by some state courts more likely suggests a lack of awareness of the option to utilize the status exception in CPO cases and the persuasive authority in the decisions of other state courts that have adopted the exception despite legislative silence on the issue. For example, the Florida District Court of Appeals did not discuss the potential utilization of the effects test or the status exception in its one reported interstate flight domestic violence case, *Becker v. Johnson*.²²⁸

As in Florida, the Georgia Court of Appeals has been presented with the opportunity to adopt the status exception approach to CPO cases involving nonresident defendants.²²⁹ However, the Georgia Court of Appeals also failed to explicitly consider the status exception in the only two reported cases on point, namely the aforementioned *Anderson* and *Huggins*.²³⁰ The default to denial of relief for domestic violence victims in Florida and Georgia highlights the importance for state legislatures and courts to proactively consider use of the status exception in interstate flight domestic violence cases in order to fully effectuate legislative intent to protect victims.

Pennsylvania's CPO statute includes a section on jurisdiction that addresses interstate flight cases and may be read as implicitly rejecting utilization of the status exception to enter an order against a

²²⁵ *Id.* § 14-07.1-02.

²²⁶ *Id.* § 14-07.1-02(9).

²²⁷ *See, e.g.,* *Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006); *Anderson v. Deas*, 632 S.E.2d 682 (Ga. Ct. App. 2006).

²²⁸ 937 So. 2d 1128.

²²⁹ *See Huggins v. Boyd*, 697 S.E.2d 253, 253–55 (Ga. Ct. App. 2010); *Anderson*, 632 S.E.2d at 683–84.

²³⁰ *See Huggins*, 697 S.E.2d at 253–55); *Anderson*, 632 S.E.2d at 683–84.

nonresident defendant.²³¹ However, no reported cases have been decided to date on this issue, so a Pennsylvania court may interpret the statute as inapplicable on the status exception question.²³²

In the aforementioned *Rios v. Ferguson* case, the Superior Court of Connecticut judge mentioned briefly in dicta that although several states have elected to enter CPOs in the absence of personal jurisdiction, Connecticut's restraining statute explicitly requires personal jurisdiction.²³³ However, the *Rios* court failed to even note the existence of the status exception and, in its string cite footnote on this point, did not distinguish between the New Jersey approach in *Shah*, a court which truly proceeded without personal jurisdiction, and the status determination approach, which represents an exception to the general requirement of personal jurisdiction, employed by Iowa in *Bartsch*, Kentucky in *Spencer*, and Massachusetts in *Caplan*.²³⁴ The *Rios* decision leaves the impression that the court did not fully consider the status exception, since it had personal jurisdiction over the nonresident defendant pursuant to the state's long-arm statute.

F. CPO Cases: New Jersey Alternative to Status Exception

In one of the earliest decisions in this area, the New Jersey Supreme Court took a unique approach in the 2005 case of *Shah v. Shah*.²³⁵ The New Jersey Supreme Court held that since the court lacked personal jurisdiction over the defendant, it lacked the authority to enter a *final* CPO against him.²³⁶ However, the court concluded that it could, consistent with due process principles, continue the *temporary* CPO with prohibitory relief only against the defendant.²³⁷ The court indicated that prohibitory relief included the provisions of the CPO ordering the defendant not to commit acts of domestic violence against the plaintiff and not to contact her.²³⁸ The court indicated in dicta that it would have struck as affirmative relief the provision of the temporary CPO requiring the defendant to return to plaintiff her personal papers.²³⁹

²³¹ 23 PA. CONS. STAT. § 6103(b)(2) (2013) (stating that “[t]he right of the plaintiff to relief under this chapter shall not be affected by . . . defendant’s nonresidence in this Commonwealth, provided that the court has personal jurisdiction over the defendant in accordance with [Pennsylvania’s long-arm statute]” (emphasis added)).

²³² *Id.*

²³³ *Rios v. Ferguson*, 978 A.2d 592, 595–96 (Conn. Super. Ct. 2008).

²³⁴ *Id.* at 595 & n.4.

²³⁵ *Shah v. Shah*, 875 A.2d 931 (N.J. 2005).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 941 (finding the issue was moot because defendant returned said papers, which included the plaintiff’s social security card, work permit, immigration documents, and mail).

In drawing this distinction between affirmative and prohibitory orders, the court reasoned that a prohibitory order “prohibits the defendant from engaging in behavior already specifically outlawed” and “does not implicate any of defendant’s substantive rights.”²⁴⁰ In the prior case of *J.N. v. D.S.*, the Chancery Division of the Superior Court of New Jersey employed similar logic in entering a temporary CPO against a defendant in the absence of personal jurisdiction reasoning, “what harm would the alleged abuser suffer?”²⁴¹

The New Jersey Supreme Court specifically rejected the argument by an amicus to apply the status exception.²⁴² In refusing to adopt this basis for an order, the court noted that the amicus argument in favor of the status exception cited cases involving exclusively child custody and termination of parental rights.²⁴³ The court failed to consider the origins of the status determination concept in the divorce context and the manner in which it has gradually been applied to other types of family law cases in response to the need for state courts to have authority to address social problems involving families living apart in different states.²⁴⁴ The court also seems to have been either uninterested in or unaware of at least two reported cases at that time specifically contemplating application of the status determination approach in CPO cases.²⁴⁵

The New Jersey Supreme Court further reasoned that a final CPO limited to prohibitory relief only (the plurality approach) was not an option without personal jurisdiction because “[a] final restraining order must, by statutory definition, include affirmative relief.”²⁴⁶ For example, the court noted that in New Jersey, a defendant faces payment of a civil penalty and surcharge, listing in a central domestic violence registry, and surrender of firearms and related permits.²⁴⁷ The court correctly points out one of the fundamental flaws in the plurality approach, and it is commendable that the justices sought to protect victims while recognizing the automatic infringement on a defendant’s rights flowing from the entry of a final CPO.²⁴⁸ However, the *Shah* court failed to recognize the ways in which its own solution was also problematic.²⁴⁹

²⁴⁰ *Id.* at 939.

²⁴¹ *J.N. v. D.S.*, 693 A.2d 571, 573 (N.J. Super Ct. Ch. Div. 1996).

²⁴² *Shah*, 875 A.2d at 940 & n.5.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *T.L. v. W.L.*, 820 A.2d 506 (Del. Fam. Ct. 2003); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001).

²⁴⁶ *Shah*, 875 A.2d at 941; see also *Bartsch*, 636 N.W.2d 3.

²⁴⁷ *Shah*, 875 A.2d at 940.

²⁴⁸ In his dissent in *Bartsch*, Justice Carter also specifically noted the prohibition on possession of firearms, which arises as a collateral consequence of the entry of a final CPO. *Bartsch*, 636 N.W.2d at 11 (Carter, J., dissenting).

²⁴⁹ *Shah*, 875 A.2d at 940.

III. BALANCING VICTIMS' RIGHTS AGAINST DEFENDANTS' RIGHTS

This Part argues that the status exception should be utilized in interstate flight domestic violence cases and then discusses the appropriate remedies and duration of a CPO pursuant to the status exception. It begins by suggesting the logic of extending the status exception from other family law contexts to CPO cases given the similar public policy interests in each area.

