

# THE DOWNSIDE OF BENIGN INTENT

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Statutes in all fifty states and the territories authorize courts to issue civil orders designed to provide protection to survivors of domestic violence and their children.<sup>1</sup> The District of Columbia statute that authorizes this intervention, the Intrafamily Offenses Act,<sup>2</sup> premises the entry of these orders, called Temporary Protection Orders (TPOs) and Civil Protection Orders (CPOs),<sup>3</sup> upon the finding that an intrafamily offense has occurred.<sup>4</sup> However, in the Intrafamily and Neglect Branch of the District's Superior Court,<sup>5</sup> traditionally those individuals required to respond to petitions for CPOs have not been required to admit to the alleged crime in order for the court to enter an order by consent.<sup>6</sup> This practice has been so

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1. See Catherine F. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993). See also Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 62 HASTINGS WOMEN'S L.J. 339, 348, n.31 (1995).

2. D.C. CODE ANN. §§ 16-1001 to 16-1006 (1981 & Supp. 1996).

3. See *infra* note 31 and accompanying text. Hereinafter the author will discuss only CPOs, but that term is meant to include both temporary and permanent protection orders.

4. In the District of Columbia, an intrafamily offense means:

an act punishable as a criminal offense committed by an offender upon a person:  
(A) to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; OR (B) with whom the offender maintains or maintained a romantic relationship not necessarily including a sexual relationship ...

D.C. CODE ANN. § 16-1001(5) (1981 & Supp. 1996). See also D.C. CODE ANN. §§ 22-101 - 22-3901 (1981 & Supp. 1996) for acts deemed criminal in the District of Columbia.

5. Pursuant to the District of Columbia Court Reform and Procedure Act, the Superior Court of the District of Columbia is a court of general jurisdiction, thus it has jurisdiction over all local matters. The Superior Court is arranged into separate, specialized divisions including the Family Division, which has exclusive jurisdiction over matters of divorce, family support, custody, marriage, adoption, paternity, intrafamily offenses, delinquency, neglect, and commitment of the mentally ill. D.C. CODE ANN. § 11-1101 (1981).

6. D.C. SUPER. CT. INTRAFAMILY R. 11(b). This subsection provides for the issuance of a CPO when the respondent has consented and the court is assured that the "respondent voluntarily consented" and "[t]he parties understand the contents of the order."

common that even a form answer for respondents was suggested.<sup>7</sup> The standard form would have instructed respondents to admit *or* deny the allegations in the petition for a CPO and the court could still enter an order indicating that the respondent had consented.<sup>8</sup> Although the proposed form was not adopted, judges in the Superior Court handling these cases are split on whether admission of the underlying offenses is required prior to entering a civil protection order. This essay asserts that courts lack authority to enter a civil protection order under such circumstances, and while the court's intent may be benign, the effect is that the integrity of protective orders is undermined in jurisdictions where such practices have developed.

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7. See *infra* note 13 (discussing the Domestic Violence Plan).

8. D.C. SUPER. CT. INTRAFAMILY R. 11(b).

## I. THE COURT ENCOURAGES THE ENTRY OF CONSENT CIVIL PROTECTION ORDERS

Significant strides have been made in this country in educating the public and their institutions about the devastating and pervasive impact of domestic violence.<sup>9</sup> The courts, due in part to the efforts of gender bias task forces<sup>10</sup> and the National Council of Juvenile and Family Court Judges,<sup>11</sup> have been under pressure to take domestic violence seriously and to intervene.<sup>12</sup> Many jurisdictions, including the District of Columbia, have responded by implementing new approaches to handle domestic violence cases.<sup>13</sup> However, there is still

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9. See Lynn Hecht Schafran, *Update: Gender Bias in the Courts: Despite Progress, Problems Persist*, TRIAL, 112, 116 (July 1991).

10. For a discussion of gender basis task forces, see, Judith Resnick, *Now is the Wrong Time to Stop Courts' Self-Study*, AALS-WLE NEWSLETTER, 6 (1995); Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, 28 (Feb. 1990); Lynn Hecht Schafran, *Update: Gender Bias in the Courts: Despite Progress, Problems Persist*, TRIAL, 112 (July 1991).

11. The National Council of Juvenile and Family Court Judges has issued a Model Code on Domestic and Family Violence and has been active promoting the judicial response to domestic violence.

12. This intervention is contrary to earlier notions of domestic violence as a private matter where legal interventions would only occur if certain boundaries were passed. For example, behind the facade of family protection, English common law permitted and encouraged the male's right to chastise his wife in order to enforce obedience. The "rule of thumb," as it was called, allowed a husband to use any reasonable instrument to physically chastise his wife, provided the instrument was no thicker than his thumb. See, J. David Hirschel and Ira W. Hutchison, *III Symposium on Domestic Violence: Studies: Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 75-76 (1992).

13. In 1993, the First National Judicial Conference on Domestic Violence, sponsored by the National Council on Juvenile and Family Court Judges and the State Justice Institute, was held in San Francisco, California. The District of Columbia sent a delegation, selected by then Chief Judge of the Superior Court, Fred B. Ugast. As a result of the Conference, Judge Ugast formed the District of Columbia Domestic Violence Coordinating Council, composed of representatives from the justice system agencies, community service agencies, law schools, and advocate organizations. The mission of the Council has been to develop and implement a coordinated response to domestic violence. In 1995, the District of Columbia Domestic Violence Plan was adopted. It was viewed as the first stage of the Domestic Violence Coordinating Council's efforts. DOMESTIC VIOLENCE COORDINATING COUNCIL, DISTRICT OF COLUMBIA: DOMESTIC VIOLENCE PLAN (1995). A major component of the plan is the restructuring of the way in which the court handles domestic violence cases. Prior to the implementation of the plan in November, 1996, there was little coordination between the family and criminal divisions of the court with regard to handling these cases. The result was conflicting orders, and poor service to those seeking judicial relief. Under the plan, one calendar handles intrafamily cases, domestic relations cases in which violence is an issue, and criminal cases identified as based upon an intrafamily offense. All of these cases are sent to one master calendar that then dispenses contested matters to one of two judges who are also specially assigned to the calendar. One of these judges handles the criminal cases and the other judge handles the protective order cases. Theoretically, the judge handling the protective order cases would handle domestic relations cases involving intrafamily violence as well, but this has not been systematized as yet. A hearing commissioner, who is also specially assigned to the calendar, hears intrafamily cases involving paternity and support. The hearing commissioner also handles other protective order hearings as needed, provided the parties consent. See, D.C. SUPER. CT. GEN. FAM. R. D (describing the duties of hearing commissioners). All three judges and the hearing commissioner sit on this

much work to be done to educate judges and implement systems that can effectively address the domestic violence problem.<sup>14</sup>

