SUFFOLK UNIVERSITY
LAW REVIEW

Volume XLIII 2010 Number 2

Denying Choice of Forum: An Interference by the Massachusetts Trial Court With Domestic Violence Victims' Rights and Safety

Margaret B. Drew*

Marilu E. Gresens**

I. INTRODUCTION

Petitions for protection from domestic abuse, often referred to as civil protection or restraining orders, are governed by Massachusetts General Laws Chapter 209A, also called the Abuse Prevention Act (APA or Chapter 209A).[1] With the passing of the APA in 1978, Massachusetts was among the first states to respond to judicial intolerance of domestic violence claims.[2] Massachusetts has since been at the forefront of many civil protections for domestic violence victims, including the provision of a timely, same-day hearing and other relief that eases the burden on petitioners in need of immediate remedies. The APA was designed to give domestic violence victims an effective legal remedy and to protect victims from future incidents of abuse through simplified and accessible judicial procedures for obtaining civil protection orders.[3]

* Margaret B. Drew is Professor of Clinical Law at the University of Cincinnati College of Law, where she is the Director of the Domestic Violence and Civil Protection Order Clinic. She served as chair of the American Bar Association's Commission on Domestic Violence and currently serves as its special advisor. She practiced law in Massachusetts for twenty-five years. Professor Drew thanks Professor Christopher Bryant, Professor Robin Runge and Attorney Pauline Quirion for their assistance.

** Marilu E. Gresens is a third-year law student at the University of Cincinnati College of Law, J.D. expected May 2010.

1. MASS. GEN. LAWS ANN. ch. 209A, §§ 1-10 (2007).

2. Esther M. Bixler, *The Legal Effects of the Massachusetts Abuse Prevention Act, The Stalking Statute, and the Marital Rape Exemption on Victims of Domestic Violence*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 79, 101 (1997).

3. *Id.* at 82; *see also* MASSACHUSETTS COURT SYSTEMS, GUIDELINES FOR JUDICIAL PRACTICE, ABUSE

The APA has been a successful vehicle for those experiencing abuse; approximately 40,000 victims of domestic violence seek civil protection orders to end violence against themselves and their children in Massachusetts each year.[4] In fiscal year 2009, 23,738 abuse victims filed protective order petitions in the District Court,[5] 4318 petitions for protective orders were filed in the Probate and Family Court,[6] and 3572 petitions were filed in the Boston Municipal Court.[7] These statistics confirm that Massachusetts courts have excelled in holding speedy hearings and providing immediate protection for thousands of victims of abuse.

Despite the success of the APA, recent statistics indicate that the number of domestic violence deaths in Massachusetts is rising: domestic violence-related deaths were nearly three times higher in 2007 than in 2005, totaling fifty-five homicides and suicides.[8] In addition, Jane Doe, Inc. reports that there were thirty domestic violence-related deaths between January and September of 2008 alone.[9] This disturbing statistical trend highlights the continued need for sufficient and appropriate statutory remedies to ensure that the courts provide all possible and necessary relief to keep victims free and independent from abusive partners. With the combination of thoughtfully crafted remedies under Chapter 209A and progressive police practices such as on-site identification of the primary aggressor,[10] Massachusetts survivors of domestic abuse benefit from some of the most comprehensive protections in the country.

Under the APA, victims can file for civil protection orders and have their

---

PREVENTION PROCEEDINGS § 1:01 (3d ed. 2000), *available at* http://www.mass.gov/courts/formsandguidelines/domestic/dvtoc.html [hereinafter GUIDELINES FOR JUDICIAL PRACTICE] ("The fundamental purpose of proceedings under c. 209A is to adjudicate the need for protection from abuse and, if that need is found to exist, to provide protective court orders.").

4. Bixler, *supra* note 2, at 79.

5. Massachusetts District Court–Filings By Court–FY 2009, http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/civilstats2009.pdf (last visited Jan. 22, 2010).

6. Probate and Family Court Department: Total Annual Case Filings by Division: Fiscal Year 2009, http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/summarystats2009.pdf (last visited Jan. 22, 2010).

7. Boston Municipal Court Department: Fiscal Year 2009, http://www.mass.gov/courts/courtsandjudges/courts/bostonmunicipalcourt/2009caseloadstats.pdf (last visited Jan. 22, 2010).

8. In Massachusetts, there were fifteen murders and four domestic violence related suicides in 2005, twenty-eight murders and three suicides in 2006, and forty-two murders and thirteen suicides in 2007. Press Release, Office of Health and Human Services of Massachusetts, Public Health Advisory: Massachusetts Health Officials Issue Advisory to Public and Health Care Providers on Domestic Violence: Increase in Domestic Violence Deaths Spur Call to Action (June 5, 2008), *available at* http://www.mass.gov/?pageID=eohhs2pressrelease&L=1&L0=Home&sid=Eeohhs2&b=pressrelease&f=080605_domestic_violence&csid=Eeohhs2.

9. Jane Doe, Inc., Factsheet: Facts and Stats 2008, http://www.janedoe.org/know/DVAM%202008%20Facts%20and%20Stats.pdf (last visited Jan. 22, 2010).

10. Press Release, Office of the Governor, Patrick-Murray Administration Highlights Innovative Approaches to Addressing Domestic Violence: State to Issue Public Health Advisory, Boost Law Enforcement Training and Conduct Trend Analysis on Domestic Violence Related Deaths (June 5, 2008), *available at* http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=080605_domestic_violence&csid=Agov3.

cases heard and decided in any superior, Boston municipal, district, or probate and family court division of the Massachusetts Trial Court having jurisdiction over the petitioner's residence.[11] The history of the jurisdiction and venue provisions of the statute reflects a thoughtful and effective process crafted by the Massachusetts Legislature. For more than three decades, victims and their advocates have been free to choose in which trial court departments to file civil protection order petitions, regardless of whether other domestic relations issues were simultaneously pending in a division of the Probate and Family Court.[12] However, on May 4, 2009, the Chief Justice of Administration and Management of the Massachusetts Trial Court launched a pilot program in the Norfolk Division of the Probate and Family Court Department through an Administrative Order entitled, in pertinent part, "for the Interdepartmental Transfer of Certain Abuse Prevention Proceedings."[13] This pilot program authorizes a judge of the Norfolk Division of the Probate and Family Court to initiate interdepartmental transfers of civil protection order petitions pending in other court departments where the parties have related domestic relations matters pending in the Probate and Family Court.[14]

This article discusses how the pilot program interferes with the rights and safety of domestic violence victims in Massachusetts, in hopes that the Trial Court will voluntarily discontinue the pilot program and return to the statutory scheme contemplated by the legislature and clarified through the long-standing Guidelines for Judicial Practice. First, this article outlines the background and legislative history of Chapter 209A's venue and jurisdictional provisions, which illuminate the proper meaning and interpretation of its provisions. Second, it argues that the provisions of the pilot program directly contradict the purpose of Chapter 209A, and indeed, rewrite statutory language, permitting unconstitutional "back door" legislation by the judicial administration. Finally, this article argues that, by denying domestic violence victims an important choice of forum when seeking protection orders from Massachusetts courts, the pilot program may put their safety at greater risk.

II. THE LEGISLATIVE HISTORY OF CHAPTER 209A

Prior to the drafting of the APA in 1978, the judicial process in Massachusetts was effectively unavailable as a remedy to victims of domestic violence because of the slow speed and high cost of judicial remedies.[15] Before

11. MASS. GEN. LAWS ch. 209A, § 2 (2008).

12. *See* GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at § 2:07 (noting petitioner should not be referred to Probate and Family Court if relief within initial court's jurisdiction).

13. The Commonwealth of Massachusetts Trial Court, Administrative Order No. 09-1, Apr. 29, 2009, *available at* http://www.kelseytrask.com/Docs/Order09-1.pdf [hereinafter Admin. Order 09-1].

14. *Id*.

15. *See* Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 160-63 (2003).

1978, abused family members, particularly abused women,[16] were forced to rely on largely unresponsive law enforcement and slow, inadequate criminal law remedies. If criminal remedies were pursued at all, they failed to protect victims from continued threats and abuse during the pendency of criminal complaints.[17] Similarly, civil remedies were only available as part of already commenced divorce or support actions.[18] While it is evident that significant progress has been made regarding the attitude of law enforcement and the courts towards claims of domestic violence, prior to the 1980s, victims seeking legal remedies often faced courts overtly hostile to their claims.[19] Judges, and indeed society at large, tended to disbelieve claims of domestic violence as fabrications, inclined to the view that courts should not intervene in marriages and other intimate relationships.[20]

What made Chapter 209A truly progressive legislation was that it was drafted in response to these problems, and creatively established effective, preventative remedies for abuse victims and their children.[21] The act was originally authored by the Battered Women's Action Committee (BWAC), a grass roots activist organization working with battered women during a time when domestic abuse victims were largely ignored by courts and law enforcement officials.[22] The APA was subsequently amended to reflect stylistic differences and to correct identified problems.[23] The material provisions of the law, however, remain substantively unchanged from the original version.[24]

The legal remedy created by the APA is a civil protection order, also referred to as a "209A order."[25] Under Chapter 209A, a temporary order can be obtained *ex parte* on the same day that a petitioner files a complaint. That emergency, or *ex parte*, order generally remains in effect for an initial ten

16. The authors recognize that domestic violence victims are not always women and that not all perpetrators are men. Furthermore, they acknowledge that intimate partner violence is a very real problem in some lesbian, gay, bisexual, and transgender relationships. However, because statistics indicate that approximately 85 percent of domestic violence victims are female, this article will occasionally use gendered pronouns for convenience.

17. Charles P. Kindregan, Jr. et al., *Domestic Violence and Abuse Prevention in Massachusetts*, 3 MASS. PRAC., FAM. LAW & PRAC. § 57:1 (3d ed. 2009).

18. *Id.*

19. 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, 668 (2003).

20. *See id.*

21. Bixler, *supra* note 2, at 81-82.

22. Katherine Triantafillou, *Massachusetts: New Legislation to Help Battered Women*, 27 JUDGE'S J. 20 (1988); *see also* Miriam Goldstein Altman, *Litigating Domestic Abuse Cases Under Ch. 209A*, 24 MASS. L. WKLY. B6 (1995).

23. *See* Brief of Petitioner-Appellant, Iamele v. Asselin, 831 N.E.2d 324 (Mass. 2005) (providing complete history of Chapter 209A).