This Part then addresses the various arguments raised against application of the status exception to CPO cases. First, it rejects the claim that a CPO does not alter parties' legal statuses and therefore does not warrant use of the status exception. Instead, through analogies to the use of the status exception in legal separation and UCCJEA cases, this Part highlights the manner in which a CPO changes the nature of the relationship between the litigants. It then explains how these changes justify employing the status exception even though the legal categorization of the relationship remains the same. Second, this Part counters claims by some state courts that the VAWA full faith and credit provisions mandate rejection of the status exception in CPO cases. Third, this Part reviews the impact of the entry of a CPO between the parties in other family law cases. It then suggests that, while concerns of the defense bar in this area may be overstated, the collateral consequences of the issuance of CPOs for defendants suggest the need to proceed with caution in deciding the appropriate parameters of use of the status exception in this setting. Fourth, this Part addresses the New Jersey approach to interstate flight domestic violence cases and rejects the claims of the New Jersey Supreme Court that temporary CPOs do not require use of the status exception because they do not impact substantive rights.

This Part suggests that precedent in other family law contexts related to the status exception dictates that a status exception CPO must be limited to prohibitory relief and custody orders independently authorized by the UCCJEA. Finally, this Part argues that status exception CPOs should be temporary given the automatic imposition of affirmative relief in a final CPO (including federal firearms prohibitions) as well as the substantially more burdensome collateral consequences for defendants from the entry of a final versus a temporary CPO. A temporary and renewable CPO pursuant to the status exception strikes the optimal balance between offering some protection for victims at a particularly dangerous time and respect for the due process rights of nonresident defendants.

Though this proposal is somewhat more limited in terms of providing relief to victims of domestic violence than the current plurality position—permitting entry of a *final* CPO limited to

prohibitory relief—it is the better option for those concerned with both victims’ needs and defendants’ due process rights. Legal approaches that fail to sufficiently respect defendants’ rights may create the perception of a false dichotomy between offering protection for victims and treating defendants with fundamental fairness. The tensions between victim and defendant rights, as well as uncertainty in this area of law in most jurisdictions, may lead some state trial court judges to reject or fail to use the status exception and therefore to deny relief to victims out of concern for the rights of defendants. Other jurisdictions may offer protection for victims in a manner that arguably violates a defendant’s due process rights. The current state of the law on this issue reflects this type of sharp division between jurisdictions with reported decisions on the use of the status exception in CPO cases. The intermediate solution proposed below takes both interests seriously, providing relief that is consistent with the policy concerns regarding victims’ rights to bodily integrity and defendants’ rights to a judicial process requiring personal jurisdiction before any imposition of affirmative duties.

A. *Extension of the Status Exception to CPO Cases*

The status exception offers a well-established mechanism for state courts to address family law issues essential to the well-being of their citizens in the ever-increasing number of cases involving nonresident defendants. States need the status exception to provide their courts with authority to address a myriad of legal and social problems arising in the family law context that would otherwise go unresolved in cases involving nonresident defendants.²⁵⁰ Gradual expansion of the concept, from its initial application in divorce and legal separation, to its current implied use in custody cases and its explicit use in termination of parental rights actions, highlights both the usefulness of the status exception in helping state courts confront a variety of family needs and its broad-based acceptance.²⁵¹

Historically, in the divorce context, states avoided the social ills of bigamy and illegitimate offspring through allowance of the dissolution of marriage pursuant to the status exception even in the absence of one spouse. With respect to custody cases, use of an implicit status exception has protected children by reducing forum shopping and encouraging enforcement of out-of-state orders. The status exception in termination of parental rights cases promotes the well-being of abused and neglected

²⁵⁰ See, e.g., *id.*

²⁵¹ See *Bartsch*, 636 N.W.2d 3; *Spencer v. Spencer*, 191 S.W.3d. 14 (Ky. Ct. App. 2006); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

children by freeing them for adoption without regard to the state of residence of their parents.

The highest state courts in both Massachusetts and Iowa have noted the logic of extending the status exception to CPO cases given the strong state interest in protecting residents from domestic violence.²⁵² If courts could use the status exception to protect children from the stigma of illegitimacy, surely the concept may be used to protect victims of domestic violence and their children from further abuse.²⁵³ While the initial rationale for the status exception focused on state sovereignty, particularly in the area of divorce, the extension of the exception over the years has been grounded in both respect for federalism and recognition of individual rights.²⁵⁴ As with marriage and custody of children, freedom from domestic violence represents a fundamental human right and an aspect of the constitutional right to privacy that warrants employment of the status exception to enable states to offer victims relief against nonresident defendants consistent with due process.²⁵⁵

1. Civil Protection Orders Alter the Legal Status of Parties

The only commentator to have addressed the applicability of the status exception to the CPO context thus far is a law student whose Comment was critical of the status determination approach. In that Comment, Bevan Graybill argued that entry of a CPO cannot be justified pursuant to the status exception because a CPO does not alter the legal status of the parties in relation to one another; it simply enjoins behavior.²⁵⁶ This is because, Ms. Graybill argues, in a divorce case, the status exception serves to modify the legal status between the parties by ending the status of marriage, whereas in a CPO case, the parties maintain their legal status in relation to one another (e.g., married, co-parents, etc.) regardless of the entry of an order. For this reason, Ms. Graybill claims a CPO is not a true status determination, and therefore a CPO cannot be entered pursuant to the status exception.²⁵⁷

²⁵² *Bartsch*, 636 N.W.2d 3; *Caplan*, 879 N.E.2d 117.

²⁵³ *Bartsch*, 636 N.W.2d at 10.

²⁵⁴ *Estin*, *supra* note 149, at 424–25.

²⁵⁵ *Albany City and County Declare Freedom from Domestic Violence to be a Fundamental Human Right*, ALB. L. SCH., <http://www.albanylaw.edu/about/news/current/Pages/Freedom-from-Domestic-Violence-Fundamental-Human-Right.aspx> (last visited Sept. 18, 2013); Jennifer Cunningham-Minnick, Nick Maull & Josh Lefevre, Letter to the Editor, *City Counsel Takes Stand Against Domestic Violence*, CINCINNATI.COM (Oct. 18, 2011), <http://cincinnati.com/blogs/letters/2011/10/18/city-council-takes-stand-against-domestic-violence>.

²⁵⁶ *See* Graybill, *supra* note 25.

²⁵⁷ *Id.* at 856–58.

This reasoning, while superficially appealing, is flawed. Although the technical *category* of the legal relationship between the parties remains unchanged following the entry of a CPO (e.g., married couples remain married), the *status* of that relationship, and the societal and legal expectations and constraints attendant to that relationship, have been fundamentally altered in response to the need to protect one spouse from domestic violence at the hands of the other spouse. The essence of a CPO is to enjoin contact and communication, which profoundly changes the dynamics and functioning of the relationship between the parties. If a defendant chooses to disregard the modified nature of the relationship pursuant to a CPO and calls his wife, his actions can result in criminal prosecution. Thus, the “status” of the parties subject to CPOs in relation to one another has been profoundly and fundamentally changed, both as a practical matter and in the eyes of the law; the fact that the parties remain married in no way suggests that these cases fall outside of the ambit of traditional authority to determine status.

The change in relationship status arising from a CPO resembles in many ways a legal separation of spouses. Legal separation does not end or otherwise affect the existence of the marriage, but it has historically been found to “modify the incidents of the marriage relationship by relieving the spouses from the duty of living with each other.”²⁵⁸ As discussed *supra*, the application of the status exception to legal separation is well-established in the law.²⁵⁹ The status exception may be utilized to grant a legal separation between a resident and nonresident spouse in part to enable a state “to protect a spouse, who is present within its territory, from the violence or cruelty of the other.”²⁶⁰ If the status exception can be employed to separate a married couple in order to protect one spouse from violence, without dissolving the marriage, there is no theoretical barrier to a court being empowered pursuant to the status exception to achieve a similar separation in the relationship between a victim of domestic violence and her nonresident abuser in a CPO case.