The liberal entry of CPOs in the District of Columbia reflects the impact of national awareness concerning domestic violence. Judges have not been immune to the social science and media accounts describing the nature and impact of domestic violence. Their response generally has been to err on the side of enjoining further abuse and providing protective measures.<sup>15</sup> The D.C. Court of Appeals has consistently ruled that the domestic violence statute is remedial and is to be interpreted broadly in favor of those who seek protection.<sup>16</sup>

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calendar for one year, as opposed to the monthly rotation for CPO cases in the past. *Id.* at 38. A separate clerk's office has been established to handle domestic violence cases, and a Domestic Violence Intake Center, located right next to the clerk's office and run by domestic violence advocates, serves those who allege domestic abuse. *Id.* A tracking system will be employed that will transfer all domestic violence cases, whether civil or criminal, to project judges. *Id.* at 40. The judges and the clerks received training on specific issues related to domestic violence and on how model jurisdictions have responded. It is too early say how well this system is working, but it reflects a concerted effort to be more responsive to the growing demand for court intervention as a means of addressing domestic violence.

14. See Schafran, *supra*, note 9.

15. D.C. CODE ANN. § 16-1005(c) (1981) delineates the remedies available if the Judge finds that there is "good cause to believe the respondent has committed or is threatening an intrafamily offense." The court may issue an order:

- (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;
- (2) requiring the respondent, alone or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs;
- (3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;
- (4) directing a respondent to refrain from entering or to vacate the dwelling of the complainant when the dwelling is (A) marital property of the parties; or (B) jointly owned, leased, or rented and occupied by both parties: Provided, that joint occupancy shall not be required if a party is forced by the respondent to relinquish occupancy; or (C) owned, leased or rented by the complainant individually; or (D) jointly owned, leased, or rented by the complainant and a person other than the respondent;
- (5) directing the respondent to relinquish possession or use of certain personal property owned jointly by the parties or by the complainant individually;
- (6) awarding temporary custody of a minor child of the parties;
- (7) providing for visitation rights with the appropriate restrictions to protect the safety of the complainant;
- (8) awarding costs and attorneys fees;
- (9) ordering the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders;
- (10) directing the respondent to perform or refrain from the other actions as may be appropriate to the effective resolution of the matter; or
- (11) combining two or more of the directions or requirements prescribed by the preceding paragraphs.

16. *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993) (citing *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991)). The D.C. Court of Appeals stressed that the Intrafamily Offenses Act is a "remedial statute and as such should be liberally construed for the benefit of the class it

Judges prefer not to have to make any decision in these cases, in part because the cases can be difficult to determine,<sup>17</sup> and in part because of the pressures of handling the heavy domestic violence docket. Judges on the Superior Court Intrafamily Bench move these cases quickly due to the potential risk to petitioners in Intrafamily Offenses.<sup>18</sup> Approximately forty CPO cases are scheduled each day, and in addition to CPO petitions, this number includes motions for contempt of CPOs and TPOs that were granted previously.<sup>19</sup> Contempt motions are more time consuming because they require appointment of counsel and, due to the higher standard of proof, often result in lengthy hearings.<sup>20</sup> The court's docket cannot accommodate more than two to three contested hearings per day and still be able to issue TPOs and CPOs in the expedited manner required by the statute.<sup>21</sup> Thus, it is not surprising that consent orders are encouraged. A settlement negotiator is available,<sup>22</sup> and the parties are expected to meet with the negotiator in order to reach a settlement. In the past, settlement negotiators along with many of the judges who rotated through this calendar, made it clear that a consent CPO could be entered where the respondent denied committing any crime or raised an exculpatory defense.

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is intended to protect." *Maldonado*, 631 A.2d. at 42.

17. For example, many judges understand that domestic violence occurs behind closed doors, and must be prepared to assess carefully the credibility of petitioners who can only offer their word that the incidents indeed occurred as represented.

18. D.C. CODE ANN. §§ 16-1004(d) (1981 & Supp. 1996) (providing that CPO hearings must commence prior to the expiration of TPOs which only last 14 days). The goal is to avoid a delay beyond three weeks in CPO cases in which a TPO is not entered, and as a rule, the CPO hearings are set within two to three weeks.

19. A recent amendment to the contempt statute makes a violation of a CPO punishable as a misdemeanor with a penalty of up to a \$1,000 fine or 180 days in jail. D.C. CODE ANN. § 16-1001(5) (1981 & Supp. 1996). This has not led to a major shift of contempt prosecutions to the criminal calendar. The Office of the U.S. Attorney, which handles most criminal prosecutions in the District of Columbia, tends to prosecute violations of CPOs and TPOs based upon the underlying crime. Furthermore, crimes that did not result in arrest generally are not prosecuted. As a result, many contempt orders are still prosecuted by the domestic violence survivor.

20. D.C. SUPER. CT. INTRAFAMILY R. 12(c) (describing the contempt hearing procedures).

21. See D.C. CODE ANNOTATED § 16-1004(d) (1981 & Supp. 1996) (discussing that TPOs expire within 14 days and the CPO hearing must commence prior to expiration).

22. Prior to implementation of the court's Domestic Violence Plan, the court relied on a settlement negotiator who initially was funded by grants obtained by the domestic violence advocacy community, and later through similar grants obtained by Georgetown University Law School. Under the new structure, the negotiator, an attorney, is hired by the court through a Violence Against Women Act grant.

## II. THE DISTRICT OF COLUMBIA'S INTRAFAMILY OFFENSE REQUIREMENT IS JURISDICTIONAL

### A. THE LAW

The Intrafamily Offenses Act states in pertinent part that, "[I]f, after a hearing, the Family Division finds that there is good cause to believe that the respondent has committed or is threatening to commit an intrafamily offense, it may issue a protective order ... [directing certain enumerated remedies]."<sup>23</sup> D.C. Code § 16-1001 defines "intrafamily offense" as "an act punishable as a criminal offense," and goes on to describe the requisite familial or dating relationship.<sup>24</sup> Thus prior to entering a CPO, there must be some finding that the respondent committed one or more of the prohibited acts.<sup>25</sup> Unless there is such a finding, the court is without authority to grant the requested order.<sup>26</sup>

Two District of Columbia Court of Appeals cases that discuss subject matter jurisdiction, *Sandoval v. Mendez*<sup>27</sup> and *McKnight v. Scott*,<sup>28</sup> address it in the context of the requirement that the parties meet the now obsolete statutory condition that an intimate relationship exist.<sup>29</sup> Because the relationship aspect was at issue in these cases, it follows that both the relationship and the offense are prerequisites to judicial action under the Intrafamily Offenses Act.<sup>30</sup> In contested intrafamily cases, it is usually the offense, not the relationship that is at issue.