24. *See id.*

25. *See* Bixler, *supra* note 2, at 82.

business days.[26] At the *ex parte* hearing, a judge reviews the complaint and the victim's supporting affidavit to determine whether there is a "substantial likelihood of immediate danger of abuse."[27] The respondent is then served and, within ten days of the *ex parte* hearing, a full hearing is held, at which the defendant is given the opportunity to defend against the petitioner's claims. After the full hearing, the judge determines whether to extend the protection order for up to one year.[28] At the expiration of the extended time, the petitioner has the opportunity to renew the order and may ask the court to issue a permanent order.[29] Although the protection order is in the nature of a civil proceeding, a violation of the order is a criminal offense and can carry a jail sentence and fine.[30]

The primary goal of Chapter 209A was to enhance existing legal remedies, such as child support and assault and battery complaints, and to provide victims with an accessible means of stopping the violence without resort to the more onerous criminal process or the protracted and often unwanted civil remedies, such as divorce.[31] The original intent of the APA's drafters was to create "a very simple law that attempts to address the immediate needs of battered women" by providing them with "easy access . . . to the courts, relief in the form of immediate restraining orders, and orders that are enforceable by the police."[32]

A. Structure of the Trial Court of the Commonwealth of Massachusetts

Also in 1978, the Massachusetts Legislature passed the Court Reorganization Act (CRA),[33] which consolidated the several independent courts, including the then-separate district, probate, and superior courts, into a single department, the Trial Court of the Commonwealth.[34] Post-1978, the Massachusetts Trial Court consists of seven court departments: Superior Court, Housing Court, Land Court, Probate and Family Court, Boston Municipal Court, Juvenile Court, and District Court.[35] Under the CRA, each court department was given equal standing with other court departments, and each

26. MASS. GEN. LAWS ch. 209A, § 4 (2007).

27. *Id.*

28. *Id.* § 3.

29. *Id.*

30. MASS. GEN. LAWS ch. 209A, § 7 (2008). The statute states: "[a]ny violation of such order . . . shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment." *Id.*

31. Triantafillou, *supra* note 22, at 22.

32. *Id.* (explaining intent and effect of APA).

33. MASS. GEN. LAWS ch. 211B, §§ 1-20 (2005).

34. *Id.* § 1 (setting forth organization of Trial Court departments).

35. *Id.* Although the full name for each court would include its department designation, the Massachusetts Rules of Civil Procedure provide for shortening the names to: Superior Court, Housing Court, Probate Court (which includes Family and Probate), Land Court, District Court, Boston Municipal Court and Juvenile Court. MASS. R. CIV. P. 1 (2008). We will use these shortened names hereafter.

judge was made an associate judge of the Trial Court appointed to a particular division.[36] The Trial Court departments were consolidated administratively, and a centralized administrative office was created for the Chief Justice of Administration and Management.[37] The Chief Justice of Administration and Management appoints a Chief Justice to head each Trial Court department for five-year terms.[38]

Subsequent statutes and amendments provide each Trial Court department with exclusive and concurrent jurisdiction within particular areas. For instance, the Probate and Family Court has superior and general jurisdiction over domestic relations matters, including divorce, child custody, and support.[39] Similarly, the Superior Court has original jurisdiction over many crimes and most civil actions in law and equity.[40] Finally, the District and Boston Municipal Courts have concurrent jurisdiction with the Superior Court over some misdemeanor crimes and many civil actions.[41]

As explored below, in 1978 the Massachusetts Legislature simultaneously passed the APA, which extended jurisdiction over civil protection order hearings to four departments of the Trial Court, and the CRA, which consolidated the Massachusetts Trial Court into several distinct departments.

B. The Evolution of Chapter 209A's Jurisdiction and Venue Provisions

The joint efforts of the BWAC and the Massachusetts Legislature created a statute with groundbreaking jurisdiction and venue provisions designed to increase domestic violence victims' access to judicial remedies.[42] The APA, as drafted by BWAC, was first introduced to the Massachusetts Legislature in 1977.[43] The original version of the venue provision of Chapter 209A read:

> Proceedings under this chapter shall be filed, heard and determined in the district, superior court or the probate court of the county in which the plaintiff resides. If the plaintiff has left the residence or household to avoid abuse, he shall have the option to bring an action in the county of the previous residence or household or the new residence or household.[44]

For our purposes, the most salient changes to the BWAC draft made by the

36. Sean M. Dunphy, *The Trial Court of Massachusetts*, 21 MASS. PRAC., PROB. L. & PRAC. § 1.2 (2d ed. 2009).
37. *Id.* (describing administrative consolidation of departments).
38. MASS. GEN. LAWS ch. 211B, §§ 1, 5 (2005).
39. MASS. GEN. LAWS ch. 215, §§ 2-3 (2005).
40. MASS. GEN. LAWS ch. 212, §§ 3, 6 (2005).
41. MASS. GEN. LAWS ch. 218, § 19 (2005).
42. Triantafillou, *supra* note 22, at 23.
43. *Id.* at 22-23.
44. MASS. GEN. LAWS ch. 209A, § 2 (1978) (amended 1983) (providing the original venue provision).

Massachusetts Senate were the venue and jurisdiction provisions, which constituted a major deviation from then standard venue and jurisdictional concepts.[45] Unlike divorce actions or criminal prosecutions, by expanding the locations where a petitioner may file for protection to different departments of the Trial Court,[46] Chapter 209A ensured that venue over abuse cases no longer depended on marital domicile, the residence of the defendant, or where the violence occurred.[47]

Another significant jurisdictional innovation the APA fostered was the wide range of courts in which a Chapter 209A petition could be brought.[48] The original version of the APA, drafted by the BWAC and passed by the Massachusetts House of Representatives, provided concurrent jurisdiction to only the Probate and Superior Court departments.[49] The original position of the BWAC was that the Probate and Superior Courts were best suited to hear protection order cases.[50] The Probate Court had exclusive jurisdiction over domestic relations cases, and the BWAC lawyers were more familiar with domestic relations practice. Additionally, the injunctive remedies provided in the APA were similar to relief often provided by the Superior Court.[51]

Therefore, when the draft bill was amended[52] to include concurrent jurisdiction with the District Court, BWAC considered the change to be problematic.[53] BWAC was concerned that extending jurisdiction to the District Court would create confusion with existing criminal remedies and frustrate the emergency order provisions of the APA.[54] However, at the time, there were seventy-two District courts as opposed to only fourteen Superior courts, and in light of the pending consolidation of the several courts into one Trial Court, the legislative rationale was to provide petitioners with greater access to the court system by extending jurisdiction to a wider range of local forums.[55]

In the end, the expansive jurisdictional scheme ensured that a victim need not travel to a distant court in order to obtain protection from abuse. Furthermore, the scheme facilitated the support of shelter advocates familiar with a victim's situation as well as with local courts.[56] By enacting these provisions, the drafters enhanced access to protection for abuse victims and created a scheme that supports the safety of petitioners and their children.

---

45. *Id.*
46. MASS. GEN. LAWS ch. 209A, § 2 (2007).
47. Triantafillou, *supra* note 22, at 23.
48. *Id.* (explaining jurisdictional changes of 209A).
49. *Id.*
50. *Id.*
51. *Id.*; *see also* Charles P. Kindregan, Jr. et al., *Jurisdiction and Venue of the Court in Chapter 209A Abuse Prevention Cases*, 3 MASS. PRAC., FAM. L. AND PRAC. § 57:7 (3d ed. 2009).
52. *See* Triantafillou, *supra* note 22 at 22-23 (outlining legislative history of APA).
53. *See id.* at 23.
54. *Id.* at 50.
55. *See* Kindregan, *supra* note 51.
56. *See* Triantafillou, *supra* note 22, at 23.

C. Resolution of Problems Presented by Chapter 209A's Concurrent Jurisdictional Scheme

After the passage of Chapter 209A, several of the BWAC's concerns over the concurrent jurisdictional scheme proved not to have been entirely in vain. However, rather than amend Chapter 209A to divest jurisdiction from the District Courts, in 1983 the legislature maintained its intent to increase access to local forums by extending jurisdiction even further to cover the Boston Municipal Court.[57] Any problems concurrent jurisdiction presented were resolved, not through interdepartmental transfer, but by clarifying guidelines issued by the Trial Court, as well as by subsequent legislative amendments, that preserved petitioners' right to have civil protection order filings heard and decided in any one of four court departments.[58]

When concurrent jurisdiction was expanded to four departments of the Trial Court, some judges were initially hesitant to hear the petitions and sought to transfer those cases to other courts, asserting that they were "family matters" or "criminal matters" not properly brought.[59] Judicial guidelines clarified this concern, stating that judges were not to transfer or refuse to determine Chapter 209A cases on grounds that that their department lacked proper jurisdiction.[60]

Another initial concern was that of overlapping and conflicting orders from different departments of the Trial Court. Conflict most commonly occurred between the Probate and Family Court and the other departments of the Trial Court when issues of child support and custody were addressed in separate actions.[61] Related concerns were that petitioners might seek to gain advantage

57. MASS GEN. LAWS ch. 209A, § 2 (1983).

58. Triantafillou, *supra* note 22, at 50.

59. *Id.*

60. *See* GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at § 2:07. The guidelines state in pertinent part:

> Plaintiffs seeking relief initially in the District Court, the Boston Municipal Court or the Superior court should not be referred to the Probate and Family Court for any relief that is within the initial court's jurisdiction, regardless of the marital status or the involvement of children . . . . While Plaintiffs seeking relief under c. 209A generally should not be referred from one court to another court with jurisdiction, a Plaintiff who has been referred to one court by another court within the same or a different department should not be sent back to the referring court, even if the latter had jurisdiction.

Id. The commentary to § 2:07 also elaborates on the original intent of the legislature:

> If the court in which a person initially seeks protection under c. 209A has jurisdiction, the person should be heard as soon as possible in that court, and should not be sent to another court. Referring a plaintiff to another court may discourage the person from seeking relief to which he or she is entitled under the law, and may expose the person to additional danger. This is particularly so where the other court is at some distance and may be inaccessible to the plaintiff.

Id.

61. *See* Triantafillou, *supra* note 22, at 50; *see also* MASS. GEN. LAWS ch. 215, §§ 2-3 (2005) (Probate

in a pending action in one department of the Trial Court by seeking a protective order from another department.[62] The perceived—albeit unsubstantiated—advantage of obtaining a protection order before or during pending domestic relations matters was the perception that a protection order awarding custody to the petitioner would create a favorable result in the subsequent divorce or other custody proceeding.[63]

These concerns were not remediated by divesting concurrent jurisdictions in the several departments, but rather were addressed through the 1983 amendments. Those amendments require petitioners to disclose any prior or pending actions between the parties.[64] In addition, the Guidelines for Judicial Practice established a procedure for resolution of conflicting orders.[65] Furthermore, both Chapter 209A and the Guidelines for Judicial Practice provide for modification of protection orders by the Probate and Family Court to eliminate conflict with subsequent or pending domestic relations matters. Subsequently issued Probate and Family Court orders addressing child support and custody effectively terminate corresponding relief previously issued by a different court under a protective order.[66] No court other than the Probate and Family Court is permitted to issue protective orders with child custody or support relief that conflict with orders from the Probate and Family Court.[67]

---

and Family Court has superior jurisdiction over issues of child custody and support).