The other family law contexts in which the status exception has been employed further demonstrate its applicability in the CPO context. First, the UCCJEA’s use of an implicit status exception in custody cases also suggests that the extension of the concept to CPO matters is entirely appropriate.²⁶¹ The issuance of a UCCJEA custody order does not change the legal relationship of the parties. They both remain parents of a child, or children, in common regardless of the terms of the custody

²⁵⁸ RESTATEMENT (SECOND) CONFLICT OF LAWS § 75 cmt. a (1971).

²⁵⁹ *Id.* § 75.

²⁶⁰ *Id.* § 75 cmt c.

²⁶¹ See UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997).

order. However, while the technical legal status of the parties vis-à-vis one another remains the same—they both remain parents—the incidents of and rights pertaining to that relationship may be profoundly altered by a custody order pursuant to the implicit status exception in the UCCJEA. Once a court assumes jurisdiction over a child custody case pursuant to the UCCJEA, that court may apply its own state's custody law to change the terms of a nonresident parent's visitation with his child in a variety of ways, including altering the times, dates, and/or location of visits as well as adding or removing a requirement of supervision and/or a requirement for contact with the custodial parent during visitation.²⁶² The court may even suspend a nonresident parent's visitation rights and grant the other parent sole legal and physical custody of the child in appropriate circumstances.²⁶³ Again, while the legal categorization of the parties as parents of a child in common remains the same, the status exception implicit in the UCCJEA permits dramatic changes in the rights and responsibilities inherent in that parental relationship. Interstate custody cases and interstate flight domestic violence cases invoke similar public policy issues, namely the recognition of a parallel need in both cases to protect a person in-state even in the absence of personal jurisdiction over a nonresident defendant.

The use of the status exception through the UCCJEA in interstate custody cases today is implicit rather than explicit, most likely as a result of the fractured United States Supreme Court decision in *May v. Anderson*, which arguably rejected the use of the status exception in this context.²⁶⁴ The *May* plurality opinion on this point has been almost universally disregarded.²⁶⁵ However, as a consequence of the apparent reluctance to explicitly rely upon the status exception in the UCCJEA in light of the *May* decision, judges and lawmakers do not necessarily recognize the implicit use of the status exception through the UCCJEA. One could argue that a custody determination simply does not require personal jurisdiction over a nonresident defendant because it does not resemble a traditional money judgment that requires affirmative conduct on the part of said defendant. However, any custody order involving visitation and/or shared legal custody will automatically impose affirmative duties upon both parents and therefore on the nonresident defendant. For example, in such a case, the custodial parent must produce the child for visitation and the non-custodial parent must return the child following visitation. Many such orders include specific

²⁶² See *id.* (Prefatory Note 5); see also *Welch-Doden v. Roberts*, 42 P.3d 1166, 1173 (Ariz. Ct. App. 2002).

²⁶³ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 102(3).

²⁶⁴ RESTATEMENT (SECOND) OF JUDGMENTS § 7 cmt. b (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 cmt. a (1971).

²⁶⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 cmt. a.

dates, times, locations, and other parameters of visitation, all of which constitute an affirmative duty upon a nonresident defendant parent.

Therefore, it is difficult to imagine that courts would be constitutionally permitted to impose orders on nonresident defendants, which clearly do require affirmative action by them, in the absence of the status exception. The implicit use of the status exception in custody cases rests upon the recognition that in a mobile society, state courts will need to render some decisions with respect to family relationships in the absence of a party and that due process is not the only important right at issue in such cases.²⁶⁶ The use of the status determination in such cases reflects the fact that custody matters also involve fundamental rights to parent one's child and the state's *parens patriae* interest in protecting a child. Greater clarity in the law, and specifically an explicit acknowledgment of the status exception in custody cases, would aid state court judges and litigants in understanding use of the status exception more generally, including in the CPO context.

It is also worthy of note that a few states' domestic violence statutes have extended protection from abuse to individuals with no familial or intimate relationship with the alleged abusers.²⁶⁷ Among other plaintiffs, this type of order aids victims of both sexual assault and stalking when either crime is perpetrated by an acquaintance or stranger. Although a full consideration of the issues raised by these statutes is beyond the scope of this Article, the fundamental rights on balance weigh in favor of applying the status determination to permit a temporary CPO against a nonresident defendant here as well. The state retains a compelling interest in protecting its residents from abuse, and victims have a constitutional right to bodily integrity, regardless of whether a defendant is a former boyfriend or merely a former co-worker. Furthermore, the impact on a defendant's rights is diminished in a CPO case filed by an acquaintance or stranger. In such cases, there are no family court matters between the parties in which the defendant may arguably be prejudiced by the entry of a CPO, and the defendant's free speech rights in contacting the plaintiff are presumably lessened given the lack of an interpersonal relationship.

Ms. Graybill argued that the traditional rationale for the status exception was respect for state supremacy in the family law arena, and therefore extension of the status exception to victims of acquaintance and stranger stalking and sexual assault would exceed the Supreme

²⁶⁶ *Id.* § 79.

²⁶⁷ *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1809 (2013) (allowing any person to obtain an injunction against another for acts of harassment); 740 ILL. COMP. STAT. 22/201 (2013) (Illinois also allows victims of sex crimes to obtain orders of protection regardless of the relationship to the attacker, but they do not contain the same provisions as domestic violence protection orders); MD. CODE ANN., CTS. & JUD. PROC. § 3-1503 (LexisNexis 2013).

Court's intended use of the exception.²⁶⁸ However, as discussed *supra*, deference to state court authority in family law matters represents only part of the support in the modern era for the use of the status exception, which is also grounded in individual rights, including the right to privacy, and is therefore independent of the legal categorization of the relationship between the litigants. Furthermore, a CPO is a civil remedy with criminal law enforcement mechanisms and is intended to protect victims against criminal behavior.²⁶⁹ CPO statutes frequently require a heightened law enforcement response to reports of domestic violence with arrest mandated in many instances.²⁷⁰ Under these circumstances, deference to states in their use of the status exception to protect state residents also seems consistent with respect for traditional state police powers.

A similar question could be raised regarding relationships that don't receive independent legal recognition in other contexts but that do enable victims in many states to seek CPOs (e.g., dating relationships, co-habitants, etc.) and whether these relationships should qualify for application of the status exception. For example, one could argue that since a couple who is merely dating has no legal status *vis-à-vis* one another, the status exception should not be utilized to provide relief. With regard to these relationships, traditional respect for the supremacy of state law in the area of family law requires allowing each state to define family relationships as it sees fit, including the types of relationships that may allow a plaintiff to qualify for a CPO as protection from family violence.²⁷¹ These federalism principles should also permit each state to extend a status determination CPO to all victims of domestic violence who meet a state's particular relationship requirement.²⁷²

²⁶⁸ Graybill, *supra* note 25.

²⁶⁹ See, e.g., New Jersey Prevention of Domestic Violence Act, 1991 N.J. Sess. Law Serv. Ch. 261 (West) (codified as amended at N.J. STAT. ANN. §§ 2C:25-17 to -35 (West 2013)).

²⁷⁰ *Id.*

²⁷¹ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (“[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.”).

²⁷² A few states' domestic violence statutes have extended protection from abuse to individuals with no familial or intimate relationship with the alleged abusers. See, e.g., § 12-1809 (allowing any person in Arizona to obtain an injunction against another for acts of harassment); 22/201 (Illinois also allows victims of sex crimes to obtain orders of protection regardless of the relationship to the attacker, but the orders do not contain the same provisions as domestic violence protection orders); CTS. & JUD. PROC. § 3-1503. Although a full consideration of the issues raised by these statutes is beyond the scope of this Article, the fundamental rights in balance weigh in favor of applying the status determination to permit a temporary order here as well.