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23. D.C. CODE ANN. § 16-1005(c) (1981).

24. D.C. CODE ANN. § 16-1001(5) (1981). The criminal offenses are enumerated at D.C. CODE ANN. §§ 22-101 et seq. (1981).

25. D.C. CODE ANN. § 16-1005(c) (1981 & Supp. 1996) (stating that [i]f, after hearing... there is good cause to believe respondent has committed ... an intrafamily offense, [then the court] may issue a [civil] protection order").

26. D.C. CODE ANN. § 16-1005(c) (1981 & Supp. 1996).

27. *Sandoval v. Mendez*, 521 A.2d 1168, 1169 (D.C. 1987) (holding that without the requisite intimate relationship in addition to sharing a residence, the court is without jurisdiction to act under the Intrafamily Offenses Act). A subsequent amendment to the Act has removed this particular jurisdictional prerequisite. D.C. CODE ANN. § 16-1001(5) (1981 & Supp. 1996).

28. *McKnight v. Scott*, 665 A.2d 973, 975 (D.C. 1995) (holding that the Court does have subject matter jurisdiction where the intimate relationship requirement is met. In this case, the court found in addition to living together, the couple was engaged to be married.). A subsequent amendment to this act has removed this jurisdictional prerequisite. D.C. CODE ANN. § 16-1001(5) (1981 & Supp. 1996).

29. The DOMESTIC VIOLENCE IN ROMANTIC RELATIONSHIP ACT OF 1994, D.C. Law 10-237, effective March 21, 1995, codified at D.C. CODE ANN. § 16-1001 and 16-1003 (1981 & Supp. 1996) eliminated the intimacy requirement.

30. See D.C. CODE ANN. § 16-1001 (1981 & Supp. 1996).

*B. THE RULE*

Rule 11(b) of the Intrafamily Branch of the Superior Court addresses CPOs consented to by the respondent.<sup>31</sup> The rule does not specify that by consenting to the entry of the order the respondent admits to the allegations made.<sup>32</sup> In fact, in *Maldonado v. Maldonado*, the Court of Appeals observed that "the purpose of the statute is served by encouraging respondents' consent to these agreements."<sup>33</sup> While extension of a CPO can be based on consideration of intrafamily offenses that supported the initial order,<sup>34</sup> the Court of Appeals made no mention of relating back to the initial offense. While it did state that the consent must "not be unlawful, unreasonable, or inequitable," it gave no indication that lack of a finding, through admission or adjudication, that an intrafamily offense occurred would hamper its conclusion that consent agreements should result in the entry of a CPO.<sup>35</sup>

Furthermore, subsection (d) of Rule 11 gives additional support to the conclusion that intrafamily offenses are not linked to the authority to grant the protective order remedies. Rule 11(d) specifically provides for a jurisdictional waiver in entering mutual protective orders, with no apparent requirement that an intrafamily offense by the petitioner be alleged, much less admitted.<sup>36</sup> As a general proposition, entering mutual orders undercuts the goal of protecting the domestic violence survivor by making it unclear who is in need of

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31. D.C. SUPER. CT. INTRAFAMILY R. 11(b) states as follows:

(b) CONSENT ORDER. When the respondent has consented to having a Civil Protection Order issued, the Court shall make sufficient inquiry to be assured that:

(1) the respondent voluntarily consented to the issuance of the Civil Protection Order; and

(2) the parties understand the contents of the Order.

32. See D.C. SUPER. CT. INTRAFAMILY R. 11(b).

33. *Maldonado*, 631 A.2d at 44.

34. See *Cruz-Foster v. Foster*, 597 A.2d at 930,932 (finding that respondent's past conduct is important evidence in predicting probable future conduct, and instructing the lower court to take into consideration the "entire mosaic" in assessing whether to extend appellant's CPO).

35. *Maldonado*, 631 A.2d at 44.

36. The Court generally requires the filing of a Petition and Affidavit to permit the entry of a CPO, but does provide an exception for: "[i]ssuance of [sic] order against both parties." It states that:

"the individual who ... after having been apprised by the Court of his or her rights with respect to the filing of a Petition and Affidavit and to a hearing on such Petition, understandingly consents to the issuance of an Order binding him or her, provided, however, that the Court may, as a condition of the issuance of a Civil Protection Order in favor of any party to abide by such fair and reasonable conditions as may be necessary and appropriate to ensure fairness and facilitate compliance with the Civil Protection Order."

D.C. SUPER. CT. INTRAFAMILY R. 11(d).

protection.<sup>37</sup> Such practices have specifically been discouraged by the Violence Against Women Act.<sup>38</sup> Similarly, mutual orders obscure the goals of the Intrafamily Offenses Act, which the D.C. Court of Appeals has consistently described as remedial.<sup>39</sup> Significantly, Rule 11(d) suggests that waiver of the allegation that an intrafamily offense was committed is an acceptable basis for entry of a CPO.<sup>40</sup> Thus, a petitioner can be equally bound by a CPO in the absence of any claim of wrongdoing simply by agreeing to its terms.<sup>41</sup>

Rule 11(d) is explicit that a party has the right to notice in the form of service of a petition and affidavit alleging the requisite relationship and offense.<sup>42</sup> It is equally explicit that this notice can be waived.<sup>43</sup> Under the rule, once this notice is waived, the court can enter a CPO. While notice can certainly be waived,<sup>44</sup> it is far less clear that waiver legitimizes the court's authority to enter a CPO in the absence of any finding of criminal activity on the part of the person bound by the order.<sup>45</sup>

One might be tempted to read Rule 11(d) as contemplating no more than an ancillary order to the petitioner that helps to effect the relief granted under the CPO. For example, a CPO that enjoins the respondent from harming or contacting the petitioner may also grant the petitioner custody of the parties' children with visitation rights to the respondent.<sup>46</sup> The petitioner would be obligated by the

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37. See Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REVIEW 1437, 1443-44 (Apr. 1994) (advocating victims should avoid consenting to mutual orders because they greatly increase the danger to the victim and her children and serve to confuse rather than guide a police officer in responding to domestic violence, making enforcement difficult).

38. For example, the VIOLENCE AGAINST WOMEN ACT presumptively orders that full faith and credit be granted to protection orders issued by a court, after reasonable notice and opportunity to be heard is given to the person against whom the order is sought. The Act does not permit full faith and credit to be given to cross or counter petitions issued against one who has filed a petition for a protection order if no counter petition was filed, or if one had been filed and the court failed to make specific findings that each party qualified for an order. This suggests Congress' distaste for mutual protection orders. VIOLENCE AGAINST WOMEN ACT OF 1994, 18 U.S.C.A. § 2265(c) (West Supp. 1994).