62. *See* Triantafillou, *supra* note 22, at 50

63. There is no empirical evidence that supports the theory that raising abuse allegations is an advantage to battered mothers. *See, e.g.*, MASSACHUSETTS SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS (1989), *reprinted in* 24 NEW ENG. L. REV. 745, 748 (1990). Indeed, the empirical evidence that is available indicates that battered mothers who litigate custody and who have raised allegations of abuse do not fair better than the alleged abusive parent. *Id.* (noting that mothers in such situations often face hostile courts). In many instances, battered mothers are in a worse legal posture for having raised allegations of abuse. *Id.*; *see also*, Meier, *supra* note 19, at 686-90.

64. MASS GEN. LAWS ch. 209A, § 3 (2008). The statute states: "A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties for divorce, annulment, paternity, custody or support, guardianship, separate support or legal separation, or abuse prevention." *Id.*

65. *See* GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at §§ 2:07, 3:07, 14:00, 13:00. The Guidelines state: "The court should not order relief inconsistent with any existing order. At the beginning of each hearing, whether an ex parte or a hearing after notice, in order to avoid issuing inconsistent orders, the judge should ask the parties whether there are any outstanding court actions or orders in the same or a different court." *Id.* § 2:07.

66. MASS. GEN. LAWS ch. 209A, § 3 (2008). The statute states:

> If there is a prior or pending custody support order from the probate and family court department of the trial court, an order issued in the superior, district, or Boston municipal court departments of the trial court pursuant to this chapter may include any relief available pursuant to this chapter except orders for custody or support. If the parties to a proceeding under this chapter are parties in a subsequent proceeding in the probate and family court department for divorce, annulment, paternity, custody or support, guardianship or separate support, any custody or support order or judgment issued in the subsequent proceeding shall supersede any prior custody or support order under this chapter.

Id.

67. *Id.*

In sum, the problems presented by judicial resistance to hearing abuse prevention petitions and the possibility of conflicting orders from different departments of the Trial Court were anticipated by the court administrators and resolved administratively. As discussed below, the experimental transfer policy, created over three decades later, undermines not only the legislative intent of Chapter 209A jurisdictional provisions but also the Trial Court's own original interpretation of the appropriate judicial response to jurisdictional concerns.

III. THE PILOT PROGRAM

It is against this backdrop that in May of 2009, the Trial Court launched a pilot program "at the Norfolk Division of the Probate and Family Court Department for the Interdepartmental Transfer of Certain Abuse Prevention Proceedings."[68] The pilot program establishes a procedure whereby any judge from the Norfolk division of the Probate and Family Court may order, *sua sponte* or upon motion of a party, the transfer of any abuse prevention proceeding pending in a District Court in Norfolk County when there are related domestic relations matters pending in the Probate and Family Court.[69] Therefore, when a petitioner files for a civil protection order under Chapter 209A in a Norfolk County District Court,[70] and one of the parties previously or subsequently files a domestic relations action in the Norfolk Probate and Family Court, a Probate and Family Court judge can order the transfer of the 209A proceeding from the District Court to the Probate and Family Court.[71]

Prior to the issuance of such a transfer, the Probate and Family Court must give the parties an opportunity to be heard in an additional hearing.[72] The Probate and Family Court judge is then given sole authority to decide whether transfer is appropriate.[73] Once a 209A case is transferred from the District Court to the Probate and Family Court, the jurisdiction of the District Court over the pending abuse prevention order will terminate and the action will then proceed in the Probate and Family Court *as if it had originated there*.[74] The pilot program gives Norfolk Probate and Family Court judges authority to "revise or modify District Court orders" issued prior to the transfer or to make

68. *See* Admin. Order 09-1, *supra* note 13.

69. The pilot program encompasses the Brookline, Dedham, Quincy, Stoughton and Wrentham Divisions of the District Court Departments. *Id.*

70. Apparently, the pilot program does not include the superior court department located in Norfolk County. Superior courts in Massachusetts are generally located in the same town as the county Probate and Family court. *See* THE LEGAL PAGES: 2010 MASSACHUSETTS EDITION, 197-282 (2009) (providing maps showing Massachusetts court locations). For this reason, Superior Courts see relatively few APA filings.

71. *See* Admin. Order 09-1, *supra* note 13 (detailing conduct of pilot program at Norfolk Division of Probate and Family Court Department).

72. *Id.* (outlining transfer procedures).

73. *Id.*

74. *Id.* (emphasis added).

new orders "as if the action had commenced in the Probate and Family Court."[75] After transfer, any existing 209A order will be considered an order of the Probate and Family Court.[76]

What is unaddressed in this transfer scheme is where the Trial Court draws its authority to implement such a dramatic change in the statutory scheme merely through the development of an administrative transfer policy. The following sections argue that the transfer policy both undermines the intent of the legislature and is directly contrary to the statutory language of Chapter 209A, even according the Trial Court's own interpretation.

A. Lack of Statutory Authority for Interdepartmental Transfer

Massachusetts is currently among the majority of states that permit abuse victims to file for protection orders in family law proceedings or as a separate civil protection order.[77] The venue provisions of Chapter 209A also give a petitioner the right to choose which court will hear the petition.[78] Chapter 209A vests jurisdiction in four different Trial Court departments to hear applications for and to issue emergency civil protection orders, temporary protection orders following *ex parte* hearings, and protection orders following full hearings.[79] The statute is designed to provide abuse victims with quick and immediate protection and relief from domestic violence through expedited procedures.[80] After the granting of a temporary, *ex parte* order, the court must hold a full hearing, giving the defendant an opportunity to present a defense, within ten court business days.[81] The venue and jurisdiction provisions enhance the statute's design to provide a simple process for immediate relief from domestic violence.

The statutory language is clear that when an action is filed under Chapter 209A, any of the listed courts with jurisdiction *must* hear and determine Chapter 209A applications, so long as the court has venue over the petitioner's prior or current residence.[82] Each Trial Court department is vested with jurisdiction to issue Chapter 209A orders without distinction, and no section of the statute authorizes or even contemplates transfer of civil protection order hearings between court departments, let alone a *sua sponte* transfer.[83] Chapter

75. Admin. Order 09-1, *supra* note 13.

76. *Id.*

77. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 881 (1993).

78. *Compare* MASS GEN. LAWS ch. 209A, § 2 (2008) (discussing venue options for protection order petitions), *with* OHIO REV. CODE ANN. § 3113.31(B) (West 2009) (resting exclusive jurisdiction over protection orders to court of common pleas).

79. MASS. GEN. LAWS ch. 209A, § 3 (2008).

80. Triantafillou, *supra* note 22, at 20.

81. MASS. GEN. LAWS ch. 209A, § 4 (2008).

82. MASS. GEN. LAWS ch. 209A, § 2 (2008).

83. As a practical or strategic matter, divorce counsel may often recommend a re-filing of a petition in

209A provides that "[a] person suffering from abuse from an adult or minor family or household member may file a complaint in the superior, probate and family, district, or Boston municipal court departments of the trial court requesting protection from such abuse."[84] Furthermore, Chapter 209A, § 6 requires that the police inform the victim of her rights as follows: "[y]ou have the right to appear at the Superior, Probate and Family, District or Boston Municipal Court, if you reside within the appropriate jurisdiction."[85] Therefore, under the transfer scheme, a victim may follow police guidance by filing for protection in her local court only to have the Probate and Family Court remove the case. As discussed further in Section IV, this transfer could have the dual effect of undermining victim empowerment as well as her confidence in the police.

The Trial Court's Guidelines for Judicial Practice on Abuse Prevention Proceedings, which provide guidance to courts on Chapter 209A cases, expressly reject interdepartmental transfer of Chapter 209A cases. They provide that "[p]laintiffs seeking relief initially in the District Court, the Boston Municipal Court or the Superior Court should *not* be referred to the Probate and Family Court for any relief that is within the initial court's jurisdiction, *regardless of marital status or the involvement of children.*"[86] Furthermore, the petitioner "should be heard as soon as possible in [the court to which she applies], and should not be sent to another court."[87] The Guidelines stress that "referring a plaintiff to another court may discourage the person from seeking the relief to which he or she is entitled under the law and may expose the person to additional danger."[88] As such, the guidelines incorporate the legislative understanding of the need for victim convenience and safety.

In contrast, the interdepartmental transfer of abuse prevention proceedings under the pilot program effectively eliminates the petitioner's right to choice of forum guaranteed under Chapter 209A, as clarified and implemented through the Trial Court's own Guidelines for Judicial Practice, where there are related domestic relations matters pending.[89]

---

the Probate and Family Court Department if a divorce or other action between the parties is pending. Donald G. Tye, Phyllis K. Kolman & Patricia A. O'Connell, *Child Custody and the Parenting Plan*, *in* TRYING DIVORCE CASES IN MASSACHUSETTS 11-1 (Mass. Continuing Legal Educ., Inc. ed., 2007). That choice, however, is best left to the petitioner and counsel and not to the Probate and Family Court.

84. MASS. GEN. LAWS ch. 209A, § 3 (2008). The statute defines "court" as "the superior, probate and family, district, or Boston municipal court departments of the trial court," except when the petitioner is in a dating relationship, in which case "court" does not include the superior court, and is defined as the district, probate and family, or Boston municipal courts. *Id.* § 1.

85. *Id.* § 6.

86. GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at § 2:07 (emphasis added).

87. *Id.*

88. *Id.*

89. Massachusetts law is clear that, "[w]here an administrative interpretation is adopted contemporaneously with the enactment of a statute, it is entitled to deference, especially when it has been observed over time." EMC Corp. v. Comm'r of Revenue, 744 N.E.2d 55, 58-59 (Mass. 2001).

The Trial Court's authority for the creation of the Norfolk pilot program is purportedly derived from the CRA, which grants the Chief Justice of Administration and Management the general responsibility of improving the proper and efficient administration of the various departments of the Trial Court.[90] This authority also includes the ability to transfer cases "upon the joint request of the chief justices of two or more departments of the trial court."[91] However, the authority for interdepartmental transfer exists in a limited fashion and certainly should not grant the authority to rewrite thoughtfully crafted statutes. Massachusetts courts interpret the transfer provision of the CRA as evidencing the legislature's intent to minimize subject matter jurisdiction concerns between the various departments of the Trial Court.[92] For instance, the Supreme Judicial Court held in *Konstantopoulos v. Town of Whately* that, rather than dismissing a complaint for lack of subject matter jurisdiction, the Probate and Family Court should have requested that the Chief Justice of Administration and Management transfer the case, the judge, or both.[93] One purpose of this administrative authority is to preserve judicial economy by permitting one judge to hear and decide overlapping or related issues.[94] The lesson of *Konstantopoulos* and subsequent cases is not that transfer should be the ordinary judicial course, but that when necessary, jurisdiction of a particular court may be *expanded* through transfer of cases or judges.[95]

Ordinarily, the transfer of cases in family matters arises when two related actions are *obligated* by statutory venue and jurisdictional requirements to be filed in two different departments of the Trial Court.[96] The most common example would be where an abuse victim has filed a tort action against a perpetrating spouse, and the tort claim must be filed in Superior Court while the divorce action requires filing in Probate and Family Court.[97] In that instance, judicial economy is enhanced by transferring one case to the court department with jurisdiction over the other case, particularly because Massachusetts courts commonly hold that issue preclusion bars a subsequent tort action where common issues of fact, for instance assault and battery, were decided during separate but related proceedings.[98] The transfer and subsequent consolidation in this instance *expands* the jurisdiction of the Probate and Family court, and

90. MASS. GEN. LAWS ch. 211B, § 9(xx) (2005).

91. *Id.* § 9.

