
April 2009

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Jennifer Cranstoun

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Tracey Alter

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Recommended Citation

Jennifer Cranstoun, Christopher O'Connor, and Tracey Alter, *What's An Intimate Relationship, Anyway? Expanding Access to the New York State Family Courts for Civil Orders of Protection*, 29 Pace L. Rev. 455 (2009)

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What's an Intimate Relationship, Anyway? Expanding Access to the New York State Family Courts for Civil Orders of Protection

Jennifer Cranstoun, Christopher O'Connor, &
Tracey Alter*

I. A Long and Winding Road Reaches the End—and a New Beginning

When New York Governor David A. Paterson signed a new law into effect on July 21, 2008 that substantially expanded access for domestic violence victims seeking orders of protection in family court,¹ his signature ended what had been an intense twenty-year lobbying effort.² Up until then, New York State's remarkably narrow family court access scheme had only included domestic violence victims legally related by blood, marriage, or having children in common,³ and bills to expand access, which were previously proposed and circulated in the

* Jennifer Cranstoun, Esq. of the Pace Women's Justice Center is the Senior Supervising Attorney at the Family Court Legal Program and a 1999 graduate of Pace University School of Law. Christopher O'Connor is a second-year law student at Pace University School of Law and was a Fall 2008 Extern in the Pace Family Court Legal Program. Tracey Alter, Esq. of the Pace Women's Justice Center is the Director of the Pace Family Court Legal Program and a 1991 graduate of Fordham University School of Law. The Pace Women's Justice Center, dedicated to providing legal services to victims of domestic violence, is a nonprofit organization affiliated with Pace University School of Law.

1. See Expanded Access to Family Court Act, ch. 326, 2008 N.Y. Laws 326 (codified as amended in scattered sections of N.Y. FAM. CT. ACT, N.Y. CRIM. PROC. LAW, and N.Y. JUD. LAW). See also New York State Coalition Against Domestic Violence, Policy Updates, <http://www.nyscadv.org/policyupdate08.htm> (last visited Apr. 7, 2009) (referencing the new legislation as the "Expanded Access to Family Court" Act.).

2. See Joel Stashenko, *Bill Passes to Expand Reach of Family Court's Protection Orders*, N.Y. L.J., June 26, 2008, at 1, col. 3.

3. See N.Y. FAM. CT. ACT § 812(1)(a)-(d) (McKinney 1998) (current version at N.Y. FAM. CT. ACT § 812(1)(a)-(e) (McKinney Supp. 2009)); HELENE WEINSTEIN, N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 11707, 231st Sess. (2008); GEORGE H. WINNER, N.Y. STATE S., INTRODUCER'S MEMORANDUM IN SUPPORT, S. 8665, 231st Sess. (2008).

state legislature by victims' rights activists and advocates for women's rights, consistently fell short.⁴ Formerly, the law deterred victims of domestic violence in dating and same-sex relationships, as well as others considered "unrelated" under New York State law, from seeking orders of protection against their abusers because the only recourse available to these groups was to pursue prosecution in criminal court.⁵

The New York State Legislature has been regarded as a notoriously slow-moving body in adapting with the times,⁶ but here it proved particularly glacial. Often, those in opposition to expanding access to the family court cited concerns over how a problematically broad access scheme could raise issues of judicial economy.⁷ Advocates for the new law and other analysts also believe that lingering political concern over what might be

4. See Stashenko, *supra* note 2. New York State Assemblywoman Helene Weinstein, the chairperson of the New York State Assembly's Judiciary Committee, was a regular co-sponsor of all similar past legislation and co-sponsored this successful effort with New York State Senator George H. Winner. See *id.* See also Assemb. 11707, 231st Sess. (N.Y. 2008); S. 8665, 231st Sess., 2008 N.Y. Laws 326.