39. See *Maldonado*, 631 A.2d at 42.

40. Waiver of notice is permissible under FED. R. CIV. P. 4(d)(1).

41. D.C. SUPER. CT. INTRAFAMILY R. 11(d).

42. D.C. SUPER. CT. INTRAFAMILY R. 11.

43. D.C. SUPER. CT. INTRAFAMILY R. 11.

44. D.C. SUPER. CT. INTRAFAMILY R. 11.

45. D.C. SUPER. CT. INTRAFAMILY R. 11(d).

46. The law was recently amended to protect victims of domestic violence and their children from the contact required through visitation orders. The court must justify in writing a grant of custody or visitation to an abusive parent, and a respondent seeking visitation must prove that such contact will not harm the abused parent or the child. D.C. CODE ANN. § 16-1005(c-1). See also, D.C. CODE ANN. §§ 16-911(a-1) and 16-914(a-1).



order to make the child available at the appointed time. Part of the comment to Rule 11 would support the conclusion that an ancillary order should be the extent to which a petitioner is bound in that it states that "[t]he terms of any order against a respondent may require certain conduct and cooperation by the petitioner or members of the petitioner's family."<sup>47</sup> This would not amount to entry of a CPO against the petitioner, although failure to comply with aspects of the orders have been viewed by judges as subject to the CPO contempt sanctions.<sup>48</sup> However, the intent to bind the petitioner in more than an ancillary manner is apparent since the comment goes on to state that:

In those situations in which the Court determines that full relief under this rule cannot reasonably be afforded without requiring more substantial conduct by the petitioner, the petitioner may be permitted to consent to issuance of an order against both parties.<sup>49</sup>

This part of the comment underscores the language in the rule that allows for both parties to be mutually bound by a CPO, provided the petitioner is also willing to consent.

Nonetheless, the opprobrium with which mutual orders have been met has reduced them to a rarity in the District of Columbia.<sup>50</sup> Nonetheless, Rule 11 is in conflict with the law both in terms of its reference to mutual orders and to consent orders in general.

### III. SUBJECT MATTER JURISDICTION IS NOT WAIVABLE

It is a basic tenet of civil procedure that subject matter jurisdiction is "at the top of the hierarchy" with regard to limitations on the court's authority to act.<sup>51</sup> It cannot be created by parties to a lawsuit, and it cannot be waived.<sup>52</sup> The District of Columbia law is firm on this point. Accordingly, "neither silence nor consent of the parties

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47. Comment, D.C. SUPER. CT. INTRAFAMILY R. 11.

48. While I am not aware of a petitioner actually being held in contempt for failing to comply with visitation orders, I have on many occasions had judges threaten my clients, with such a penalty, as a matter of course in granting CPOs.

49. See *infra* note 53.

50. See *supra* note 38 (discussing the Violence Against Women Act); and Zorza *supra* note 37 (discussing the negative impact of mutual orders upon the victims of domestic abuse).

51. Leandra Lederman, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 427 n.29 (1991) (quoting Allan Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 786-787 (1985)).

52. F.R. CIV. P. 12(h)(3) and 5A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1393 (waiver of subject matter jurisdiction cannot be done by consent of the parties). See also, Lederman *supra* note 49 (citing *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960)).

can confer jurisdiction."<sup>53</sup> Additionally, the issue of subject matter jurisdiction can be raised for the first time on appeal or *sua sponte* by the court.<sup>54</sup> The rule is so strong, that even if a party strategically or deliberately failed during trial to raise the issue of the court's competency to hear the dispute, the court will still reject the case if it is determined that subject matter jurisdiction is lacking at any stage of the case.<sup>55</sup>

Absolutes, however, are difficult to sustain. For example, the D.C. Court of Appeals has described jurisdiction as an "elusive and uncertain characterization depending on the environment in which it is employed."<sup>56</sup> The Court has taken some pains to draw distinctions between "classic subject matter jurisdiction," the kind that concerns the competence of a court to adjudicate a particular kind of controversy,<sup>57</sup> and "territorial jurisdiction," which combines certain aspects of subject matter jurisdiction with those of *in personam* jurisdiction, and which relates jurisdiction over subject matter to a certain "geographical relationship to a particular 'thing' or 'status.'"<sup>58</sup> Classic subject matter jurisdiction is not waivable, whereas territorial jurisdiction is.<sup>59</sup> Using territorial jurisdiction, the court in *B.J.P.* resolved the inherently awkward results that can flow from the jurisdictional mandates of the Parental Kidnapping Prevention Act (PKPA)<sup>60</sup> and

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53. *McCray v. McGee*, 504 A.2d 1128, 1131 (D.C. 1986) (quoting *1425 F Street Corp. v. Jardin*, 53 A.2d 278, 279 (D.C. 1947)).

54. "[W]hen it affirmatively appears that [subject matter] jurisdiction is lacking, an objection may be raised by the parties or by the court for the first time on appeal." *B.J.P. v. R.W.P.*, 637 A.2d 74, 78 (D.C. 1994) (citing *King v. Kidd*, 640 A.2d 656 (D.C. 1993)). "The District of Columbia adheres to the traditional rule that a party's acquiescence in the trial court's exercise of subject matter jurisdiction (or a waiver of a defense of lack of subject matter jurisdiction), indicated by the failure to raise the defense before or during the trial, does not preclude that party from raising the issue on appeal." *King*, 640 A.2d at 652 (citations omitted). "[W]here a substantial question exists as to this court's subject matter jurisdiction, it is our obligation to raise it, *sua sponte*, even though no party has asked us to consider it." *Murphy v. McCloud*, 650 A.2d 202, 203 n.4 (D.C. 1994) (citations omitted).

55. "[A] question of subject matter jurisdiction may be presented by any interested party at any time ... [even] for the first time on appeal ... . If ... jurisdiction is not apparent, the Court not only will, but must, refuse to proceed with the determination of the merits of the controversy, unless this failure can be cured. This is true regardless of what stage the case may be in, and whether the defect is called to the Court's attention by suggestion of the parties or otherwise." *King*, 640 A.2d at 662 n.4 (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1393, 766-73 (1990)).

56. *B.J.P.*, 637 A.2d at 78 (quoting *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952)).

57. "[T]he one commonly meant when referring to 'subject matter jurisdiction'—concerns [sic] the 'competence' of the court to adjudicate a particular kind of controversy; e.g., divorce or child custody." *Id.* at 80 (Ferren, J., concurring).