92. Konstantopoulos v. Town of Whately, 424 N.E.2d 210, 216 (Mass. 1981).

93. *Id.* at 215.

94. Charles P. Kindregan, Jr. et. al, *Requests for Interdepartmental Judicial Assignments*, 1 MASS. PRAC., FAM. L. AND PRAC. § 10:8 (2009).

95. Worchester v. Sigel, 644 N.E.2d 238, 240 (Mass. App. Ct. 1994).

96. *See generally* Harvey v. Harvey, 676 N.E.2d 44 (Mass. 1997) (involving motion to consolidate divorce proceeding in probate and family court with tort action in superior court).

97. *See* MASS. GEN. LAWS ch. 215, §§ 3, 6 (2005) (probate and family court without jurisdiction to hear tort actions and award damages).

98. *See, e.g.*, Heacock v. Heacock, 580 N.E.2d 151, 153 (Mass. 1988) (leaving open possibility of issue preclusion in tort action subsequent to a related divorce).

preserves judicial economy as contemplated by the CRA.[99] Also, this form of transfer and consolidation does not cause geographic hardship to the parties. In Massachusetts, the Superior Court and Probate and Family Court facilities are usually close in proximity, often in the same building.[100]

On the other hand, the 209A transfer pilot program seeks not an expansion of jurisdiction, but an administrative contraction of District Court jurisdiction in favor of the Probate and Family Court.[101] Consequently, the pilot program deprives the District Court of its equal and concurrent authority to hear and determine cases on the merits. Any transfer authority should not be permitted to authorize a wholesale change to specific statutory jurisdictional provisions. Nor should it be used to permit usurping of a Trial Court department's jurisdictional authority upon the determination of a judge in another Trial Court department.

B. The Pilot Program as Judicial Activism

It is well settled under Massachusetts law that it is not a proper function of the judiciary to rewrite a statute or to disregard clear legislative intent; amendment of a statute can only be done by the legislature.[102] Massachusetts courts "do not read into legislation rights not provided."[103] Rather, they follow the canon of statutory construction that "a statutory expression of one thing is an implied exclusion of other things omitted from the statute."[104] There is no legal basis for the Trial Court to claim legitimacy for the pilot program based solely on the *absence* of a provision proscribing interdepartmental transfer[105] without clear evidence that the absence undermines the intent of the statute.[106]

---

99. *See* Custody of a Minor (No. 1), 463 N.E.2d 324 (Mass. 1984) (CRA authorized the Chief Justice of Administration and Management to consolidate related Probate Court proceeding with Juvenile Court proceeding rather than dismissing Probate Court action); *see also* Rogers v. Comm'r of the Dep't of Mental Health, 458 N.E.2d 308, 315 (Mass. 1983) (holding consolidation authorized by the Chief Justice of Administration and Management proper under CRA where personal rights might be harmed by delay).

100. *See* THE LEGAL PAGES: 2010 MASSACHUSETTS EDITION 248-55 (2009).

101. *See* Admin. Order 09-1, *supra* note 13 (providing upon determination of Probate and Family Court judge, District Court's jurisdiction over 209A petition terminates and petition is considered to have originated in Probate and Family Court).

102. *See* Commonwealth v. Biagiotti, 888 N.E.2d 364, 367 (2008) (recognizing "[i]t is not the function of the courts to rewrite a statute"); *see also* Ropes & Gray LLP v. Jalbert, 910 N.E.2d 330, 338 n.8 (Mass. 2009) ("The Supreme Judicial Court is not free to ignore or to tamper with a clear expression of legislative intent. If the law is to be changed, the change can only be made by the Legislature."); Thomas v. Dept. of State Police, 814 N.E.2d 376, 381 (Mass. App. Ct. 2004) ("Where 'the language of the statute is clear, it is the function of the judiciary to apply it, not amend it.'" (quoting Comm'r of Revenue v. Cargill, Inc., 760 N.E.2d 625, 627 (1999))).

103. Hagan v. Commonwealth, 772 N.E.2d 32, 37 (Mass. 2002).

104. Commonwealth v. Russ R., 744 N.E.2d 39, 44 (Mass. 2001) (quoting Police Comm'r of Boston v. Cecil, 727 N.E.2d 846, 848 (Mass. 2000)).

105. The authority for the pilot program is purportedly derived from MASS. GEN. LAWS ch. 211B, § 9(xx) (2005).

106. We must assume that if the Legislature had intended to authorize inter-departmental transfer, it would have done so. *See* Comm'r of Revenue v. Cargill, Inc., 706 N.E.2d 625, 627 (Mass. 1999) (explaining

The Chapter 209A jurisdiction and venue provisions are clear:

> [p]roceedings under this chapter *shall be filed, heard and determined* in the superior court department *or* the Boston municipal court department *or* respective divisions of the probate and family *or* district court departments having venue over the plaintiff's residence.[107]

Any argument that the provisions are unclear would fail on additional principles of Massachusetts legislative interpretation. It is well settled that where statutes are unclear, they "are to be interpreted not based solely on simple, strict meaning of words, but in connection with their development and history, and with the history of the times and prior legislation."[108]

For sake of argument, even if it could be found that Chapter 209A's jurisdiction and venue provisions are unclear because they do not authorize interdepartmental transfer, the pilot program's interpretation of Chapter 209A's jurisdiction and venue provisions is contrary to clear legislative intent gleaned from the history of the statute. The legislative history of Chapter 209A is unmistakably unambiguous; it was designed because of frustration with indifference to battered women's claims, with the main goals of educating people about domestic violence and giving victims temporary and short term means of protection from violence.[109] At least one Massachusetts appellate court has had occasion to explore the legislative history of Chapter 209A to interpret its provisions.[110] The court in *Sommi v. Ayer* found the statute lacked a definition of "mutual restraining order," and sought a definition consistent with Chapter 209A's legislative purpose, which is to give "parties seeking protective orders a wide choice of courts in which to pursue petitions."[111] The court then determined the legislature did not intend to limit mutual restraining orders to orders issued from the same court, citing the venue provisions of Chapter 209A, and reasoning that "[b]ecause it is probably not uncommon for a plaintiff to have left a residence or house-hold to avoid abuse, it would not be uncommon for parties to seek protective orders in different courts."[112]

Permitting a Probate and Family Court judge to interfere with a petitioner's right to have the District Court hear and determine the dispute alters the

---

legislature's omission of language must be read as intentional).

107. MASS. GEN. LAWS ch. 209A, § 2 (2008) (emphasis added).

108. Kobrin v. Gastfriend, 821 N.E.2d 60, 66 (Mass. 2005) (quoting Quincy City Hosp. v. Rate Setting Comm'n, 548 N.E.2d 869, 876 (Mass. 1990)) (adopting a narrow interpretation of statute based on legislative intent gleaned from legislative history); *see also* Bynes v. School Comm. of Boston, 581 N.E.2d 1019, 1021-22 (Mass. 1991) (determining legislative intent through examination of legislative history in conjunction with the plain language of statute).

109. Triantafillou, *supra* note 22, at 22.

110. *See generally* Sommi v. Ayer, 744 N.E.2d 679 (Mass. App. Ct. 2001).

111. *Id.* at 681.

112. *Id.* at 681 n.3.

statutory scheme of Chapter 209A in a way that is in direct conflict with legislative intent. The pilot program's interpretation of Chapter 209A as permitting interdepartmental transfer of pending protection order cases to the Probate and Family Court creates internal inconsistency within the statute itself, and renders Chapter 209A's jurisdictional provisions superfluous.[113]

The Trial Court's interdepartmental transfer policy constitutes judicial activism, which is defined as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions . . . with the suggestion that adherents of this philosophy . . . are willing to ignore precedent."[114] While in this instance the policy may reflect professional rather than personal concerns, the effect of the transfer program is an administrative rewriting of Chapter 209A's jurisdiction and venue provisions that the legislature thoughtfully and purposefully enacted. As noted earlier, the expanded venue provisions were added to the original and amended statutes after legislative deliberation on the very issues the Trial Court now uses to implement the transfer program.[115]

C. The Pilot Program Extends the Reach of the Probate and Family Court to 209A Orders Entered by Other Trial Court Departments

In addition to granting authority to issue civil protection orders, Chapter 209A also authorizes all Trial Court departments to make orders granting temporary child custody and support.[116] Although these issues normally fall under the jurisdiction of the Probate and Family Court, Chapter 209A vests the authority to order what is necessary for the protection of the petitioner and any children in district, superior, and Boston municipal courts.[117] The Guidelines for Judicial Practice elaborate on the rationale for this system, stating:

> fragmenting the relief available in the initial court, such as refusing to deal with support orders even when they are necessary to assure a plaintiff's ability to live independently and free from abuse, denies the plaintiff rights which the law provides, and may discourage a victim of abuse from seeking any relief at all.[118]

Therefore, Chapter 209A establishes a system whereby multiple Trial Court

113. *See* Ropes & Gray LLP v. Jalbert, 910 N.E.2d 330, 336 (Mass. 2009) (explaining "[a] statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage"); *see also* Wolfe v. Gormally, 802 N.E.2d 64, 68 (Mass. 2004); Bankers Life & Cas. Co. v. Comm'r of Ins., 691 N.E.2d 929, 932 (Mass. 1998).

114. BLACK'S LAW DICTIONARY 862 (8th ed. 2004).

115. *See supra*, Section II.B.

116. MASS. GEN. LAWS ch. 209A, § 3(d)-(e) (2008).

117. *Id.* § 3(i). Pursuant to this section, a judge may "impos[e] any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent." *Id.* ; *see also* GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at §2:07 (commentary).

118. GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at §2:07 (commentary).

Departments have jurisdiction to hear and determine some domestic relations issues inherently connected to the safety goal of civil protection orders.