5. See Stashenko, *supra* note 2. See also HELENE WEINSTEIN, N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 11707, 231st Sess. (2008); GEORGE H. WINNER, N.Y. STATE S., INTRODUCER'S MEMORANDUM IN SUPPORT, S. 8665, 231st Sess. (2008). By making Family Court accessible to these individuals, the victim's safety is promoted by the expedited manner in which a family court order of protection can be obtained, by the focus on prevention of future abuse, and by the potential two- to five-year duration of orders of protection. N.Y. FAM. CT. ACT § 842 (McKinney Supp. 2009). Additionally, victims seeking protection in family court maintain a significant degree of control in the process by being able to choose a safe time to obtain the temporary order, help determine the relief sought, and ultimately decide whether to continue with the process. N.Y. FAM. CT. ACT § 812 (McKinney Supp. 2009).

6. See JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 1 (2004), available at <https://www.policyarchive.org/bitstream/handle/10207/8774/34The%20New%20York%20State%20Legislative%20Process-%20An%20Evaluation%20and%20Blueprint%20for%20Reform.pdf?sequence=1> ("It has become something of a cliché to bemoan Albany's dysfunctional legislative process and the 'three men in a room' system of lawmaking. Virtually every major newspaper in New York State has editorialized for many years against the current system and its byproducts, including perennially late budgets, the lack of open deliberation and debate, empty seat voting, gridlock, costliness and inappropriate payments, incumbency protection, or the extent of control exercised by the two leaders.").

7. N.Y. CITY COUNCIL, OVERSIGHT: OBTAINING ORDERS OF PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE: PROBLEMS & SOLUTIONS (2004), available at <http://webdocs.nycouncil.info/attachments/63305.htm?CFID=2696206&CFTOKEN=34714253>.

perceived as an implicit legislative endorsement of same-sex marriage historically impeded the bill's passage.⁸

The question that arises then is what changed in 2008 to finally drive the bill to passage? Governor Paterson, a former state senator and lieutenant governor, has long been a staunch supporter of efforts to combat domestic violence.⁹ Moreover, Governor Paterson had the political expertise needed to persuade the conservative leadership of the State Senate to endorse the bill's passage.¹⁰ In fact, Governor Paterson told the *New York Times* just prior to the bill's passage that he "personally took up the issue" with now-retired Senate Majority Leader Joseph Bruno, a long-time power player in Albany.¹¹

Additionally, the coalition of activists and advocates that pushed for the change was larger and more organized than ever. In a letter prepared and sent to domestic violence advocates, activists, survivors, and community members throughout New York State in January 2008, the New York Statewide Coalition for Fair Access to Family Court emphasized the importance of seeking the change:

These victims [ineligible for family court access] often go without protection because, currently, the only other option is to involve law enforcement and hope that the abuser will be prosecuted and an order of protection granted by the Criminal Court. This is not an option for many victims, especially given the very real risk of increased violence from their abuser [sic] if law enforcement becomes involved.¹²

8. See, e.g., Sarah E. Warne, Note, *Rocks, Hard Places and Unconventional Domestic Violence Victims: Expanding Availability of Civil Orders of Protection in New York*, 52 N.Y.L. SCH. L. REV. 279, 300 (2008).

9. Press Release, State of N.Y., *New York State Enhances Domestic Violence Prevention Efforts* (Oct. 25, 2007), available at http://www.ny.gov/governor/press/1025072_print.html; New York State, *Learn More About Lt. Governor Paterson*, <http://www.ny.gov/ltagov/> (last visited Apr. 7, 2009).

10. Danny Hakim, *Albany to Expand Domestic Violence Law to Include Dating Relationships*, N.Y. TIMES, July 10, 2008, at B3, available at <http://www.nytimes.com/2008/07/10/nyregion/10domestic.html>.