58. *Id.* at 80-81 (Ferren, J., concurring) (citing Restatement (Second) of Judgments § 11 cmt. b (1982)).

59. *Id.* at 81 (Ferren, J., concurring) (citations omitted).

60. 28 U.S.C. § 1738A (1991)

the Uniform Child Custody Jurisdiction Act (UCCJA),<sup>61</sup> which have been adopted by the District of Columbia and the states.

In *B.J.P.*, the court denied a mother's claim on appeal that the District of Columbia lacked subject matter jurisdiction to adjudicate the custody of her children because the District was not the "home state" of either child.<sup>62</sup> This objection was raised by the mother for the first time on appeal.<sup>63</sup> The court, in denying her claim, observed that "[u]ncritical application of the 'no waiver of subject matter jurisdiction' rule to the sort of situation presented in the case would permit a litigant to contest the merits of a controversy in a convenient forum, exult in victory if she wins, but keep the jurisdictional card in her hip pocket, to be produced only in the event that she loses."<sup>64</sup> Which is precisely what issues of subject matter jurisdiction allow litigants to do, since a party cannot confer jurisdiction by failing to raise it.<sup>65</sup> According to the court, the issue in *B.J.P.* was really one of territorial jurisdiction, and thus the hard rule did not apply.<sup>66</sup> This territorial jurisdiction, as a geographically driven subset of the court's general authority to hear custody cases, does not impact the power of the court to adjudicate a particular type of controversy,<sup>67</sup> and thus it can be waived.<sup>68</sup>

The Intrafamily Offenses Act does not trigger the hybrid of geographical and subject matter jurisdictional issues raised by the statutory guidelines for asserting jurisdiction in a custody case.<sup>69</sup> The statutory guideline in this instance is that authority exists to enter a specific creation, the CPO, if a criminal act was perpetrated and the requisite relationship exists.<sup>70</sup> That suggests a classic limitation on the court's authority.<sup>71</sup>

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61. D.C. CODE ANN. § 16-4501 et seq. (1981 & Supp. 1996).

62. *B.J.P.*, 637 A.2d at 79 (finding that "the mother waived any territorial limitation of the Supreme Court's jurisdiction").

63. *Id.* at 77-78.

64. *Id.* at 79 (citing *Palmer Constr. Co. v. Patouillet*, 42 A.2d 273, 274 (D.C. 1945)).

65. *King*, 640 A.2d at 662 n.4.

66. *B.J.P.*, 637 A.2d at 78 (finding the court had not lacked subject matter jurisdiction that would result in dismissal).

67. "Once a court possesses subject matter jurisdiction to consider the general class or kind of case, its specific jurisdiction over a particular case within the general class is subject to waiver." *B.J.P.*, 637 A.2d at 79 (quoting *Williams v. Williams*, 555 N.E.2d 142, 144 (Ind. 1990)).

68. *B.J.P.*, 637 A.2d at 81 (Ferren, J., concurring) (citing *Williams*, 555 N.E.2d at 144 (finding any challenge to territorial jurisdiction "must be raised at the outset of the action")).

69. See D.C. CODE ANN. §§16-1001 to 16-1006 (1981 & Supp. 1996).

70. See D.C. CODE ANN. §16-1005 (1981 & Supp. 1996).

71. "A court by its own words cannot create or extinguish its own subject matter jurisdiction. Rather, the source of jurisdiction is 'the constitutional and statutory provisions by which it is created.'" Appeal of A.H., 590 A.2d 123, 129 (D.C. 1991) (quoting *Demar v. Open Space &*

Still, the D.C. Court of Appeals has made clear its intent to support the spirit of protection for victims of domestic violence reflected in the Intrafamily Offenses Act. In *Cruz-Foster v. Foster*, it held that the Intrafamily Offenses Act "must be liberally construed in furtherance of its remedial purpose"<sup>72</sup> and that it is necessary to consider whether the "balance of harms" favors granting the requested relief.<sup>73</sup> The court went on to describe the potential harm to Ms. Cruz of refusing to protect her from assaults and threat of assaults as substantial. On the other hand, the potential harm to Mr. Foster of requiring him "to do no more than obey the law and ... stay away from Ms. Cruz," was deemed relatively minor.<sup>74</sup> The issue in *Cruz-Foster* was not whether an intrafamily offense had occurred, but whether there was sufficient basis for extending the original order. The court found that the past history is critical to petitioners' meeting the good cause standard for extending a civil protection order.<sup>75</sup>

#### IV. AN ALTERNATIVE TO CONTORTING THE INTRAFAMILY STATUTE

Despite the statutory limitation on entry of CPOs, D.C. Superior Court judges have authority, under the equitable powers of the court, to enter protective orders absent a relationship or criminal offense.<sup>76</sup> The court's equitable powers allow it to enter orders granting remedies similar to those available under the Intrafamily Offenses Act to persons who consent to such action. While the specific remedies granted could be the same, the enforcement would be based upon the general contempt sanctions available to judges.<sup>77</sup> The criminal contempt sanctions that are available for violation of the intrafamily order would not apply to orders entered under the court's general equitable powers.<sup>78</sup> The court has the authority to

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Conservation Comm'n, 559 A.2d 1103, 1107-08 (Conn. 1989)).

72. *Cruz-Foster v. Foster*, 597 A.2d at 929.

73. *Id.* at 930.

74. *Id.*

75. *Id.* at 930-32. See D.C. CODE ANN. § 16-1005(d) and D.C. SUPER. CT. INTRAFAMILY R. 11(f) (providing that an intrafamily order can be extended for good cause shown).

76. See e.g., *Felder v. Allsopp*, 391 A.2d 243 *reh'g denied* (D.C. 1978) (holding that while not specified in D.C. CODE ANN. § 11-1101 (1981), a judge assigned to the Family Division of the Superior Court has authority to hear a complaint for visitation).