Chapter 209A and subsequently issued judicial procedures preserve the final jurisdiction of the Probate and Family Court over domestic relations issues in a number of ways. First, the statute prohibits the District Court, Boston Municipal Court and Superior Court from including custody or support relief in a protection order where there is a previous custody determination by a Probate and Family Court.[119] Second, the statute also grants the Probate and Family Court authority to subsequently modify custody and support orders issued by other court departments. If a Probate and Family Court judge makes a subsequent order in a proceeding for "divorce, annulment, paternity, custody or support, guardianship or separate support," then that order will supersede any prior custody or support order given as part of a 209A civil protection order.[120]

On the other hand, the pilot program's provisions drastically deviate from previously accepted approaches to reducing conflicts between orders of the Probate and Family Court and protective orders issued by other departments. For instance, the pilot program expands the concurrent jurisdiction of the Probate and Family Court, and grants it authority to permanently modify, extend, or vacate protective orders issued by other Trial Court departments as if the protective order petition had been originally filed in the Probate and Family Court.[121] The result of this provision is problematic in two ways. First, it divests the Norfolk County District Courts of finality in their protective orders where the parties have related issues pending in the Norfolk division of Probate and Family Court.[122] The pilot program permits the Probate and Family Court not just to modify custody and support provisions of protective orders for the limited purpose of eliminating conflict between departments, but also to revise, modify or create a new protection order for any reason it may find appropriate. A Norfolk Probate and Family Court judge may now override the protection and abuse prevention provisions of a District Court judge's 209A order, or make a new order denying a victim the relief she or he seeks, simply because the victim has other domestic relations issues pending in the Probate and Family court.

The pilot program authorizes the Probate and Family Court to take actions not authorized by, and in direct conflict with, the provisions of Chapter 209A. If the Probate and Family Court wishes to have the authority provided in the pilot program, it must be done through legislative amendment.

---

119. *Id.*

120. *Id.*

121. Admin. Order 09-1, *supra* note 13.

122. *Id.* The Administrative Order states that "The Probate and Family Court shall thereupon have the authority to revise or modify District Court orders . . . issued prior to such [inter-departmental] transfer or to make new orders in the transferred action *as if the action had commenced in the Probate and Family Court*." *Id.* (emphasis added).

IV. THE PURPOSE OF THE PILOT PROGRAM IS INCONSISTENT WITH THE LEGISLATIVE INTENT OF CHAPTER 209A AND COMPROMISES VICTIM SAFETY

As discussed above, the legislature's purpose in enacting Chapter 209A is clear: to protect the safety of victims of abuse with simple, immediate and accessible means of ending the abuse.[123] The Supreme Judicial Court has acknowledged that "the most basic human right, the most basic condition of civilized society . . . [is] the right to live . . . free from the fear that brute force will determine the conditions of one's daily life."[124] Like other abuse prevention statutes, Chapter 209A "effectuates the notion that the victim of domestic violence is entitled to be left alone. To be left alone is, in essence, the basic protection the law seeks to assure these victims."[125] Since enactment of Chapter 209A, strong public policies and law enforcement measures have been put in place to protect victims of abuse, reflecting heightened awareness and widespread attention to domestic violence and its consequences for society.[126]

Massachusetts's statutory scheme reflects the legislature's deep concern about domestic violence.[127] While physical violence is the most easily recognized type of domestic violence, other forms of abusive conduct also are

123. *See* Triantafillou, *supra* note 22, at 22.

124. Custody of Vaughn, 664 N.E.2d 434, 437 (Mass. 1996) (characterizing abuse in terms of human rights).

125. State v. Hoffman, 695 A.2d 236, 246 (N.J. 1997) (describing purposes of New Jersey's abuse prevention statute).

126. *See* Kindregan, *supra* note 17 (highlighting stronger domestic abuse prevention and protection policies in recent years).

127. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 28 (2008) (restricting visitation and child custody for parent who murdered other parent); MASS. GEN. LAWS ch. 208, § 31 (2008) (restricting abuser's access to child's school or medical records and requiring findings if shared custody is ordered when a 209A order is in effect); MASS. GEN. LAWS ch. 208, § 34B (2008) (allowing court to order abuser to vacate marital home); MASS. GEN. LAWS ch. 208, § 34C (2008) (imposing criminal sanctions for violations of orders to vacate); MASS. GEN. LAWS ch. 208, § 34D (2008) (requiring search of criminal registry record keeping system); MASS. GEN. LAWS ch. 209, § 32 (2008) (providing for protective orders in separate support cases); MASS. GEN. LAWS ch. 209, § 37 (2008) (restricting visitation and custody if a parent murders other parent); MASS. GEN. LAWS ch. 209A, § 1 (2008) (including 1986 and 1990 amendments expanding definition of family and household members to include parent of child unrelated by blood or marriage, former household members, and dating relationships); MASS. GEN. LAWS ch. 209A, § 3 (2008) (including 1990 amendment adding "no contact" orders); MASS. GEN. LAWS ch. 209A, § 3B (2008)(added in 1994 for surrender or suspension of firearms and licenses); MASS. GEN. LAWS ch. 209A, § 5A (2008)(added in 1996 for enforcement of foreign orders); MASS. GEN. LAWS ch. 209A, § 6 (amended in 1988 and 1990 for mandatory arrest on violation of no contact, refrain from abuse, or vacate orders and amended in 1996 for mandatory arrest for violations of firearm orders); MASS. GEN. LAWS ch. 209A, § 7 (2008)(amended in 1992 to implement domestic violence registry; in 2002 to provide enhanced punishment for 209A violations in retaliation for victims seeking support or paternity orders, and in 2003 to require certified batterers' intervention for 209A order violations); MASS. GEN. LAWS ch. 209A, § 10 (2008) (added in 1993 for assessments against those referred to a batterer's program as a condition of probation); MASS. GEN. LAWS ch. 265, § 43 (2008) (punishing stalking and enhancing penalties for violation of 209A orders); and MASS. GEN. LAWS ch. 265, § 43A (2008) (creating crime of criminal harassment); An Act Relative to the Consideration of Domestic Violence in Custody and Visitation Proceedings: 1988 Mass. Acts ch. 179 (amending section 31 of chapter 208, sections 3 and 10 of chapter 209A and adding section 38 of chapter 209 and section 31A of chapter 208, containing rebuttable presumption against awarding child custody to parent committing pattern or serious incident of abuse).

prevalent in violent relationships.[128] The interpersonal dynamics of domestic violence often include psychological and verbal abuse, economic retaliation, and other disruptive conduct.[129] Chapter 209A is unique in its characteristics combining elements of domestic relations, equitable, and tort relief, as well as criminal sanctions for violations of "no abuse," "no contact" and "vacate" orders.[130] The legislature has also amended and expanded the relief available under Chapter 209A over time to better address nuances and dynamics of domestic violence that extend beyond prevention of physical characteristics.[131] The Supreme Judicial Court has noted that Chapter 209A's "primary goal [is] abuse prevention" by helping victims "in structuring some of the basic aspects of their lives such as economic support and custody . . . in accordance with their right not to be abused."[132]

The Massachusetts Access to Justice Commission addressed the complexity of administrative procedures that can result from multiple court hearings issuing 209A orders. After hearing testimony from a handful of legal advocates, the Commission recommended in a 2007 report: "the relationship between the District and Boston Municipal Courts and the Probate and Family Court in the handling of [209A] cases should be studied to see how the processes and coordination can be improved."[133] In making its findings, the commission was not recommending that jurisdiction and venue options for petitioners be contracted. The preference seems to have been simply that the courts develop better communication and better order processing systems so that multiple orders regarding the same issues (such as child custody) have a way of identifying the order in effect. There seem to be some quite simple solutions to the problem the Commission identified. For example, the Probate and Family Court order could simply state: "This order of child custody voids

128. *See, e.g.*, MASSACHUSETTS SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 87-88 (1989) (noting "abusers may use economic retaliation to force the victim to continue the relationship or to abandon legal proceedings" and use children as a "bargaining chip" to persuade victims to resume the relationship or have contact); Nancy Kelly & Lesleye Orloff, *A Look at the Violence Against Women Act and Gender-Related Political Asylum*, 1 VIOLENCE AGAINST WOMEN 380, 381-86 (1995) (highlighting immigration status used against victims of domestic violence by their abusers); Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266 (1984) (victims pressured to bargain away alimony, support and equitable division of proper in exchange for safety); Kathleen Waits, *Battered Women and Family Lawyers: The Need for an Identification Protocol*, 58 ALB. L. REV. 1027, 1028 (1995) (noting abusers interfere with victims' ability to work, ruin their credit, and force them into bankruptcy).

129. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON B.J. 23 (1989).

130. Kindregan, *supra* note 17, at § 57:8.

131. In 1990, for example, the legislature broadened the scope of "vacate" orders to require that the defendant surrender any keys to a victim's home, refrain from shutting off the victim's utilities, and refrain from interfering with the victim's mail delivery and right to possession of the residence. MASS. GEN. LAWS ch. 209A § 1 (2008) (as amended 1990).

132. Commonwealth v. Gordon, 553 N.E.2d 915, 919 (Mass. 1990).

133. MASSACHUSETTS ACCESS TO JUSTICE COMMISSION, BARRIERS TO ACCESS TO JUSTICE IN MASSACHUSETTS: A REPORT, WITH RECOMMENDATIONS, TO THE SUPREME JUDICIAL COURT 43 (June 2007), *available at* http://www.massaccesstojustice.org/reports-of-the-commission.php.

the custody order of the Dedham District Court dated 01/06/10. All other provisions of the District Court Order remain in full force and effect."

The Commission further noted, in response to testimony from one family lawyer, that the District Courts were generally reluctant to enter child support orders along with 209A orders.[134] The more appropriate solution to this concern is for District Court judges to comply with the statutory direction to entertain requests for child support. This issue may not have been addressed squarely in the Massachusetts appellate courts, but other jurisdictions have decided that the lower courts must entertain support requests when made under the statutory scheme of the civil protection order statute.[135]

The Massachusetts Access to Justice Commission's focus is, as its name implies, on the citizen's ability to obtain judicial determinations more easily. Rather than limiting access to local courts, the avenue for this goal should be developing procedures that will make the administrative processes function more easily without impeding access, particularly for pro se litigants.

In response to the Commission's report, the Chief Justices of the several Trial Court departments responded nearly unanimously that the concerns raised in the 2007 report were being addressed through draft legislation, to be crafted by the Trial Court's interdepartmental working group on domestic abuse, designed to "eliminate the . . . complexity when . . . [a 209A] order of one court is amended by another court" and through "[a] process and form to document action by Probate and Family Court judges when modifying District and Boston Municipal Court orders and returning them to the issuing court."[136] There was no indication that a pilot program of this nature was contemplated by either the Commission or the interdepartmental working group. It also appears that prior to the implementation of the pilot program, the Trial Court's interdepartmental group sought no comments from domestic abuse advocacy groups in its attempts to address the concerns raised by the Commission.[137]

---

134. *Id.* at 42.

135. *See, e.g.*, Hayes v. Gibbs, No. C-070219, 2008 Ohio App. LEXIS 972 (Ohio Ct. App. Mar. 14, 2008).