11. *Id.*

12. Letter from the N.Y. Statewide Coal. for Fair Access to Family Court (Jan. 2008), available at <http://fairaccessnewyork.com/>. Members of the coalition's steering committee include Day One, the Empire Justice Center, the Joint Public Affairs Committee for Older Adults, the New York State Coalition Against Domestic

Stephanie Nilva, executive director of the New York City non-profit agency Day One, stated that the force in numbers of assembling such a large network had a tangible effect.¹³ Ms. Nilva relayed that another coalition member recalled being contacted by an editorial writer for the *New York Times* in early June 2008.¹⁴ The paper was preparing an editorial pressing the state legislature to pass several proposed and, in the paper's opinion, much-needed pieces of legislation.¹⁵ One of these legislative proposals was an effort to hire thirty-nine new family court judges to alleviate the excessive caseload burden.¹⁶ While offering input on that issue, the coalition member also urged the writer to discuss the coalition's cause in the article.¹⁷ On June 2, 2008, that *New York Times* editorial included the following couplet: "The Legislature should also fix a serious gap in the law: the inability of people in serious relationships with no children in common to obtain orders of protection in Family Court. Most states allow such orders, which are critical for public safety."¹⁸ In reaction to this key and timely media exposure, Ms. Nilva reflected that it "was a moment where we recognized the importance of having so many people involved in our effort."¹⁹

This article is intended as a starting point and will, it is hoped, serve as a useful guide for New York practitioners by analyzing how the new access scheme for obtaining family court orders of protection will operate. First, the article will examine the relevant statute's language and the issues that it presents. Second, it will attempt to predict what structural and political conundrums lie ahead as the state adapts to any changes and awaits the interpretive guidance of family court judges. Lastly, the article will analyze how other states have set their own

Violence, Sanctuary for Families, the New York City Gay & Lesbian Anti-Violence Project, and the Urban Justice Center. *Id.*

13. Telephone Interview with Stephanie Nilva, Esq., Executive Dir., Day One (Oct. 8, 2008) [hereinafter Nilva, Telephone Interview].

14. *Id.*

15. *Id.*

16. Editorial, *Repairing New York's Justice System*, N.Y. TIMES, June 2, 2008, at A18, available at <http://www.nytimes.com/2008/06/02/opinion/02mon2.html> [hereinafter *Repairing New York's Justice System*].

17. *Id.*

18. *Repairing New York's Justice System*, *supra* note 16.

19. Nilva, Telephone Interview, *supra* note 13.

boundaries for issuing family court orders of protection and will analyze case law from Texas, Massachusetts, and Pennsylvania, states whose access schemes closely resemble those of New York.

II. The Statutory Change Itself

The Expanded Access to Family Court Act effects a significant change to New York State's definition of "members of the same family or household" for purposes of establishing jurisdiction for orders of protection in family court.²⁰ Previously, section 812 of the Family Court Act read:

For purposes of this article, "members of the same family or household" shall mean the following: (a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another; and (d) persons who have a child in common regardless whether such persons have been married or have lived together at any time.²¹

Among the fifty states, New York's statutory definition stood as one of the narrowest in the country and was the only one that did not permit persons unrelated by law to earn an

20. Ch. 326, sec. 7, § 812(1), 2008 N.Y. Laws 326 (codified as amended at N.Y. FAM. CT. ACT § 812(1) (McKinney Supp. 2009); ch. 326, sec. 11, § 503.11, 2008 N.Y. Laws 326 (codified as amended at N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney Supp. 2009)). The enumerated family offenses over which family court and criminal court are afforded concurrent jurisdiction pursuant to N.Y. FAM. CT. ACT § 812(1) and N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney Supp. 2009) are

disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree [and] attempted assault

N.Y. FAM. CT. ACT § 812(1); N.Y. CRIM. PROC. LAW § 530.11(1).