2. Full Faith and Credit Provisions and the Status Exception

The full faith and credit provisions of VAWA require that a court issuing a CPO have “jurisdiction” over both parties in order for that CPO to be entitled to interstate recognition and enforcement.²⁷³ However, these provisions do not explicitly rule out the use of the status exception to the requirement of personal jurisdiction in CPO cases.²⁷⁴ At the time of VAWA’s enactment in 1994, drafters may not have contemplated extension of the status exception concept to CPO matters given that the first state court decision on this issue was the Iowa *Bartsch* case in 2001.²⁷⁵ Since the *Bartsch* decision twelve years ago, VAWA has been amended and reauthorized, but the full faith and credit provisions have not been revised to directly address this issue, leaving the potential entitlement of a status exception CPO to interstate recognition and enforcement an open question.²⁷⁶

At the state court level, judges have improperly relied upon statutory provisions adopted in response to VAWA as some indication of legislative intent with respect to the status exception.²⁷⁷ Decisions by state legislators to comply with the VAWA full faith and credit provisions reflect nothing more than an effort to maximize out-of-state recognition of CPOs. These actions do not suggest a full and reasoned consideration and rejection of status exception CPOs. These state statutory provisions do not reference the status exception in any manner.²⁷⁸ Nonetheless, at least one court has mistakenly relied upon full faith and credit provisions to establish legislative intent as to the adoption or rejection of the status exception in CPO cases.²⁷⁹

For example, in *Rios v. Ferguson*, the Connecticut Superior Court held that the language of the state’s domestic violence statute, which requires every CPO to include a provision indicating the court issuing the CPO had personal jurisdiction over the parties, meant that the court should not consider entering an order without personal jurisdiction over the defendant.²⁸⁰ While Connecticut courts must certainly respect the legislative intent behind enactment of Connecticut’s CPO statute, reliance on this portion of its state statute does not explain the court’s

²⁷³ See 18 U.S.C. § 2265(b)(1) (2012).

²⁷⁴ See Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)).

²⁷⁵ *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001).

²⁷⁶ See Violence Against Women Act § 40221(a); *Bartsch*, 636 N.W.2d 3.

²⁷⁷ See *Rios v. Ferguson*, 978 A.2d 592, 595–96 (Conn. Super. Ct. 2008); *Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006).

²⁷⁸ See, e.g., CONN. GEN. STAT. § 46b-15(e) (2013); FLA. STAT. § 741.30(6)(d) (2013).

²⁷⁹ *Rios*, 978 A.2d at 595–96.

²⁸⁰ *Id.*; see also *Becker*, 937 So. 2d at 1131–32, 1132 n.4 (holding that Florida’s CPO statute required the court to have “jurisdiction over the parties” to enter a final CPO and failed to consider use of the status exception in a CPO case).

rejection of the status exception as well as the New Jersey approach in the *Shah* case.²⁸¹ State statutes adopted in response to VAWA may indicate, at most, a state's desire to ensure its orders receive full faith and credit treatment elsewhere and that status exception CPOs may not merit full faith and credit.

However, since several states now recognize the application of the status exception in CPO cases and all fifty states have adopted the VAWA full faith and credit provisions, it is clear that these full faith and credit provisions do not suggest a bar to, or a substitute for, the use of the status exception.²⁸² Any decision to import full faith and credit concerns into the context of interstate flight domestic violence cases and then use them as a basis for rejecting the status exception CPO would be contrary to the intent of VAWA to maximize protection for victims of domestic violence.²⁸³ Victims who receive temporary CPOs pursuant to a status exception will not necessarily need to travel or relocate during the pendency of an order and would presumably prefer to have an order that may or may not be enforceable in another state than to have no order at all. In interstate flight domestic violence cases, victims will have no access to the protection of a CPO without the status exception.

3. Family Court Impact Concerns

Even in cases in which personal jurisdiction over the defendant is unproblematic, family courts have at times expressed some concern about the power of a woman to seek a CPO and thereby undermine the rights of a defendant.²⁸⁴ Though such problems would ostensibly be amplified under a CPO regime in which the status exception was applicable, this is an insufficient basis to reject use of the status exception. Interstate flight domestic violence cases will inevitably involve more defaults by defendants and therefore a less balanced case presentation than if traditional personal jurisdiction existed over the defendant. This may make judges' already existing anxiety that victims will utilize the CPO as "a sword rather than as a shield" even more pronounced.²⁸⁵ Courts may be reluctant to grant CPOs to fleeing domestic violence victims out of concern that these self-professed victims may be attempting to take advantage of the legal system. An approach that acknowledges the need to respect the due process rights

²⁸¹ *Shah v. Shah*, 875 A.2d 931 (N.J. 2005).

²⁸² See Violence Against Women Act, Pub. L. 103-322, § 40221(a), 108 Stat. 1796, 1930 (1994) (codified as amended at 18 U.S.C. § 2265 (2012)).

²⁸³ *Id.*

²⁸⁴ See, e.g., *N.B. v. T.B.*, 687 A.2d 766, 769-70 (N.J. Super. App. Div. 1997); *Murray v. Murray*, 631 A.2d 984, 985-86 (N.J. Super. Ct. App. Div. 1993).

²⁸⁵ See, e.g., *State v. Hoffman*, 695 A.2d 236, 247 (N.J. 1997).

of defendants will be more effective in allaying judicial concerns regarding system misuse.

It is frequently alleged that some plaintiffs, who are not victims of domestic violence, file frivolous CPO complaints in efforts to gain advantage in family law matters.²⁸⁶ Regardless of whether these contentions may on occasion be true, it is important to note that the co-occurrence of family law and domestic violence disputes does not in and of itself imply improper motive. Furthermore, fears of system manipulation and unjust outcomes in family law cases do not merit the level of concern they often receive from the defense bar. Although in some jurisdictions a CPO will serve as an evidentiary shortcut for a victim of abuse, the fact remains that in all jurisdictions, domestic violence is likely to be considered relevant to a custody²⁸⁷ and/or visitation determination and to marital misconduct in states that still consider fault in divorce.²⁸⁸ Thus, even in the absence of a CPO, a victim can offer proof of domestic violence and argue its relevance to a custody, visitation, alimony, or equitable distribution award.

With regard to children, the filing of a petition for protection offers no access to relief that the alleged victim could not obtain by a parallel emergency custody filing in the same court. Since the UCCJEA governs virtually all child custody cases involving interstate activity in both the traditional family law and CPO contexts, courts will utilize the same law to determine jurisdiction for all custody and visitation issues regardless of the nature of the case.²⁸⁹ The UCCJEA does provide for temporary emergency jurisdiction in custody cases on a number of grounds, including domestic violence directed against a child's parent.²⁹⁰ Therefore, presence of the child with a safety issue confers jurisdiction in appropriate cases without regard to the origin of the case as a custody or protection order matter. Thus, whether a victim of domestic violence files a CPO with a request for custody or an emergency custody case in family court, the UCCJEA will apply and, presuming the court finds it has temporary emergency jurisdiction, the victim will have a forum to address custody.

²⁸⁶ See, e.g., David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009 (2005); Hutton, *supra* note 57, at 109.

²⁸⁷ AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, CHILD CUSTODY AND DOMESTIC VIOLENCE BY STATE (2008) available at <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf>.