77. D.C. CODE ANN. § 16-944 (1981 & Supp. 1996).

78. The Intrafamily Offenses Act provides that the violation of a TPO (referred to in the statute as "temporary" because of its fourteen day duration) or CPO (referred to in the statute as "permanent" because of its one year duration) "shall be punishable as contempt." D.C. CODE ANN. § 16-1005(f) (1981). It is the Superior Court Intrafamily Rules that provide that the punishment may be a fine of not more than \$300.00 or imprisonment for not more than six months, or both. D.C. SUPER. CT. INTRAFAMILY R. 12(e). The statute was recently amended to provide that violation of a temporary or permanent protection order is chargeable as a misde-

impose criminal sanctions for contempt,<sup>79</sup> and unlike the CPO contempt sanction, there is no specific limit on the length of sentence an offender would face for having violated such an order.<sup>80</sup>

The broad power available to the court under D.C. Code Ann. §11-944, could provide ample protection for a person claiming domestic abuse who is seeking to obtain an order by consent against an alleged abuser who denies the underlying offense.<sup>81</sup> The problem is that equitable injunctions have not been the normative response among judges to domestic violence cases. The statutory scheme adopted throughout the country attests to the fact that an alternative to existing equitable authority was deemed necessary.<sup>82</sup> Furthermore, law enforcement systems are set up to respond to cases specifically identified as having protective orders.<sup>83</sup> For example, in the District of Columbia, CPOs are recorded in the Metropolitan Police Departments computers, and thus police coming to the scene of a dispute should be aware that such orders exist, which should in turn inform their understanding of the situation.<sup>84</sup> Also, under the Violence Against Women Act, CPOs are enforceable across state lines,<sup>85</sup> and under the Gun Control Act, possession of a gun by the person subject to a restraining order is prohibited during the term of the order.<sup>86</sup> The force of the protections contemplated by these laws, however, should be backed by a finding or an admission of abusive activity. If all that is forthcoming is a willingness to be bound by the

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meanor and "upon conviction shall be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 180 days, or both." D.C. CODE ANN. §16-1005(g) (Supp. 1996). While this new subsection provides the only statutory reference to a penalty for contempt of a protection order, the language does not address the extent of any penalty that is not the result of a misdemeanor charge. Contempt actions still fall under subsection (f) and follow the remedy available under Intrafamily Rule 12(e). Both the misdemeanor and contempt remedies for violation of a protective order are tied to the intrafamily statute. They do not confer a contempt power that would reach protection orders entered outside of the scope of the statute.

79. See D.C. CODE ANN. § 11-944 (1981). The elements of criminal contempt are (1) willful disobedience (2) of a court order and (3) causing an obstruction of the orderly administration of justice. In re Thompson, 454 A. 2d 1324 (D.C. App. 1982).

80. While there is no limit on the length of a sentence for criminal contempt, this does not mean that the proportionality principal does not apply; the sentence must bear a reasonable relationship to the underlying conduct. Caldwell v. United States, 595 A.2d 961 (D.C. App. 1991).

81. See D.C. CODE ANN. § 11-944(b) (1981).

82. See *eg.* D.C. CODE ANN. §16-1001 - 16-1006 (1981 & Supp. 1996).

83. See, *eg.*, D.C. CODE ANN. § 16-1005(c)(8) (1981). The judge issuing CPOs can order "the Metropolitan Police Department to take such action as the Family Division deems necessary to enforce its orders." *Id.* As a matter of course, all intrafamily orders are entered into the police computer system.

84. See D.C. CODE ANN. § 16-1031.

85. 18 U.S.C.A. § 2265(c) (West Supp. 1994).

86. 18 U.S.C. §§ 922 (West 1997).

court order, then the scheme designed to address domestic violence embodied in the Intrafamily Offenses Act should yield to a less specific standard.<sup>87</sup>

#### V. VICTIMS OF DOMESTIC VIOLENCE ARE NOT SERVED BY CASUAL APPLICATION OF THE LAW

Significant strides have been made in this country in educating the public and its institutions about the devastating and pervasive impact of domestic violence.<sup>88</sup> The tremendous effort over the past few decades to generate remedies for domestic violence has resulted in increased societal interest in protecting survivors of domestic violence.<sup>89</sup> The District of Columbia is one of many jurisdictions that

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87. One could also argue that consent CPOs accompanied by a denial of the intrafamily offense charged are comparable to the acceptance of *Alford* pleas in criminal cases. A guilty plea in a criminal case requires the defendant to admit guilt, unless it is entered pursuant to the doctrine in *North Carolina v. Alford*, which allows a defendant to plead guilty while still maintaining innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). The Court found that an express admission of guilt is "not a constitutional requisite to imposition of a criminal penalty," and an "individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37. See also, D.C. Super. Ct. Crim. Rule 11(b) (authorizing a plea of *nolo contendere*.) The basic rationale for supporting entry of the *Alford* plea is that defendants should be able to avoid the risk of conviction of more serious charges by pleading guilty to a lesser charge, even if the defendant claims innocence or, for some reason, cannot admit guilt. *Id.* That this allows courts to move their criminal dockets more quickly is an added benefit.

Setting aside arguments for and against such pleas in a criminal context, the lack of an admission or finding of abusive action in entering civil protective orders undermines the very basis for this injunctive action. The Intrafamily Offenses Act is on firmer ground if protective orders are entered as a result of a finding or admission of abusive behavior. Injunctions are deemed extraordinary relief, justified by the irreparable harm that can result from failure to grant the requested intervention. See *Wieck v. Sterenbuch*, 350 A.2d 384 (D.C. 1976) (in order to obtain a temporary restraining order or a preliminary injunction, the moving party must demonstrate that: (1) there is a substantial likelihood of prevailing on the merits of the action; (2) irreparable harm will result to the moving party during the pendency of the action; (3) more harm will result to the moving party by denial of the TRO than to the adverse party from its grant; and (4) the public interest will not be disserved by granting the order.). Danger of irreparable harm is the most important of these elements. *Id.* at 387. Questions as to the existence of the underlying danger should not be glossed over in an effort to err on the side of granting protection or of simply moving a crowded docket.

88. See Schafran *supra* note 9.

89. Civil remedies were first created for D.C. Court Reform and Criminal Procedure Act of 1970 (codified at D.C. CODE ANN. §§16-1001 - 16-1006 (1981 & Supp. 1996)). The very existence of civil protection orders throughout the country is due in part to the insipid response from the criminal justice system to this brand of crime. Civil injunctions that create an opportunity for private prosecution for future infractions do not exist simply because they can provide more flexibility with regard to tailoring relief for the victimized family. They exist because of the woeful lack of response to crimes against intimates. See Barry, *supra* note 1, at 340, "[t]he sluggish criminal justice response to domestic violence led women's groups in the early 1970s to seek legislative alternatives to state prosecution and to obtain structural reform of state law enforcement efforts through statutory requirements and conforming policy changes. The approach by women's groups has been three-pronged: to gain better police intervention, to in-

have implemented new procedures to effectively respond to the needs of those seeking protection from domestic violence.<sup>90</sup> These procedures hinge on the vast majority of cases that are resolved by consent agreement.<sup>91</sup> As indicated above, the court which needs to accommodate approximately forty family law cases per day cannot hold more than a few brief hearings at best.<sup>92</sup> Settlement is therefore essential, and given the nature of the harm the court is designed to address, the desire to err on the side of enjoining future harm often sets a tone that encourages respondents to consent to protective orders.<sup>93</sup> The result can be that the rights and liberty of the accused are restricted despite a firm denial of the underlying offenses.<sup>94</sup> The desire to protect victims of domestic violence, however, is hampered if the respondent defends enforcement of the CPO by arguing that the court lacked jurisdiction to enter the mutual order since consent was not based on the requisite finding that an intrafamily offense occurred.<sup>95</sup>

Furthermore, while there is merit in the sentiment that it is better to err on the side of entering a protective order in the litigated context, there are several flaws in that perspective. First of all, a disturbing trend is occurring in the D.C. Superior Court. Batterers rush to the courthouse to file their own petition for a CPO and, in some instances, they seek and obtain preliminary two-week TPOs that are granted *ex parte* if the petitioner can convince the court that exigent

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crease criminal prosecution, and to utilize civil orders of protection." (citing *The Effect of Woman Abuse on Children*, NATIONAL CENTER ON WOMEN AND FAMILY LAW 86 (1991)).