136. Letter from Lynda M. Connolly, Chief Justice of the District Court Department, Trial Court of the Commonwealth of Massachusetts, to Hon. Herbert P. Wilkins, Chair of the Massachusetts Access to Justice Commission (Jan. 17, 2007), *available at* http://www.massaccesstojustice.org/third-annual-report.php; *see also* Letter from Paula M. Carey, Chief Justice of the Probate and Family Court Department, Trial Court of the Commonwealth of Massachusetts, to Hon. Herbert P. Wilkins, Chair of the Massachusetts Access to Justice Commission (Nov. 20, 2007), *available at* http://www.massaccesstojustice.org/third-annual-report.php; Letter from Charles R. Johnson, Chief Justice of the Boston Municipal Court Department, Trial Court of the Commonwealth of Massachusetts, to Hon. Herbert P. Wilkins, Chair of the Massachusetts Access to Justice Commission (Jan. 15, 2008), *available at* http://www.massaccesstojustice.org/third-annual-report.php; Letter from Barbara J. Rouse, Chief Justice of the Superior Court Department, Trial Court of the Commonwealth of Massachusetts, to Hon. Herbert P. Wilkins, Chair Massachusetts Access to Justice Commission (Jan. 10, 2008), *available at* http://www.massaccesstojustice.org/third-annual-report.php.

137. The Access to Justice Commission noted this in its subsequent report, stating "[t]he Commission regrets that the domestic abuse interdepartmental working group is not planning to take comments from groups interested in the Trial Court's handling of interrelated problems in [209A] matters." MASSACHUSETTS ACCESS TO JUSTICE COMMISSION, THIRD ANNUAL REPORT 12-13 (June 2008).

As the following discussion will illuminate, the pilot program is an inappropriate means of achieving the goals of the Trial Court to reduce problems with modifying protective orders, which is essentially an administrative and clerical problem. The first stated purpose of the pilot program is "to minimize the burden otherwise imposed on parties to related cases simultaneously pending in different court departments."[138] More specifically, the goal is to "avoid the need for a petitioner who has an abuse prevention proceeding pending in the District Court to have to complete a new complaint and affidavit and have a new hearing on the abuse prevention proceedings if he or she has related matters in the Probate and Family Court" and to "alleviate any possible confusion to the parties about where any subsequent hearings will take place and . . . minimize the number of times parties need to travel to different courts."[139]

This stated reason is insufficient justification for such a change in Chapter 209A procedure, and fails to properly uphold the primary goal of the statute, which is victim safety. The petitioner who files in District Court likely never anticipated the filing of a new complaint and affidavit, so alleviation of filing a new petition is a gift undesired. Petitioners are rarely confused as to where to appear for court. Most litigants understand that the appropriate court in which to appear for subsequent hearings is the court in which the petition was filed. And as addressed in more detail below, traveling to a different court can be a burden, not a benefit. If a victim files a 209A petition in a District Court just down the road from home, or the residence to which she has fled the abuse, traveling to a distant county seat can be more than an inconvenience; it can be a hardship.

The second stated purpose of the pilot program is "to improve the efficiency of the handling and processing" of Chapter 209A cases in order to minimize potential delay in "entering information into the Statewide Registry of Civil Restraining Orders" and to enhance the enforcement and "seamless" modification of existing orders.[140] Entry of information into the Statewide Registry is a clerical function. Administrative efficiency is an inadequate justification for non-compliance with the clear intent of the legislature to preserve the safety of domestic violence victims.

The Trial Court's claim that the pilot program promotes victim safety is misguided and a pretext for replacing legislative provisions that it finds undesirable. The pilot program addresses problems already remedied by the legislature and acts clearly outside of its statutory role. Chapter 209A and the Judicial Guidelines already contain provisions for reducing the risk of inconsistent orders by requiring judges to inquire of the petitioner whether or not there are any existing court orders involving the parties. The Judicial

138. Admin. Order 09-1, *supra* note 13.

139. *Id.*

140. *Id.*

Guidelines further provide a procedure for resolution of inconsistent orders between court departments.[141] Under Chapter 209A, as elaborated in the Guidelines, it is not the role of the Probate and Family Court judge to determine which court should hear a petitioner's case for a civil protection order. The legislature already provided for resolution of these issues when it enacted the civil protection order statute and granted the Probate and Family Court the final authority on custody, visitation and support.

The following sections discuss the ways in which the pilot program compromises victim safety. First, the pilot program removes control from victim-petitioners when there are related domestic relations matters pending, which is likely to have a disempowering effect, placing victims at the risk of being discouraged from pursuing civil protection. Furthermore, interdepartmental transfer can place additional burdens on petitioners by requiring them to travel to potentially distant courts. Finally, there are many legitimate reasons why victim-petitioners choose to file in a particular court department, and it does not necessarily follow that the Family and Probate Court is better suited to hear civil protection orders involving child custody and support matters.

A. Interdepartmental Transfer Removes Control from the Victim Petitioner and Increases Safety Risks

The pilot program's assumption that allowing transfers of cases will alleviate any burden on the parties having two cases simultaneously pending in different court departments is faulty because it ignores the real risk that the petitioner will be disempowered and discouraged from pursuing a protective order altogether by being forced into a forum not of her choice. The Trial Court's own Guidelines for Judicial Practice recognize this risk, stating that "referring a plaintiff to another court may discourage the person from seeking relief to which he or she is entitled under the law, and may expose the person to additional danger."[142]

Given that a victim of domestic violence is at heightened risk of homicide when attempting to leave the abusive relationship,[143] discouraging victims from seeking legal protection during this crucial time-period seriously threatens the efficacy of 209A remedies. Although it may seem counterintuitive to the general population, separation does not change the behavioral characteristics of the batterer, and can often place the victim in a more dangerous position.[144]

---

141. *See supra* section II.C.

142. GUIDELINES FOR JUDICIAL PRACTICE, *supra* note 3, at 2:07 (commentary). In the Guidelines, the word "plaintiff" and "petitioner" are used interchangeably. *Id.*

143. PAULINE QUIRION, REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL § 25.3.1 (2008).

144. *Id.*

Studies have shown that abused women face a very high risk of homicide from their estranged partners after separation[145] and during protracted divorce or child custody proceedings.[146]

The nature of intimate partner violence is coercive control, and victims have had control over their lives removed or severely restricted.[147] Batterers often employ a myriad of techniques aimed at controlling their partners, including physical force, fear based on threats of physical force, financial dependency, threatening to take custody of children, isolation from family and friends, and emotional manipulation.[148] The common denominator of battering is the tendency to control, intimidate and inject themselves into their former partners' lives even after a relationship has ended.[149] Therefore, batterers often use perpetual litigation as an additional form of ongoing control and harassment for the victim, a tool for them to continue abusive behaviors after separation.[150] Extremely litigious behavior is considered a classic form of abuse typical of batterers, especially when child custody proceedings are involved.[151]

The pilot program provides abusers with additional tools for prolonging protection order litigation. Delay can be a powerful tool when employed by the abuser. Batterers often use the court system to engage in delay tactics in order to increase costs, wear down their partners' resolve for leaving, and remain in positions of emotional and financial power.[152] Abusers often fail to respond in a timely manner or use continuances to further harass victims and disrupt their lives.[153] Financial control is a frequent characteristic of abuse during the relationship and batterers are known to protract litigation to exploit their victims' financial vulnerability.[154] Batterers with more access to money can exhaust their former partners' financial resources.[155] They use delays in judicial proceedings to purposefully disrupt victims' lives.[156]

---

145. Peter G. Jaffe, Claire V. Crooks & Frances Q.F. Won, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interests*, 6 J. CENTER FOR FAMS., CHILD. & CTS. 81, 82 (2005).

146. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 290 (1995).

147. *See generally* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605 (2000).

148. Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 163-65 (2003).

149. QUIRION, *supra* note 143.

150. Jaffe, Crooks, and Won, *supra* note 145, at 82-83.

151. QUIRION, *supra* note 143.

152. *Id.*

153. Kara Bellew, Note, *Silent Suffering: Uncovering and Understanding Domestic Violence in Affluent Communities*, 26 WOMEN'S RTS. L. REP. 39, 45 (2005).

154. *Id.*

155. *Id*.

156. *See, e.g.*, Schuyler v. Ashcroft, 680 A.2d 765 (N.J. Super. Ct. App. Div. 1996) (involving abusive partner who manipulated Florida and New Jersey judicial systems in effort to maintain control over former partner and children both during and following contested divorce proceedings).

The pilot program, by causing the delay that accompanies transfer, not only disempowers the victim, but also may unwittingly contribute to the victim's abuse. The pilot program, unlike Chapter 209A, was designed without victim empowerment as a primary goal. Often, filing for a protection order petition is an act of great courage on the part of the petitioner, and represents a significant step toward leaving the abusive relationship. The fact that a Probate and Family Court judge can effectively overrule a petitioner's reasons for filing in the District Court by demanding the transfer of a case can defeat the petitioner's resolve and signal to the petitioner that, once again, she has no control over her destiny.[157] In fact, this type of intervention from the courts can defeat a victim's recovery efforts altogether.[158]

The pilot program permits *the named abuser* to request an interdepartmental transfer of a petition filed against him, which the Probate and Family Court judge may grant above the petitioner's objections. The pilot program then requires the petitioner to participate in an additional hearing at which she must face her abuser in court. Given that there are only ten days between the initial hearing and the full hearing, delay will inevitably follow. When an abuser files for divorce in retaliation, or follows through on threats to take custody,[159] and then successfully transfers the hearing for the protective order, he obtains a greater opportunity to have continued contact with the victim to wear down her resolve. Under such circumstances, the pilot program can empower the abusive parent. Furthermore, the Probate and Family Court can become the unwitting facilitator of domestic violence by aiding the batterer's continued attempts to control the victim. Both outcomes dangerously disempower the victim, and inevitably delay (or defeat altogether) efforts to end the abuse.

The domestic violence movement focuses on client empowerment as a recovery and prevention tool;[160] to that end, the interdepartmental transfer policy is counter-productive and potentially dangerous. On the other hand,

---

157. The empowerment model, widely adopted by domestic violence advocates, suggests that such intervention can defeat victim recovery efforts. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY (1997). Herman states:

> The first principle of recovery is the empowerment of the survivor. She must be the author and arbiter of her own recovery. Others may offer advice, support, assistance, affection and care, but not cure . . . . No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.

Id. at 133.

158. *Id.*

159. Abusers frequently threaten to take custody of children as a tactic of coercive control. *See* Meier, *supra* note 19, at 687.

160. *See* Han, *supra* note 148, at 163. In response to the challenges battered women face, advocates have developed the "empowerment model" of working with domestic violence victims, which is centered on the victim as the decision-maker and allows her to decide what to do with her situation. This model is effective because it recognizes that victims are in the best situation to understand their own level of risk, and simultaneously gives them a sense of autonomy. *Id.*

Chapter 209A was designed to reduce the burden on victims by empowering them with the right to choose the least burdensome forum.[161] Chapter 209A allows a victim to apply for a civil protection order in one court whether or not she has other proceedings pending in the Probate and Family Court, trusting the victim to decide what forum is least burdensome. This scheme is consistent with the true purpose of protection orders: to provide immediate, accessible relief from abuse. There is little to no safety purpose served when the Probate and Family Court overrides the victim's determination of which forum is least burdensome, even where there might be overriding orders issued in future proceedings.