²⁸⁸ Sparks v. Sparks, 485 N.W.2d 893, 888-89 (Mich. 1992) (marital fault as factor in equitable distribution); SCHNEIDER ET AL., *supra* note 12, at 565, 567-69.

²⁸⁹ *Child Custody Jurisdiction and Enforcement Act*, *supra* note 178 (noting that the only two United States territories that have not enacted a version of the UCCJEA are Massachusetts and Puerto Rico).

²⁹⁰ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 204(a) (1997).

In contrast, when considering a decision on the merits, rather than merely the right to be heard, the existence of a CPO may have an impact on the court's conclusion. Custody statutes in about half of the states include rebuttable presumptions against granting physical and/or legal custody to a batterer.²⁹¹ A CPO in and of itself may or may not trigger a rebuttable presumption of custody to the victim, depending upon the jurisdiction. In states in which there is no legal presumption, defendants accused of domestic violence may still be concerned that a CPO will lead to a de facto presumption against their petition for custody. Courts may also be more likely to consider requests for supervised visitation in the context of a CPO case than in a standard family law matter.²⁹² However, even in the absence of a CPO, courts may consider evidence of domestic violence in determining custody and/or visitation.²⁹³ Thus, when considering the degree to which a CPO influences subsequent custody proceedings, the relevant point of comparison is *not* cases involving a CPO versus cases with no evidence whatsoever of domestic violence, but rather, cases involving a CPO versus cases with some evidence of domestic violence but no CPO. In sum, the effect of a CPO on custody decisions is potentially significant but primarily in jurisdictions with established presumptions triggered by the existence of a CPO.

With respect to spousal support, a CPO will have no impact on access to relief because a CPO can only enter an enforceable support order for a victim when the court has personal jurisdiction over the defendant. In divorce cases, the modern trend is away from use of marital fault as a factor in determining the amount and/or duration of alimony or the appropriate division of assets.²⁹⁴ In states that still consider fault, in determining alimony and/or equitable distribution, a CPO may have an impact on outcome. A victim of domestic violence may certainly attempt to argue that abuse during the marriage should weigh in favor of awarding her more alimony and/or a larger portion of the marital assets. However, she would be free to make such an argument in any event, with or without a CPO.²⁹⁵ Even in states permitting or requiring consideration of fault, domestic violence would be only one of a myriad of factors, although admittedly it might be a highly salient factor depending upon the circumstances of the case.²⁹⁶

²⁹¹ AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 287 (evidence permitting a defendant to rebut a presumption typically includes showing compliance with all CPO terms and the passage of time).

²⁹² Mary L. Pulido, Stephen P. Forrester & Janine M. Lacina, *Raising the Bar: Why Supervised Visitation Providers Should Be Required To Meet Standards for Service Provision*, 49 FAM. CT. REV. 379, 380 (2011).

²⁹³ AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, *supra* note 287.

²⁹⁴ *See, e.g., Mani v. Mani*, 869 A.2d 904 (N.J. 2005); SCHNEIDER ET AL., *supra* note 12, at 567-70.

²⁹⁵ *See, e.g., Ohendalski v. Ohendalski*, 203 S.W.3d 910, 914 (Tex. Ct. App. 2006).

²⁹⁶ *See, e.g., Mani*, 869 A.2d 904.

With respect to child support, a CPO will have no impact on either access to relief or the amount of support, although a hearing on relief is almost certain to be held sooner in a CPO case than in a standard child support matter, since most states require a final CPO hearing be held within ten to twenty days of filing.²⁹⁷ All fifty states use child support guidelines, which are applied in the same manner in all types of cases: paternity, divorce, and protection order cases.²⁹⁸ A CPO can only enter an enforceable child support order for a victim when the court has personal jurisdiction over the defendant.²⁹⁹ If no personal jurisdiction exists, a victim can file an interstate case pursuant to UIFSA, regardless of the existence of a CPO.³⁰⁰

It is certainly not a foregone conclusion that a CPO will benefit the plaintiff in family court in relation to custody, visitation, or economic issues in divorce. In fact, citing to a CPO may work to a victim's detriment in custody cases, since family court judges often respond initially to allegations of domestic violence with disbelief and view them as "mudslinging" for a variety of reasons, including the desire to promote parental equality and greater involvement by fathers.³⁰¹ In addition, even when granting a CPO, many judges show reluctance to grant victims all available relief in CPO cases.³⁰² Therefore, while a CPO may have an impact in some states by law and in other states based upon judicial viewpoint, the link between a CPO and preferential treatment in a family law case is unclear. The impact may be beneficial, non-existent, or potentially even detrimental to victim interests. In conclusion, since a CPO has some potential family law effect, particularly in the areas of custody and visitation, courts should be especially careful in interstate flight domestic violence cases to respect a defendant's due process rights, since any default by the defendant or hindrance in case presentation may have a broader impact. However, these particular concerns do already seem to receive heightened attention from the defense bar and judges. Judicial education on the fact that all interstate custody cases (CPO or standard custody) are governed

²⁹⁷ See Schneider et al., *supra* note 12, at 256; see also N.J. STAT. ANN. § 2C:25-29(b)(10) (West 2013) (ongoing support in FRO will be according to "applicable law").

²⁹⁸ Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 269 ("[A]ll states have replaced the discretionary approach to child support determination with formulas or guidelines.").

²⁹⁹ Kulko v. Superior Court, 436 U.S. 84 (1978).

³⁰⁰ Steven K. Berenson, *Home Court Advantage Revisited: Interstate Modification of Child Support Orders Under UIFSA and FFCCSOA*, 45 GONZ. L. REV. 479 (non-custodial parent has access to relief although case proceeds in other parent's home state).

³⁰¹ Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003).

³⁰² See, e.g., *In re M.G.M.*, 163 S.W.3d 191 (Tex. Ct. App. 2005) (denying custody claim due to confusion on interplay between CPO law and UCCJEA). *But see* Caplan v. Donovan, 879 N.E.2d 117 (Mass. 2008).

by the UCCJEA and may include evidence of domestic violence issues pursuant to state statute even in the absence of a CPO could help to reduce concerns that CPOs might have an unjust family law case impact.

4. Temporary CPOs Impact Substantive Rights

The New Jersey Supreme Court in its decision in *Shah*, discussed *supra*, held that a court may enter a temporary³⁰³ CPO without personal jurisdiction or the use of the status exception because a temporary CPO does not affect substantive rights but simply prohibits “behavior already specifically outlawed.”³⁰⁴ However, contrary to the *Shah* court’s reasoning, even a temporary CPO inevitably implicates a defendant’s substantive rights. If a temporary CPO did no more than outlaw acts that are already separately defined as crimes, there would be little or no reason for a domestic violence victim to seek one. Temporary CPOs in fact prohibit otherwise lawful contact between plaintiff and defendant.³⁰⁵ As in the *Shah* case, virtually every temporary CPO prohibits a defendant from “having any oral, written, personal, electronic or other form of contact” with the plaintiff, actions that do affect substantive rights and are not otherwise illegal prior to the entry of the CPO.³⁰⁶

Normally, a defendant like Mr. Ferguson could text his former girlfriend Ms. Rios, for example to apologize for an incident of domestic violence and attempt to persuade her to reconcile. However, if Mr. Ferguson texted Ms. Rios after being given a copy of the temporary CPO by his home state law enforcement officers, he is arguably in violation of the CPO and may even be subject to criminal charges for harassment. Even though the New Jersey courts do not have personal jurisdiction over Mr. Ferguson, his actions following his actual notice of Ms. Rios’s temporary CPO may be sufficient for prosecution.³⁰⁷ Law enforcement agencies often cooperate to effectuate personal service in interstate CPO civil protection order cases because, in order to receive VAWA grant funds, states must certify that they do not charge victims fees for service

³⁰³ It is also worth noting that the “temporary” CPO issued in *Shah* had no expiration date. New Jersey courts commonly issue temporary CPOs without expiration dates in cases in which service cannot be effectuated within a reasonable time period. However, this practice is not typical. Most states provide for time-limited renewals of a temporary CPO while a plaintiff seeks service of process.