90. "All 50 states, the District of Columbia and Puerto Rico have civil protection order provisions." See Barry, *supra* note 1, at 348, n.31 (citing Klein, *supra* note 1, at 810).

91. See *supra* note 31 (discussing D.C. SUPER. CT. INTRAFAMILY R. 11).

92. See *supra* Part II (discussing the D.C. Superior Court Intrafamily Bench).

93. See Catherine F. Klein and Leslie Orloff, *Representing a Victim of Domestic Violence*, 17 FAMILY ADVOCATE 25, 28 (1995) (discussing the dangers of mutual civil protective orders and why judges issue mutual CPOs).

94. Superior Court judges have the authority to grant the following relief to a victim of domestic violence: (1) prohibitory injunction directing the abuser to refrain molesting, assaulting, or threatening the victim; (2) requiring the abuser to submit to psychiatric or medical treatment or counseling programs (e.g., Domestic Violence Intervention Program); (3) directing the abuser to stay away from the victim; (4) ordering the abuser to vacate the residence of the abused, if the residence is jointly owned or rented by both parties, or personally owned or rented by the victim and some other individual; (5) directing the abuser to give up rights to certain property; (6) awarding custody of minor children; (7) determining visitation rights of the abuser (court has the authority to determine if visitation should be supervised); (8) awarding costs and attorney's fees; (9) obtaining assistance from the D.C. Metropolitan Police Department in carrying out the provisions of the CPO. This includes having a police officer present when dividing property, etc. (10) any other relief the court deems necessary. D.C. CODE ANN. § 16-1005(c) (1981).

95. See D.C. CODE ANN. § 16-1005(c) and (j). See also, D.C. SUPER CT. INTRAFAMILY R. 11(e) and R. 12 (discussing contempt) To date, the author knows of no cases in D.C. where a jurisdictional defense has been raised.

circumstances exist.<sup>96</sup> The TPO is readily granted, with judges often taking very little oral testimony or granting the TPO based purely on reviewing the petition.<sup>97</sup> The remedies under the TPO are the same as those available under the one-year CPO.<sup>98</sup> The result can be that not only is the batterer physically and emotionally abusing the victim, but that the court is complicit in these actions. The victim faces a machine tuned to issue orders of protection, and at times resistant to the facts asserted by the respondent/victim. The perpetrator of the violence gains the court's contempt power as another element of the abuse arsenal. Nor would seeking a mutual order in response to such a tactic be beneficial. A domestic violence survivor who seeks a mutual protection order in response to such a tactic does little more than reduce its impact. Even if the victim could overcome the procedural hurdles, the value of the mutual order is minimal in that nothing is conveyed as to fault.<sup>99</sup> Police and the courts have little insight into who is at risk under mutual orders.<sup>100</sup>

Secondly, judges who enter, or who know CPOs are entered under lax procedural circumstances, are reluctant to credit them as indicative of a past history of violence.<sup>101</sup> One example of the impact of

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96. D.C. CODE ANN. § 16-1004(d) (1981 & Supp. 1996).

97. The court must find by a preponderance of the evidence that there is good cause to issue a CPO. D.C. CODE ANN. § 16-1005(c) (1981 & Supp. 1996); D.C. SUPER. CT. INTRAFAMILY R. 11(c). The District of Columbia Superior Court's Domestic Violence Implementation Plan anticipates that petitioners seeking Temporary Protection Orders will submit pleadings only, and that oral testimony will be taken only at the request of the judge. Thus, the practice of doing little to assess the credibility of the unopposed litigant will be firmly built into the court process. This approach would be consistent with D.C. SUPER. CT. INTRAFAMILY R. 7(a)(1)-(2) (permitting a petitioner to request a TPO by motion and enabling the court to determine from testimony or the petition whether a family member is in immediate danger). See generally, Kin Kinports and Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & LAW 163, 166 (1993) (discussing how TPOs are often *ex parte* in nature and require no prior notice to respondent upon showing that if the respondent is notified, the petitioner will be subject to abuse). See also *New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528 (1993).

98. D.C. CODE ANN. § 16-1004(d) (1981) (granting the court the authority to issue TPOs where it finds "the safety or welfare of a family member is immediately endangered by the respondent"). TPOs may include any of the remedies authorized under the one year CPO statute. D.C. SUPER. CT. INTRAFAMILY R. 7(a)(2) (discussing contempt procedures for TPOs).

99. See Zorza, *supra* note 37, at 1443-44; Klein, *supra* note 93, at 28 (explaining that the presumption of a mutual order is "that both a petitioner and a respondent are equally at fault").

100. See Zorza, *supra* note 37, at 1443-44; Klein, *supra* note 85, at 28 (explaining the "ambiguity rewards batterers, who can wrongly accuse the victim of being the instigator or perpetrator of the violence, and endangers the victim, who may be falsely arrested and left unprotected against future assaults by the abuser").

101. See Klein, *supra* note 93, at 28-29 (advising lawyers of domestic abuse victims to "[a]sk the judge to specify the incidents on which [the denial or issuance of the civil protective order] is based" and "[m]ake sure that the court makes these statements on the record," and warning these lawyers that "[w]ritten findings and conclusions are crucial to enforcement and will provide critical information to judges ruling on other cases between the same parties, including divorce actions, child abuse charges, or criminal prosecutions").



this approach is that the abused parent may find it difficult to demonstrate that a history of violence should preclude an award of custody or visitation.<sup>102</sup> In *Prost v. Green*,<sup>103</sup> a series of TPOs were entered by consent against the respondent who was subsequently granted custody of the minor children.<sup>104</sup> Respondent nonetheless firmly denied all allegations of abuse.<sup>105</sup> The Court of Appeals remanded the case finding that it was "unresolved whether all or any of the acts occurred."<sup>106</sup> If fault was unresolved, then the TPOs should never have been entered. Conversely, if TPOs were entered, it should follow that at least one of the alleged criminal acts occurred.<sup>107</sup> The weight given to the issuance of TPOs and CPOs will also affect their value in tort and contract actions.<sup>108</sup>

Thirdly, for respondents who in fact did not transgress, being propelled into consenting to a CPO can be a blow from a system that they feel powerless to entreat. This is destructive, particularly in the black community, where the judicial system has been viewed as short on justice throughout the history of this country.<sup>109</sup> Most of the parties moving through the D.C. Superior Court's Intrafamily calendar are black,<sup>110</sup> and while the battle is largely personal, it does not help for either the petitioner or the respondent to experience the court's disinterest in the merits. This breeds anger, frustration and cynicism.