B. Interdepartmental Transfer Adversely Impacts Victims by Requiring Travel to Distant Courts

The pilot program presents interdepartmental transfer of abuse prevention proceedings from District Court to Probate and Family Court as a great convenience.[162] However, traveling to a different court can be a burden, and being required to make three appearances where only two are necessary is no benefit at all. In Massachusetts, District Courts are often more accessible than Probate and Family Courts, particularly in suburban and rural areas, providing a more convenient forum for a proceeding designed to be quick and accessible.[163]

The pilot program ignores the fact that Chapter 209A deliberately gave jurisdiction to several divisions of the Trial Court to create a convenient location for abuse victims to file for needed relief. Norfolk County Probate and Family Court, which is located in a remote and inconvenient location in Canton, is a great example of why District Courts can more easily provide relief to those in need of protection. The Probate and Family Court is most easily accessed by motor vehicle. While arguably one could take a commuter train to Canton from a limited number of locations, the subsequent walk to the courthouse would be significant.[164] Taxi transportation is available, but at what can be a prohibitive cost, given that victims of domestic violence often lack access to money and other family resources, such as cars.[165] In fact, they might require a 209A order to gain access to a vehicle in order to transport them to the Probate and Family Court for subsequent divorce or child custody proceedings.[166] Poor victims may come from households that do not have access to sufficient funds or to vehicles. Those who are disabled or who lack

161. Triantafillou, *supra* note 22, at 50.

162. Admin. Order 09-1, *supra* note 13.

163. *See* THE LEGAL PAGES: 2010 MASSACHUSETTS EDITION 248-55 (2009).

164. For example, the Canton Junction train station is 2.5 miles from the Probate and Family Court.

165. *See* Bellew, *supra* note 153, at 45.

166. *See* MASS. GEN. LAWS ch. 209A, § 3 (2008) (permitting court to guarantee petitioner use of vehicle as part of protection order relief).

transportation might be overwhelmed by having to make additional trips to the Probate and Family Court beyond what they may already have to endure in other proceedings.

District Courts, on the other hand, are scattered throughout the county and are often on public transportation lines.[167] Dedham District Court provides an example of a court convenient to public transportation.[168] Other outlying courts, such as Wrentham, may be within walking distance to residents in need of protection. Traveling additional miles to the remote Norfolk Probate and Family Court adds another layer of hardship for petitioners. The legislature wisely created multiple convenient forums for hearing 209A petitions, the purpose being to increase accessibility.

None of this is to discount the many sound reasons why the victim or counsel may choose to file for protection in Probate and Family Court. For instance, a prior experience in the Probate and Family Court may have been satisfactory or the petitioner may anticipate a complicated custody issue that she feels will be best handled by the Probate and Family Court. Or, more simply, the petitioner might find the Probate and Family Court the most accessible depending upon residential location. Once a victim makes the choice, however, it is appropriate for that choice to be supported when it is in compliance with statutory authority. Transferring cases to the Probate and Family Court after a petitioner decides to file elsewhere defeats the purpose of the statutory jurisdiction and venue provisions of Chapter 209A.

C. Probate and Family Courts Are Not Necessarily Better Forums for Abuse Prevention Petitions

While Chapter 209A acknowledges that the Probate and Family Court has ultimate authority over domestic relations issues, such as child custody, that can be addressed in civil protection orders,[169] there is no presumption that the Probate and Family Court is therefore better suited to make findings on child custody and support issues involving violence. As discussed below, the Probate and Family Court can be an inappropriate forum for civil protection order petitions where there may also be pending domestic relations matters. Furthermore, violence is a topic with which District Courts are well versed, and therefore these courts may be preferable forums. The following discussion of the differences between the Probate and Family Courts and the District courts highlights the importance of preserving victim-petitioner choice of forum in

167. For instance, there are five district court divisions in Norfolk county: Brookline, Dedham, Quincy, Stoughton and Wrentham. The Massachusetts Court System: District Courthouses and Areas Served, http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/courthouses.html#norfolk (last visited Jan. 18, 2010).

168. The Dedham District Court is located less than a mile from the Washington Street and High Street train station.

169. *See* MASS. GEN. LAWS ch. 209A, § 3 (2008).

Chapter 209A proceedings.

1. Family Court Concerns

Family courts exist to resolve divorces, child custody disputes, support, adoptions, guardianships, and other domestic relations matters.[170] Although they have authority to issue civil protection orders, they are not necessarily better suited to understand violence and the impact it has on the targeted individuals, including children.[171] In Massachusetts alone, approximately fifty family court judges managed 164,525 new filings in fiscal year 2009.[172] Family court judges are often focused on making proceedings as brief as possible and on finding ways for parties to settle their differences. Although this focus is understandable, it can create undue burdens on those who have suffered abuse.[173] The Family Court's strong preference for settlement can be detrimental to a victim of violence with a legitimate legal claim stemming from abuse. This is particularly true where the adversary has achieved superior emotional, financial, and legal bargaining power through the threat of violence and coercion.[174] When settlement is the goal, the burden is on the more reasonable or less powerful party to concede; most often, the victim of abuse is the less powerful party.[175]

To that end, family courts often view the filing of a 209A petition as "interference" with the court's control over settlement and resolution of the case. Many courts are skeptical when a protection order proceeding commences around or during the pendency of a divorce or other family law matter.[176] The old stereotype is that petitioners seeking protection are often hoping for an advantage in the divorce, particularly in child custody matters.[177] Research and advocate experience does not support that perspective, but it is nonetheless pervasive.[178] The reality is that, because of safety concerns,

170. *See* MASS. GEN. LAWS ch. 215, § 3 (2007).

171. While Probate and Family Courts have exclusive jurisdiction over domestic relations matters, they do not hear misdemeanor domestic violence cases. MASS. GEN. LAWS ch. 265, § 13M (2008).

172. The Massachusetts Trial Court, Probate and Family Court Department: Total Annual Case Filings by Division: Fiscal Year 2009, http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/summarystats2009.pdf (last visited Jan. 22, 2010).

173. *See* CARRIE CUTHBERT ET AL., BATTERED MOTHERS SPEAK OUT: A HUMAN RIGHTS REPORT ON DOMESTIC VIOLENCE AND CHILD CUSTODY IN THE MASSACHUSETTS FAMILY COURTS (Wellesley Centers for Women ed. 2002).

174. *See generally* Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992) (examining mandatory mediation in divorces involving domestic violence and suggesting reform).

175. *Id.* at 281.

176. *See* Meier, *supra* note 19, at 686 (noting that courts view claimants of domestic violence as self-interested and not credible).

177. LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 115 (2002).

178. *Id.*; *see also* Kristen Lombardi, *Custodians of Abuse*, THE PHOENIX (Jan. 9, 2003), *reprinted at* http://poetsforhumanrights.ning.com/profiles/blogs/american-journalist-kristen.

domestic abuse is often not disclosed until separation occurs.[179] In the case of child abuse, children often do not disclose the abuse to the non-abusive parent until the abuser is out of the home and his access to the children is restricted.[180] The timing of the petition for protection makes sense when viewed from the victim's perspective. Since most petitioners are female, one also has to wonder if the cultural stereotype of women lying (which is not so far in the past as to not be subtly or blatantly influential in our time) unwittingly drives some of the family court suspicion of forum shopping.

Another perception of the Probate and Family Court may be that, by filing for protection orders in the District Court, petitioners are deliberately attempting to undermine the orders of the Probate and Family Court. This may be true in a minimal number of cases; however, empirical evidence does not support avoidance of existing orders as a motivating factor in most filings.[181] Perhaps a more accurate observation is that the victim's belief that the family court has not been willing to address the issues of violence drives the victim to seek a forum that will be receptive.[182] From the perspective of a petitioner, having another judge in another court department hear the abuse petition may restore the petitioner's confidence in the judicial system, no matter what the outcome of the hearing. Obtaining an independent determination may provide the support and affirmation that a victim needs in order to continue effective participation in the family court proceedings.

As stated before, docket control and case settlement is a primary concern for many family court judges. The family court judge may believe that a matter is approaching resolution, and therefore that a protective order disrupts settlement negotiations. Child custody issues, for example, often must be revisited if another court department enters a protection order, whether or not the children are named as protected parties. How and when visitation occurs might need revision in order to comply with an order of protection. The family court judge may resent having settlement discussions disrupted or derailed by entry of a protection order. The consideration of settlement and other collateral matters is precisely the sort of extraneous evidence that is not appropriately before the

179. It is well documented that separation increases the risk of more serious violence, including homicide. *See* Jaffe, Crooks and Won, *supra* note 145, at 83.

180. Also, children are often much more at risk for abuse once separation occurs. Neil Websdale et al., *Domestic Violence Fatality Reviews: From a Culture of Blame to a Culture of Safety*, 50 JUV. & FAM. CT. J. 61 (1999). The fact that children might begin disclosing abuse once the abuser has restricted access to them makes sense. Often the physical abuse of the children may not have started until the parents separated. *See* BANCROFT & SILVERMAN, *supra* note 177, at 73. Once access to the mother is restricted, the risk of harm to her children increases exponentially. *Id.*

181. In fact, at least in the context of child abuse, research shows that fabricated claims are rare. *See* Nancy Theonnes and Patricia G. Tjaden, *The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes*, 14 CHILD ABUSE & NEGLECT 151, 152-53 (1990).

182. *See* Martha Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 218 (2002) ("[W]omen are reluctant to raise patterns of domestic abuse to their lawyers, let alone the judges who pass judgment on them in regard to custody petitions.").

court on a protection order matter. To avoid the influence of these collateral matters, it makes sense for the protection order to be heard not only by a separate judge, but in a different court.[183]

Family courts may not fully appreciate the far-reaching impact of coercive control on most issues raised in a divorce proceeding. As a result, the courts may minimize the need to protect the targeted spouse or parent from further subtle control tactics employed by the abusive party.[184] Sometimes this minimization occurs at the very time when acknowledging coercion and emphasizing safety is most needed.[185] The increased risk of separation violence and the negative emotional effects of domestic violence on children are well documented.[186] Safety is too often discounted in family courts because a petitioner's raising issues of abuse is seen as tactical and not protective.[187]

Overall, frustrated family court judges may misunderstand what could be a wise safety choice as well as the petitioner's exercise of her statutory freedom to choose the 209A forum. The reality is that, knowing family courts are often frustrated by mid-case filings for protection orders, many practitioners place more value on remaining in the family court's good graces than on what might be the best safety plan for the client.[188]

2. District Court Expertise

Like the Probate and Family Court, District Court judges hear an extraordinary number of cases per year. In fiscal year 2009, approximately 177 judges managed 315,918 new filings.[189] Because District Courts do not regularly deal with domestic relations matters, District Court judges may feel inadequate in addressing issues involving children. They may believe that the Probate and Family Court has superior expertise on issues of child custody and support. It incorrectly follows, however, that the District Court does an inadequate job of determining the best interests of children, even if the orders are in effect only on a short-term basis.