³⁰⁴ *Shah v. Shah*, 875 A.2d 931, 939 (N.J. 2005).

³⁰⁵ See SCHNEIDER ET AL., *supra* note 12, at 221.

³⁰⁶ *Shah*, 875 A.2d at 933.

³⁰⁷ E-mail from Gail Gallagher, Assistant County Prosecutor, New Jersey Prosecutor’s Office, to author (Aug. 2012) (on file with author); Interview with Jenny Carroll, Associate Professor of Law, Seton Hall University School of Law (Aug. 2012).

of process.³⁰⁸ Potential prosecution for a CPO violation and/or harassment charges, if a district attorney can prove actual notice of the CPO, has a chilling effect on free speech rights. Such an impact may be particularly concerning in cases in which the parties have a child, or children, in common, or financial ties through marriage or otherwise. Furthermore, even if a court finds violation of a temporary CPO insufficient grounds for criminal prosecution, the communication may be considered harassing in light of the knowledge of the temporary CPO and therefore may constitute grounds for personal jurisdiction pursuant to the state's long-arm statute.

Second, the "temporary" CPO issued by the New Jersey Court in *Shah* had no expiration date.³⁰⁹ The New Jersey courts commonly issue temporary CPOs, called "Indefinite Temporary Restraining Orders," in cases in which service cannot be effectuated within a reasonable time.³¹⁰ The defendant in *Shah* objected to the lack of an expiration date on the CPO entered against him.³¹¹ The court rejected the defendant's argument, reasoning that the defendant had the ability himself to resolve these alleged problems by either consenting to an exercise of personal jurisdiction by the New Jersey courts or by requesting that the case be heard in Illinois where he continued to reside and had filed for divorce.³¹² In offering these alternative "solutions" to the defendant, the court glossed over two fundamental problems.³¹³ To suggest that a nonresident defendant can avoid the consequences of an indefinite temporary order entered without personal jurisdiction against him by consenting to submit to the personal jurisdiction of the court, and the potential entry of a final order, creates a catch-22. Requiring a defendant to "voluntarily" consent to proceed with his case in New Jersey and face possible entry of a final CPO against him in order to avoid an indefinite temporary CPO disregards the notions of "fair play and substantial justice" that constitute the hallmark of due process standards.³¹⁴

In addition, it is facile to suggest, as another alternative to an indefinite temporary CPO, that the defendant can seek to have the CPO case heard in his home state of Illinois.³¹⁵ There is no legal mechanism for the defendant to seek "transfer" of the CPO case to his home state without the cooperation of the plaintiff. The CPO case can only be heard in Illinois if and when the plaintiff chooses to file it there. For

³⁰⁸ See SCHNEIDER ET AL., *supra* note 12, at 266.

³⁰⁹ *Shah*, 875 A.2d 931.

³¹⁰ *Id.* It is noteworthy that New Jersey's method of entering "indefinite" temporary CPOs is not typical. Most states provide for time-limited renewals of a temporary CPO while a plaintiff seeks service of process followed by dismissal without prejudice if service cannot be obtained.

³¹¹ *Shah*, 875 A.2d at 941.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

these reasons, the New Jersey approach to interstate flight domestic violence cases unreasonably infringes on a defendant's constitutional rights and therefore fails to offer a viable alternative to the status determination.

B. *Limited Remedies*

1. Affirmative Versus Prohibitory Relief

Precedent seemingly requires that a court entering a CPO pursuant to the status exception limit the order to prohibitory relief.³¹⁶ Status exception jurisprudence reflects a balancing of competing litigants' rights, as well as those of the state, through the allowance of only certain types of relief. Courts have historically utilized the status determination in a circumscribed manner in recognition of the fact that it represents an exception to the general rule requiring personal jurisdiction.³¹⁷ Due process considerations limit status determinations to orders that impose no personal obligations on nonresident defendants.³¹⁸ The application of the status determination in divorce cases offers the most helpful example of appropriate limitations on the use of the status exception, which can be extrapolated to the CPO context.³¹⁹ In establishing a "divisible divorce," the United States Supreme Court distinguished between the divorce itself, a permissible status determination, and the financial incidents to divorce, which require personal jurisdiction for adjudication.³²⁰

The plurality approach discussed *supra* attempts to apply similar limits in CPO cases but fails.³²¹ These courts authorize the entry of a final CPO, which they expressly limit to only prohibitory relief (e.g., no abuse, no contact, etc.). This limitation parallels the restricted relief available in a status exception divorce. However, the plurality approach does not acknowledge the reality that a final CPO inherently provides affirmative relief, most clearly in terms of the prohibition on possession of firearms pursuant to federal law.³²² State statutes may also include

³¹⁶ See *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

³¹⁷ See *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948).

³¹⁸ *Caplan*, 879 N.E.2d. at 119.

³¹⁹ See *Estin*, 334 U.S. at 545.

³²⁰ *Id.* at 545-49.

³²¹ See *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Spencer*, 191 S.W.3d. 14; *Caplan*, 879 N.E.2d 117; *Hemenway*, 992 A.2d 575.

³²² Compare 18 U.S.C. § 922(g)(8) (2012) (prohibits a person subject to a CPO, following actual notice and an opportunity to be heard, from possession of a firearm), with *Spencer*, 191 S.W.3d. 14 (remand on issue of prohibiting possession of firearms following entry of final

other automatic requirements of defendants in final CPO cases, such as payment of court costs and/or fines and submission to fingerprinting and listing of their names on a central registry.³²³ These types of provisions impose obligations on defendants and therefore constitute affirmative relief.

Since affirmative relief generally results from the entry of a final CPO pursuant to state statutes and federal law, the status exception should not serve as a basis for a final CPO, although it can and should provide grounds for a temporary, renewable CPO with prohibitory relief only. As discussed *supra*, status exception CPOs should also provide relief pursuant to the UCCJEA in applicable cases. The UCCJEA specifically enables victims of abuse to obtain custody orders after fleeing across state lines pursuant to “temporary emergency jurisdiction” in both emergency custody and CPO cases.³²⁴ The UCCJEA provides an independent jurisdictional basis enabling courts to issue temporary emergency custody orders against nonresident defendants in status exception CPO cases.³²⁵ It is critical to highlight state court authority to enter temporary custody orders in CPO cases pursuant to the UCCJEA to avoid courts incorrectly categorizing custody as affirmative relief in status exception CPO cases and refusing to issue temporary custody orders.³²⁶

The lack of a final CPO will not deny a victim of domestic violence the opportunity to pursue long-term legal relief on issues, such as custody and child support, that are either unaddressed in the temporary CPO or require more permanent resolution. With respect to child support, victims may file a separate action pursuant to UIFSA in their new home state.³²⁷ If a victim seeks adjudication of custody issues beyond the relief available pursuant to UCCJEA “temporary emergency jurisdiction,” she may be able to file a separate custody case requesting her new home state court hear the matter pursuant to home state or significant connections jurisdiction.³²⁸ Although these alternative bases for jurisdiction may or may not become available over time, depending upon the facts of the case, the court will utilize the same law, namely the UCCJEA, to determine where the case should be heard regardless of its origin as a CPO or a custody matter.³²⁹ The requirement to file multiple

CPO), and *Hemenway*, 992 A.2d 575 (remand to modify final CPO with respect to affirmative relief, implicitly rejecting ban on firearms).