Conversely, there is a considerable incentive to encourage consents in these matters as a means of protecting victims. Domestic

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102. A history of domestic violence is relevant to custody and visitation awards under recent amendments to the District of Columbia intrafamily and divorce statutes. D.C. CODE ANN. § 16-1005(c-1) (Supp. 1996) (codifying Joint Custody of Children Act of 1996, D.C. LAW 11-112 (1996)). Some argue that domestic violence is used to gain the upper hand in custody cases. Such claims would be harder to assert where CPOs are used as evidence of the violence, provided such orders are the result of a trial or an admission of violent actions. The statute refers to a history of violence, and thus the entry of one CPO may still not provide the requisite proof of domestic violence.

103. *Prost v. Green*, 652 A.2d 621 (D.C. 1995).

104. *Id.* at 631.

105. *Id.*

106. *Id.*

107. *Id.* (discussing that the court's acceptance of consent to TPOs leaves the issue of whether intrafamily violence occurred unresolved).

108. See Klein, *supra* note 1, at 995 n.1235 (citing JACQUELINE A. AGTUCA, DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 293-327 (1992)); see also *New State and Federal Responses to Domestic Violence*, *supra* note 97, at 1549.

109. See generally Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & LAW 1 (1995).

110. In 1989, 80.4% of petitioners for CPOs were African-American. D.C. COURTS: FINAL REPORT OF THE TASK FORCE ON RACIAL AND ETHNIC BIAS AND TASK FORCE ON GENDER BIAS IN THE COURTS, 143 (May 1992).

violence survivors are often traumatized by the prospect of facing their abusers at trial, and thus may be effectively precluded from getting a protective order absent a consent. One of my clients, for example, was so terrorized by her abuser that she was afraid to step out of her house to come to my office to prepare the protective order petition.<sup>111</sup> When we finally went to court, it was only on the condition that we could get a consent from a respondent who had broken down her door twice, beaten her up once, and generally terrorized her and her twelve year old daughter. Another client who happened to suffer from epilepsy was so afraid of going to trial that just before the CPO hearing she became increasingly certain that she would have a seizure.<sup>112</sup> I spent a good part of the time that we waited for her case to be called with my legal pad folded and ready so that she would be able to bite down on it if necessary. This intolerable situation ultimately led us to the court nurse, and resulted in a consent order without one of the remedies sought by my client.

Thus, seeking to extract more than noncommittal consent may effectively cut victims off from a much needed intervention. On balance, however, seeking alternative forms of equitable relief for victims who are not prepared emotionally to prove their case is preferable to undermining the intrafamily system and the contingent remedies that protective order violations may support. If instead of routinely issuing intrafamily consent orders equitable relief by consent was granted in those cases where the respondent denied culpability, the culture of the court may evolve to a routine of accommodating these equitable orders.

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111. The facts in the cases have been adjusted slightly to protect client confidentiality.

112. The facts in the cases have been adjusted slightly to protect client confidentiality.

## VI. CONCLUSION

Civil protection orders provide an important set of remedies to survivors of domestic violence. These orders are at once broader than criminal prosecution and more forgiving. They offer injunctive relief from violence, distance, interim resolution of custody, support, and property issues. Judges focusing particularly on the relief from violence are inclined to grant the desired remedies under most circumstances, and particularly when presented with orders to which the accused has consented. This is problematic where the accused has denied, or failed to admit to the underlying offense, since committing a prohibited offense is a prerequisite to judicial action. If the accused has committed a criminal offense, fault should be established. When a wrong has been perpetrated, a remedy is both just and warranted. If the offense is denied, denial should be made clear and the court should structure its course of action accordingly.

Absent an admission of guilt and in the context of avoiding litigation, it may be appropriate under the general equitable jurisdiction of the court to enter an injunction against violence by consent, and to grant other broad remedies similar to those available under a CPO. Such action should not be confused with the issuance of a CPO, since the procedural context and enforcement are different.<sup>113</sup> It should also be clear that such an order will not be included in the system designed to combat domestic violence since it is not based on a finding or admission of a criminal offense in the context of an intrafamily relationship.

There is tension between making important protective order remedies available to the many survivors of domestic violence who desperately need help and following the statutory requirement that an intrafamily offense be established. More cases will be tried due to failed negotiations where the accused, while willing to agree to entry of an order, will not admit to wrongdoing.<sup>114</sup> In fact, this is already beginning to happen as a result of one judge's demand for admis-

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113. Chapter 16 of D.C. CODE ANNOTATED outlines the power of the court with intrafamily causes of action. Sections 16-1001 to 16-1006 outline the power of the court to peacefully resolve intrafamily offenses. The D.C. Family Division Court has equitable powers to enjoin parties in divorce and custody cases without triggering the remedies available under the D.C. Intrafamily Offenses Act (codified at D.C. CODE ANN. §§16-1001 to 16-1006 (1981 & Supp. 1996)).

114. Batterers counseling programs focus on the batterers accepting responsibility for their wrongdoing. Naomi Cahn and Joan Meier, *Domestic Violence and Feminist Jurisprudence: Toward a New Agenda*, 1 B.U. PUB. INT. L.J. 339, 347-48 (1995). Such counseling is routinely ordered in the Intrafamily Branch of the D.C. Superior Court. The respondents are sent to the Domestic Violence Intervention Program, which is part of the court's probation division. The program struggles to accommodate the ever increasing number of referrals.

sion of guilt in consent agreements. Solutions that require more judicial resources are not palatable to courts that are pressed by high caseloads and tight budgets. Nonetheless, accommodations can be made. Cases that are contested could, for example, be sent to judges whose dockets have cleared, or if absolutely necessary, cases could be rescheduled. An admission of guilt or a hearing on the merits and findings of fact by the judge are preferable to undermining this important intervention, both in terms of the integrity of the orders within the judicial system and the respect they command in the community at large.