On the contrary, the District Court may actually be in a far better position to

183. *See generally* Sinclair v. Sinclair, 914 N.E.2d 1084 (Ohio Ct. App. 2009).

184. Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias and the Courts*, 27 FAM. L.Q. 247, 258 (1993) (noting "judges disregard or minimize domestic violence in custody disputes and visitation due to the gender-biased belief that these are just 'family squabbles'").

185. *See* CARRIE CUTHBERT ET AL., *supra* note 173.

186. BANCROFT & SILVERMAN, *supra* note 177, at 172.

187. *Id.*

188. Tye, Kolman & O'Connell, *supra* note 83 (recommending when "there is a pending action in the Probate [and Family] Court, [a family law practitioner] should not seek an abuse prevention order in the superior or district courts because the judge in the Probate and Family Court may view this as an "end run" to avoid a probate court decision").

189. Massachusetts District Court–Filings By Court–FY 2009, http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/civilstats2009.pdf (last visited Jan. 22, 2010).

adjudicate domestic violence issues. Domestic violence proceedings can be most effective when heard by courts whose primary experience has been in the criminal arena. Research suggests that specialization in criminal courts that routinely handle misdemeanors and felonies results in courts that have a better understanding of the dynamics of domestic violence than do other courts.[190] Specialized criminal courts typically develop sentencing practices that take into account the need to hold perpetrators accountable and to keep victims safe. These courts work most effectively when they have had specialized training on domestic violence.[191] Furthermore, specialized criminal courts are more likely to follow-up with civil protection order compliance through probation mechanisms, and are more likely to be taken seriously by perpetrators, thereby reducing repeat offenses.[192]

On the other hand, courts specializing in domestic relations civil matters, such as divorce and child custody, often lack specialized understanding of violence and of how domestic violence, in particular, repeats and escalates over time.[193] What can be absent from the Probate and Family Court perspective is an understanding that the physical violence in abuse cases is likely to continue and escalate, and that the violence impacts every aspect of the family law case. Where the physical violence has not yet occurred, but other serious coercive control tactics are present, physical violence can be anticipated.[194] Because domestic violence is legally the same as any other criminally prohibited violence, criminal courts have a better appreciation of the dynamics and the need to enforce accountability. That criminal courts can be better vehicles for adjudicating protection order cases is acknowledged through the training and funding provided under the Violence Against Women Act (VAWA).[195] Indeed, it was the Dorchester division of the District Court that became a demonstration court for the Department of Justice under VAWA funding.[196] To transfer a domestic violence case to a court lacking in such expertise can minimize the need to protect the victim and hold the abuser accountable in favor of settlement of other matters pending between the parties. Where a court's primary focus is not accountability for abusive behavior, but resolution of a broader range of family issues, batterers are enabled and free to continue their

190. EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002).

191. SUSAN KEILITZ, NATIONAL CENTER FOR STATE COURTS, SPECIALIZATION OF DOMESTIC VIOLENCE CASE MANAGEMENT IN THE COURTS: A NATIONAL SURVEY (2000).

192. *See* Sack, *supra* note 190.

193. *See* Keilitz, *supra* note 191.

194. *See* Christina Nicolaidis et al., *Could We Have Known? A Qualitative Analysis of Data from Women Who Survived an Attempted Homicide by an Intimate Partner*, 18 J. GEN. INTERNAL MED. 788 (2003) (finding that a significant number of women who had survived attempted homicide from an intimate partner had no history of repeated physical abuse).

195. United States Department of Justice, Fiscal Year 1999 Annual Report, Chapter 4: Combating Family Violence, *available at* http://www.ojp.usdoj.gov/99anrpt/chap4.htm.

196. *Id.*

abusive behavior.

To the extent that a District Court judge may feel inadequate in determining family issues, there is comfort in knowing that either party may seek further remedies on support and custody issues through the Probate and Family Court. Filing for those remedies in Probate and Family Court, however, can take weeks, if not months due to scheduling delay. The fact remains that due to convenience of location, District Courts can best provide the immediate financial relief that a victim needs in order to remain out of an abusive relationship. The separation from the Probate and Family Court proceedings also can make the District Court judge less susceptible to extraneous information, such as pending divorce, and indeed the best judge of the need for protection from abuse.

D. Family Courts Sometimes Inadvertently Punish Victims for Bringing Abuse Claims

The importance of preserving choice of forum for victims of domestic violence seeking civil protection orders is highlighted by a growing body of research indicating the failures of family court systems to adequately protect victims and their children.[197] This is a nationwide phenomenon and Massachusetts is no exception.[198] Over the past decade, domestic violence victim advocates have been documenting a prevalent and disturbing pattern in family courts across the country: while understanding of some aspects of domestic abuse is increasing, and it is no longer the norm for judges to dismiss victims' claims of violence as trivial domestic disputes, there is decreasing tolerance in the treatment of domestic violence cases involving other domestic relations issues, particularly child custody.[199]

A 1989 study found that in seventy percent of child custody cases in which a mother complained of child abuse, the courts awarded unsupervised visitation or joint custody to abusers.[200] *Domestic Violence, Child Custody, and Child Protection* is a seminal article on this phenomenon. The author, Joan Meier, argues that,

> [w]hile significant progress has been achieved in many state courts concerning basic understandings of domestic violence, including the commitment of resources, creative efforts to assist victims, and a genuine culture of change,

197. *See* Meier, *supra* note 19.

198. *See* Lombardi, supra note 178.

199. Meier, *supra* note 19, at 662.

200. RUTH ABRAMS & JOHN GREANEY, SUPREME JUDICIAL COURT MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 62-63 (1989); *see also* Amy Neustein & Ann Goetting, *Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse*, 8 J. CHILD SEXUAL ABUSE 103, 105 (1999); Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGE'S J. 38, 40 (1997).

> making the dismissal of such claims no longer an acceptable norm, there has been a striking insulation of custody/visitation adjudications from this new "enlightenment."[201]

Meier documents her own experiences litigating domestic violence cases in D.C.'s Domestic Violence Courts, and reports that judges who are respectful and objective during protection order issues frequently react harshly towards victims who bring allegations of abuse and request limitations on the custody or visitation rights of the abuser. This is so even where there is a documented history of abuse.[202]

The concerns raised by Meier are not unusual. On the contrary, even in jurisdictions where courts are seemingly restrained by a statutory presumption against awarding custody to abusers, courts are resistant to find incidents of domestic violence sufficient to trigger the presumption.[203] Overburdened family court judges often adopt a cynical point of view towards allegations of domestic violence, and often assume that a parent who applies for a protection order does so in order to get a "leg up" in the custody dispute.[204] Even though there is no empirical data to support the view that women frequently fabricate allegations of abuse in order to take children away from their fathers, this view is adopted and referenced in family courts across the county.[205] While there can be no doubt that at times petitioners may inappropriately seek orders of protection, the vast majority of those who file for protection are in fear for their safety or the safety of their children.[206] Outcomes based on inadequate evidence should not be confused with ill-intentioned motivation, as both mothers and fathers often unsuccessfully file petitions seeking protection for children with sufficient facts to alarm the courts, but without sufficient facts to prove the underlying allegations.[207] Seeking to protect a child is not equivalent to seeking an advantage in pending family court litigation. Family court judges may not understand the fact that abuse often increases post-separation, particularly where the victim lacks the resources to hire expert witnesses to explain the increased risk to the children where the mother has been abused.[208] Without the scientific data before the family court, the victim's motivations may be misunderstood and her concerns about ongoing coercive control may be

201. Meier, *supra* note 19, at 667.

202. *Id.* at 671.

203. *See, e.g.*, *In re* Custody of Zia, 736 N.E.2d 449, 456 (Mass. App. Ct. 2000).

204. Meier, *supra* note 19, at 684.

205. *Id.*

206. *See id.* at 683.

207. *See* Theonnes & Tjaden, *supra* note 181, at 152-53 (finding various factors affect likelihood courts will perceive child abuse allegations as valid and finding no evidence for proposition that child abuse is more frequently falsely alleged by mothers against fathers in order to gain or maintain custody of children).

208. Rebecca Fialk and Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 BUFF. WOMEN'S L.J. 171, 204 (2004-2005).

minimized.

When a judge outside of the Probate and Family Court awards a civil protection order, that order can be difficult for a Probate and Family Court judge to ignore or minimize in a subsequent custody determination. Obtaining an order of protection from a District Court may, for example, be viewed by the Probate and Family Court as interference with the ability of the Probate and Family Court judge to determine the custody arrangement. In fashioning a custody remedy, the Probate and Family Court can be limited by the "no contact" provisions of the protection order. If a protection order issued by the District Court has prohibited contact between the abuser and the other parent, joint custody is impractical since the parties cannot communicate without the restrained party violating the terms of the order. However, had the same petition been brought in Probate and Family Court, undue pressure may have been placed on the victim to forfeit the order or modify the "no contact" provision in order to communicate with the other party regarding the children. The ability of the abusive partners to access victims through any channel of communication can increase safety risks for victims,[209] highlighting the importance of "no contact" provisions.

Given the documented hostility of family courts to claims of domestic violence in child custody disputes, petitioners may legitimately want to avoid the Probate and Family Court when seeking protection. The District Court is more likely to base its decision solely on the statutory risk of harm to the petitioner, whereas the Probate and Family Court may be influenced by matters unrelated to the risk from abuse—whether raised by the petitioner or not—particularly where there are other pending matters before the court. In some jurisdictions, consideration of collateral proceedings is impermissible where the evidence regarding other proceedings is not presented in the protection order case.[210] However, asking Probate and Family Court judges to ignore collateral divorce proceedings in which they have been intimately involved may be a near impossible task.

IV. CONCLUSION

In conclusion, there are many reasons why Chapter 209A's jurisdiction and venue provisions make sense for victim safety; they give the victim-petitioner the right to choose the most convenient, and in turn most safe, forum in which to bring a petition for civil protection. The perceptions and preferences of the various courts regarding proper jurisdiction over abuse protection proceedings are irrelevant and inappropriate. The overriding fact is

209. Klein, *supra* note 77, at 929 (noting when protection orders leave open avenues for contact, batterers more likely to violate orders).

210. *See* Sinclair v. Sinclair, 914 N.E.2d 1084 (Ohio Ct. App. 2009); *see also* Rankin v. Criswell, 277 S.W.3d 621 (Ky. App. 2008) (holding domestic violence order length cannot depend on related criminal case).

that the Massachusetts Legislature thoughtfully prioritized victim safety in crafting the jurisdictional provisions of the APA. The Legislature's decision to give multiple courts authority to hear petitions for protection from abuse was a deliberate choice to increase victim access to a historically inaccessible and ineffective judiciary. It is not within the purview of Trial Court authority to disrupt the clear intention of the statute, absent solid constitutional grounds. The broad changes in jurisdiction sought through the interdepartmental transfer provisions of the Trial Court pilot program, no matter how well-intentioned, are an inappropriate use of judicial process in an effort to void statutory provisions with which the courts disagree.