21. N.Y. FAM. CT. ACT § 812(1)(a)-(d) (McKinney 1998) (current version at N.Y. FAM. CT. ACT § 812(1)(a)-(e) (McKinney Supp. 2009)). Consanguinity is defined as "[t]he relationship of persons of the same blood or origin." BLACK'S LAW DICTIONARY 133 (3d pocket ed. 2006). Affinity is defined as "[t]he relation that one spouse has to the blood relatives of the other spouse; relationship by marriage." *Id.* at 26.

order of protection from family or other civil courts.²² Consequently, interpretation of the old definition created a restrictive access scheme. This meant that if an unmarried woman was pregnant with her abusive male partner's child, or a teenager was being mistreated by her boyfriend, or one partner in a same-sex relationship was being battered by the other, or a step-parent or step-child lost affinity with the abusive party either through death or divorce, then no legal recourse likely existed for these victims of domestic violence to receive orders of protection from the family court.²³

One recent case, decided just weeks before Governor Pater-son signed the final version of the new law, demonstrates just how constricted efforts to seek remedies in family court can be. In *In re Miriam M. v. Warren M.*,²⁴ the petitioner successfully sought a two-year order of protection against the respondent, her brother, following a dispute in which he verbally threatened her, made "violent motions with his hands in close proximity" to her, and struck her domestic partner (referred to in the decision as "Ms. Diaz").²⁵ The court held that the brother's conduct constituted disorderly conduct and harassment in the second degree.²⁶ The family court order barred respondent from contacting Ms. Diaz and from visiting her at her job.²⁷

The First Department of the Appellate Division, however, found two errors in the lower court's decision to grant this order. First, the Appellate Division held that the family court order *could* legally bar the respondent from contacting Ms. Diaz or from visiting her at her job because "it would go toward achieving the purpose of fully protecting petitioner."²⁸ Second,

22. HELENE WEINSTEIN, N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 11707, 231st Sess. (2008); GEORGE H. WINNER, N.Y. STATE S., INTRODUCER'S MEMORANDUM IN SUPPORT, S. 8665, 231st Sess. (2008). *See also* N.Y. FAM. CT. ACT § 812(1)(a)-(d) (McKinney 1998) (current version at N.Y. FAM. CT. ACT § 812(1)(a)-(e) (McKinney Supp. 2009)).

23. *See, e.g.*, *Dulanto v. Dulanto*, 714 N.Y.S.2d 748 (App. Div. 2000) (denying family court jurisdiction to a stepmother seeking an order of protection against her stepdaughter because her divorce from stepdaughter's father "dissolved" and "terminated" any affinity, or legally recognized relationship, the two enjoyed).

24. 859 N.Y.S.2d 66 (App. Div. 2008).

25. *Id.* at 67.

26. *Id.*

27. *Id.*

28. *Id.* at 68.

and paradoxically, the court *could neither* uphold the respondent's assault of Ms. Diaz as an "aggravating circumstance," *nor* could the order prohibit the respondent from committing family offenses against Ms. Diaz because she was not eligible for such protection under section 812(1).²⁹ In essence, the court's decision in *In re Miriam M.* disturbingly seemed to brand petitioner's domestic partner as a person not entitled to full safety and protection as a resident of the home.³⁰

Presently, because of the alterations to section 812(1), the paradigm has shifted. One could argue that New York now boasts one of the nation's broadest access schemes for family court orders of protection. The Expanded Access to Family Court Act, by adding a new subsection, codified as section 812(1)(e), specifically amends the statutory definition of "members of the same family or household" to include:

[P]ersons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."³¹

Determining precisely what subsection (e) means remains to be seen. Theoretically, the wording is open-ended enough to per-

29. *Id.* See also N.Y. FAM. CT. ACT § 827(a)(vii) (McKinney 1998) ("For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.").