³²³ See, e.g., New Jersey Prevention of Domestic Violence Act, 1991 N.J. Sess. Law Serv. Ch. 261 (West) (codified as amended at N.J. STAT. ANN. §§ 2C: 25-17 to -35 (West 2013)).

³²⁴ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997).

³²⁵ *Id.*

³²⁶ See, e.g., *In re M.G.M.*, 163 S.W.3d 191 (Tex. Ct. App. 2005).

³²⁷ See UNIF. INTERSTATE FAMILY SUPPORT ACT (2008).

³²⁸ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201(a)(1)–(2); see, e.g., § 2A:34-65(a)(1)–(2).

³²⁹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 102(4).

legal actions to address one family's problems is not optimal from the victim's viewpoint but will provide alternative mechanisms for relief.

2. Prohibitory Relief CPOs and Impact on Substantive Rights

At least one dissenting judge has argued that because status determination CPOs impact substantive rights of defendants, even in the absence of affirmative relief, these orders go beyond merely determining the relationship status between the parties, and therefore the extension of the status exception to CPO cases is improper.³³⁰ While it is true that CPOs impact rights, status determinations inherently impact rights in other contexts as well, yet it is not thought to be a problem. In reality, there is no such thing as a "pure" status determination in which only the relationship status between the parties is changed. In family law, changing status inevitably impacts rights although courts strive to minimize this impact and can effectively refuse to impose affirmative duties.

The traditional use of the status exception in a divorce case highlights the inherent fallacy in the idea that a declaration of the familial status of one individual vis-à-vis another can occur without affecting the rights or interests of nonresident defendants.³³¹ Families are entangled in a myriad of legal as well as emotional ways that are not easily dissected. For example, marriage confers a vast array of economic benefits that a person loses upon divorce, including the right to inherit intestate from a spouse, health insurance coverage available through a spouse, the right to file joint tax returns with a spouse, Family Medical Leave Act benefits and the right to bring wrongful death and loss of consortium claims related to a spouse.³³² Marriage also creates evidentiary privileges related to spousal testimony in many states that a divorce may then negate.³³³ Divorce also eliminates immunity from liability for marital torts in the states still clinging to the doctrine of interspousal tort immunity.³³⁴ Although some states, in the aftermath of *Williams*, *Estin*, and *Vanderbilt*, provided that state courts could award alimony to a former spouse, other states made no provision for such a remedy.³³⁵ Thus, one cannot argue that a status determination, even in the context of divorce, is limited to merely a declaration of the parties' relationship to one another. Rights are impacted. The fact that some of

³³⁰ *Bartsch v. Bartsch*, 636 N.W.2d 3, 11 (Iowa 2001) (Carter, J., dissenting).

³³¹ See, e.g., *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942).

³³² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955-56 (Mass. 2003).

³³³ See *id.* at 956.

³³⁴ See SCHNEIDER ET AL., *supra* note 12, at 780-81.

³³⁵ See, e.g., *Vanderbilt*, 354 U.S. 416 (1957); *Estin*, 334 U.S. 541; *Williams*, 317 U.S. 287; RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

these rights were prospective does not lessen the impact for a spouse who opposed the divorce.

Examination of the implicit use of the status exception in custody cases provides an even more compelling example of the manner in which decisions made on status determination grounds may nonetheless impact substantive rights of nonresident defendants. In a custody determination pursuant to the UCCJEA, a parent may lose primary physical custody, be required to begin sharing physical custody, or have limitations imposed upon visitation with his child.³³⁶ In addition, in the child welfare context, a nonresident defendant may face termination of parental rights pursuant to the status exception. Certainly, these decisions would qualify as impacting the substantive rights of the nonresident defendant, and yet they are permissible outcomes pursuant to the status exception doctrine.

Status exception jurisprudence avoids creating a false dichotomy between a determination limited only to status and decisions as to all other aspects of a familial relationship. Instead, the case law pursuant to the status exception recognizes that courts must balance the privacy rights of all family members and the need to resolve problems related to separation of families in a mobile society against respect of litigants' due process rights.³³⁷ For this reason, courts endeavor to resolve only the issues necessary to the status determination and attempt to avoid imposing any affirmative obligations on a nonresident defendant. In the context of a status exception CPO, this approach requires entry of a temporary order with prohibitory relief only.

C. *Temporary and Renewable in Duration*

The proper accommodation of victims' safety interests and defendants' due process rights is a temporary, renewable CPO with prohibitory relief only entered against a nonresident defendant, in the absence of personal jurisdiction, when pursuant to the status exception. This approach will reduce protection for victims in some states that now offer final CPOs in status determination cases.³³⁸ However, for victims in the vast majority of states, which have either rejected or failed to consider the status exception and therefore denied relief to victims in countless interstate flight domestic violence cases, clarity in this area of the law has potential to offer some assistance.

³³⁶ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997).

³³⁷ See SCHNEIDER ET AL., *supra* note 12, at 245.

³³⁸ See *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001); *Spencer v. Spencer*, 191 S.W.3d. 14 (Ky. Ct. App. 2006); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010).

Although a temporary CPO is not an ideal solution for victims, it offers significant protection during at least a portion of the time in which victims are likely to be in the greatest danger given the research on separation assault.³³⁹ During the pendency of the temporary CPO, the defendant may well commit another act of domestic violence crossing state lines, and thereby provide the victim with grounds to amend her complaint and grounds for the court to potentially find it has personal jurisdiction over the defendant based on minimum contacts pursuant to a state long-arm statute. A dismissal of a temporary CPO is generally without prejudice, and therefore a victim can re-file for protection in the future if abuse or threats continue.³⁴⁰ State statutes already include renewal provisions for temporary CPOs for a variety of reasons, including the need to effectuate service of process, generally for a period of a few months.³⁴¹ Renewal in a status exception case should be permissible for the maximum potential time pursuant to state law at the discretion of the trial court.

Considering the interests of defendants is critical for victim advocates. Legal arguments that do not adequately address defendants' rights may reflect a view initially promoted by the battered women's movement, which often portrayed batterers as "villains."³⁴² However, caricatured depictions of perpetrators of abuse do not correspond with either social science research indicating several different types of abusers or with the observations of abusers by other actors within the legal system, including judges.³⁴³ Attempts by victim advocates to characterize and treat all batterers as "monsters" can actually be counterproductive, resulting in judges rejecting claims of domestic violence by actual victims because the alleged perpetrators do not seem to fit the stereotype.³⁴⁴ In addition, overly negative treatment of batterers (e.g., failing to respect constitutional rights of defendants) may ultimately undermine the confidence of some victims in working with advocates who appear to disregard the human dignity of their former intimate partners.³⁴⁵ Therefore, the legal system can be more effective on behalf of both victims and batterers when advocates avoid "villain"

³³⁹ See SCHNEIDER ET AL., *supra* note 12, at 68.

³⁴⁰ See *What to Do If You Don't Get a Restraining Order*, LEGAL SERVICES OF NEW JERSEY, www.lsnjlaw.org/Family-Relationships/Domestic-Violence/NJ-Laws-DV/Pages/No-Restraining-Order.aspx#Uiv19mR4Ypx (last visited Sept. 18, 2013).