30. See *In re Miriam*, 859 N.Y.S.2d at 68.

31. Ch. 326, sec. 7, § 812(1), 2008 N.Y. Laws 326 (codified as amended at N.Y. FAM. CT. ACT § 812(1)(e) (McKinney Supp. 2009)).

mit those who can prove only a modicum of intimacy to obtain an order of protection from the family court.³²

An analysis of the change must then start with an overview of its most unambiguous elements:

- Lacking a legal relation by blood or marriage or not having a child in common with the respondent no longer stand as obstacles to potentially gaining access to family court.³³
- The subsection covers those who “are or have been” in a relationship, meaning that a break-up does not automatically preclude entry into family court.³⁴
- While the subsection demands an “intimate relationship,” the relationship need not be sexual in nature.³⁵
- The subsections reveal what the state holds is *not* an “intimate relationship”—a “casual acquaintance” or “ordinary fraternization” in “business or social contexts” does not count.³⁶

These elements establish parameters, but otherwise, the amended statute makes no clear offering of its intent.³⁷ The lack of statutory clarity raises several critical questions and issues. What is an “intimate relationship,” especially one with no sexual component? Do two dates and a quick dissolution of the relationship constitute intimate relations? Can pre-teens and young teenagers ably enter into “intimate relationships” that would necessitate judicial intervention, and if so, will the court need to appoint guardians? Can elderly victims who have been abused by their full-time caretakers apply for orders? While the subsection lists three guiding factors—the nature of a relationship, the frequency of contact between the members of the rela-

32. See N.Y. FAM. CT. ACT § 812(1)(e).

33. See *id.*

34. *Id.* Connecticut, in its own access scheme, qualifies those who are or who “[have] *recently* been in a dating relationship.” CONN. GEN. STAT § 46b-15(a) (2007) (emphasis added). The word “recently” subtly distinguishes Connecticut’s law from that of New York’s. See N.Y. FAM. CT. ACT § 812(1)(e).

35. N.Y. FAM. CT. ACT § 812(1)(e). On this point Governor Paterson told the *New York Times*, “They do not have to be sexual. Theoretically, it could be two people who are dating and haven’t had sex. They’ve come close, one refuses the other and then the stalking starts.” Hakim, *supra* note 10.

36. N.Y. FAM. CT. ACT § 812(1)(e).

37. See *id.*

tionship, and the duration of the relationship—how should the judge measure these factors? The wording of the new subsection underscores the notion that the ultimate determination may be left to the ideological leanings of the person occupying the bench.³⁸

Many experts believe judicial guidance at the trial and appellate levels is needed to clarify who is covered by this statutory provision.³⁹ Additionally, the state has begun to study emerging patterns and is monitoring the increase in the number of people seeking orders of protection through the family courts. Early indications show that the majority of people seeking orders based on their involvement in an “intimate relationship” are those expected to take advantage of the change (teens, same-sex intimate partners, and women who are or are not living with their boyfriends), while a minority are involved in relationships that cannot be considered “intimate.”⁴⁰ A substantial training effort will be needed to educate police, judges, and attorneys to handle the interpretive and enforcement challenges that lie ahead. In fact, the Expanded Access to Family Court Act requires the New York State Office for the Prevention of Domestic Violence (“OPDV”) to “develop curricula and make available training to” all of the various parties.⁴¹

III. Statutory Schemes from Other States

At this early stage, it is impossible to fully predict how the courts will interpret section 812(1)(e) of the Family Court Act. Until New York courts precisely define how to interpret the new

38. See N.Y. FAM. CT. ACT § 812(1)(e). Stephanie Nilva, Esq., member of the New York Statewide Coalition for Fair Access to Family Court, stated that there was a concern during negotiations over the wording of section 812(1)(e). See Nilva, Telephone Interview, *supra* note 13. Specifically, the concern was whether the wording would allow judges to make rulings adverse to the petitioner in significant numbers to limit the amendment’s intent. *Id.* This may help to explain the vague wording and limited guiding factors that the state legislature eventually adopted. *Id.*

39. See, e.g., Telephone Interview with Amy Barasch, Esq., Executive Dir. of the N.Y. State Office for the Prevention of Domestic Violence (Oct. 10, 2008) [hereinafter Barasch, Telephone Interview] (“Frankly, it’s going to be very challenging. The law has to be defined by the judges. We’ll start to get a clear definition of ‘intimate relationship’ [only when that happens].”).