³⁴¹ MD. CODE ANN., FAM. LAW § 4-505(c)(2) (LexisNexis 2013) (judge may extend a temporary protective order as needed, but not to exceed six months, to effectuate service of the order where necessary to provide protection or for other good cause).

³⁴² LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 146 (2012).

³⁴³ See SCHNEIDER ET AL., *supra* note 12, at 83–85.

³⁴⁴ See *id.* at 83.

³⁴⁵ See *id.*

characterizations and instead show attention to the individuals involved in the case and their respective rights.

A temporary CPO minimizes the potential collateral consequences for defendants in comparison with a final CPO. The primary areas in which a defendant may face collateral consequences from the entry of a CPO, discussed *supra*, include: (1) employment and/or education, (2) family law cases, (3) firearms prohibitions, and (4) travel restrictions. In each of these areas, the potential harm will be minimized by the limited duration of a temporary CPO as well as the preliminary nature of the determination that lead to its entry. Somewhat akin to an arrest for alleged criminal conduct, a temporary CPO represents only an initial step in the process of determining if misconduct occurred and, if so, the appropriate consequence. For example, in the employment context, a defendant subject to a temporary CPO is unlikely to face termination of his job unless the employer happens to conduct a criminal record check during the few weeks or months of the pendency of the temporary order and also determines that this *ex parte* finding is sufficient to warrant firing the employee. In a family law case, although evidence of domestic violence may be relevant, the existence of a temporary CPO does not establish that domestic violence occurred and has little or no evidentiary value beyond that of an allegation. The federal prohibition on purchase or possession of firearms by a defendant subject to a CPO does not take effect until the entry a final CPO.³⁴⁶ Although in some jurisdictions, weapons may be seized by local law enforcement officers at the time of a domestic violence arrest and/or service of a temporary CPO, in interstate flight domestic violence cases with nonresident defendants the absence of the defendant from the state will render this issue moot.³⁴⁷ Finally, any travel restrictions resulting from the entry of a temporary CPO will be short in duration and there will be no longer-term impact on travel. In conclusion, these possible ramifications seem *de minimis*, especially in comparison with those in status determination divorce cases discussed *supra* (e.g., loss of health insurance, loss of intestate right of inheritance, etc.). In contrast, a final CPO may result in more substantial repercussions, including ineligibility for or termination of employment and prohibitions on purchase and possession of firearms for the duration of the order.³⁴⁸ These types of ramifications go beyond those anticipated in the divorce status exception jurisprudence.

Using the status exception as the basis for entry of a temporary CPO finds additional support in an analogy to the UCCJEA's temporary emergency jurisdiction provision.³⁴⁹ In general, the UCCJEA aims to

³⁴⁶ See SCHNEIDER ET AL., *supra* note 12, at 293.

³⁴⁷ See, e.g., N.J. STAT. ANN. § 2C:25-21(d) (West 2013).

³⁴⁸ 18 U.S.C. § 922(g)(8) (2012) (prohibits a person subject to a CPO, following actual notice and an opportunity to be heard, from possession of a firearm).

³⁴⁹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997).

reduce forum shopping in custody cases by giving priority to the child's home state to hear the case.³⁵⁰ However, the UCCJEA recognizes that in some cases, such as those involving imminent harm to a child or a child's parent, the state in which the child is present may assume temporary, emergency jurisdiction.³⁵¹ The same reasoning that prompted states to adopt the temporary emergency jurisdiction provision of the UCCJEA should now motivate state legislatures and courts to utilize the status exception in protection order cases. The goal in both instances is protection of victims of abuse, and their children, on a temporary basis in the absence of personal jurisdiction over a nonresident defendant.

When a status exception temporary CPO is about to expire and cannot be renewed, states should offer victims the option to transfer their CPO case to the defendant's home state and to appear by telephone or video-conferencing technology for a final CPO trial in that state. Providing victims with this remedy would require extensive coordination between states, and most likely a technical refilling of the victim's CPO case unless and until states amend their CPO statutes to provide otherwise, but there is precedent in the family law arena in both the UCCJEA and UIFSA for this type of cooperative approach. This option should not be offered to victims as a substitute for an in-state temporary status determination CPO, since the process, even once established, is likely to remain subject to delay. Despite the VAWA full faith and credit provisions and UIEDVPOA, many victims face ongoing enforcement issues with regard to out-of-state CPOs and therefore will likely prefer an in-state order.³⁵² Furthermore, given that the victim has the burden of proof and the victim's new home state has a superior interest in protecting the victim, and therefore in the litigation, the equities weigh in favor of proceeding in the victim's new home state when feasible and consistent with due process principles.³⁵³

CONCLUSION

The strong public policy consensus across the United States to enhance the safety of victims of domestic violence and their children through CPOs demands that courts and legislatures address jurisdictional issues in interstate flight cases in a manner designed to define courts' authority to provide protection as broadly as possible. However, states must also be mindful of defendants' due process rights, since defendants are less likely to comply with orders entered in the

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *See* Sack, *supra* note 11.

³⁵³ *See id.*

absence of procedural justice. Judges and legislatures concerned about the potentially serious collateral consequences of CPOs will not be persuaded to adopt an approach that does not reflect consideration of the constitutional rights of both victims and defendants.

The approach that best balances these considerations in interstate flight domestic violence cases is the entry of a temporary, renewable CPO, limited to prohibitory and UCCJEA relief, pursuant to the status exception. State courts and/or legislatures should clarify state law with respect to personal jurisdiction in these cases to avoid differing lower court decisions and to promote consistency of outcome. In addition, on a national level, states should work to offer a uniform approach to this issue. To achieve this result, courts can assist in jurisdictions in which the legislature fails to act by inviting litigants to offer the status determination argument.³⁵⁴ Another option could be a model act on jurisdiction in interstate flight domestic violence cases promulgated by NCCUSL, which the federal government could encourage states to adopt through funding incentives tied to grants awarded through VAWA.

Courts can also provide the opportunity for defendants to be heard as effectively as possible while out-of-state through the use of technology, which may in turn lead some defendants to consent to the court's jurisdiction. Our legal system should, at a minimum, provide for telephonic testimony and strive to also provide videoconference access to hearings in interstate flight domestic violence cases. Family court hearings now frequently include telephonic testimony and mandating provision of this option in an interstate flight CPO case would enable a defendant who is unable and/or unwilling to travel to the forum state to be heard in the matter. Enabling a defendant to see the judge and witnesses against him as well as to visually present his own testimony and that of any witnesses on his behalf will enhance the perception that he is truly being heard by the court as well as improving the court's ability to accurately assess credibility and thereby promote the fact-finding process. Many courthouses already have technology in place to receive remote testimony of criminal defendants and/or immigrants in state custody, and the availability of such options seems likely to increase over time. In terms of transmitting such testimony, if the defendant does not personally have access to the requisite technology, courts in his jurisdiction should provide access. Telephonic and particularly video testimony will promote the confidence of all litigants in the procedural justice of the CPO hearing process.

Although status determination jurisdiction remains something of an elusive and evolving concept, it represents the best possible means of providing relief to domestic violence victims in many of the most

³⁵⁴ See *LaMarche v. Lussier*, 844 N.E.2d 1115, 1121 n.13 (Mass. App. Ct. 2006).

difficult to resolve interstate flight cases, while still recognizing defendants' due process rights. As the United States Supreme Court stated in *Estin v. Estin*, in defining the limits and compromises inherent in the status determination in the divorce context: "[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests."³⁵⁵

³⁵⁵ *Estin v. Estin*, 334 U.S. 541, 545 (1948).