40. *Id.*

41. Ch. 326, § 14, 2008 N.Y. Laws 326.

statute and these definitions become etched into common law, those courts must look to other jurisdictions for legal guidance. It is therefore instructive to survey the statutory language and evolving case law from other states to ascertain how they have attempted to define an “intimate relationship.”⁴² Overall, the individual states differ widely in their approaches.

Some states have set specific limits when defining an “intimate relationship.” For example, Louisiana, Montana, North Carolina, and South Carolina expressly limit access to orders of protection to people in heterosexual relationships.⁴³ In fact, South Carolina expressly lists “a *male and female* who are cohabiting or formerly have cohabited” as one subcategory under “household member.”⁴⁴ In contrast, Hawaii defines “family or household member” as “spouses or *reciprocal beneficiaries . . . persons* jointly residing or formerly residing in the same dwelling unit, and *persons* who have or have had a dating relationship.”⁴⁵

States also appear to struggle with how to define intimacy. For example, Delaware and Massachusetts maintain that petitioners must prove a “substantive dating relationship,” which seems slightly less vague than a “dating relationship” designation.⁴⁶ Maine includes “individuals currently or formerly involved in dating each other, whether or not the individuals are or were sexual partners,”⁴⁷ while several other states categorize dating relationships and sexual relationships separately.⁴⁸ Additionally, some states put time restrictions or *de facto* statutes of limitations on “intimate relationships.” For example, Rhode

42. Many states use the related term “dating relationship” rather than “intimate relationship.” See, e.g., DEL. CODE ANN. tit. 10, § 1041(2) (1999); MASS. GEN. LAWS. ch. 209A, § 1 (2008). The states differ as to whether the relationship must involve sexual contact or not. See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 4005(1) (1998).

43. LA. REV. STAT. ANN. § 46:2132(4) (2008); MONT. CODE ANN. § 40-15-102(2) (2008); N.C. GEN. STAT. § 50B-1(b) (2008); S.C. CODE ANN. § 20-4-20(b) (1976).

44. S.C. CODE ANN. § 20-4-20(b)(iv) (emphasis added).

45. HAW. REV. STAT. § 586-1(2) (2006) (emphasis added).

46. DEL. CODE ANN. tit. 10, § 1041(2); MASS. GEN. LAWS. ch. 209A, § 1. Specifically, the Massachusetts statute states that petitioners must prove a “substantive dating or engagement relationship.” *Id.*

47. ME. REV. STAT. ANN. tit. 19-A, § 4002(3-A).

48. See, e.g., ALASKA STAT. § 18.66.990(5) (2006); CAL. FAM. CODE § 6211 (West 2004); IND. CODE. § 34-26-5-3(a)(2)(c) (2008); VT. STAT. ANN. tit. 15, § 1101(2) (2002).

Island specifies that couples must have dated within the past six months or lived together within three years.⁴⁹ Maryland goes further than Rhode Island in setting limits by requiring cohabitants to establish that they engaged in a sexual relationship *and* lived together with the respondent for “at least 90 days” within one year of the date that she or he files for the order of protection.⁵⁰

Moreover, a number of states are very inclusive in defining who should count as a household member. For example, many states include stepparents and stepchildren, as well as foster family members, in their characterization of a household member.⁵¹ Several states, including California, Colorado, and Georgia, also include roommates or housemates in such definitions.⁵² Additionally, Illinois allows “high-risk” adults who need substantial personal assistance from caregivers to obtain orders of protection.⁵³ Finally, West Virginia extends protection to a person who “reports or witnesses the domestic violence and has been abused, threatened or harassed as a result.”⁵⁴

IV. Texas, Massachusetts and Pennsylvania—New York’s Spiritual Cousins?

Ultimately, statutes in three states appear to be excellent prisms through which to contemplate the scope of New York’s scheme—Texas, Massachusetts, and Pennsylvania.⁵⁵ In fact, except for a few minor differences, the language of the Texas statute is virtually identical to New York’s.⁵⁶ Texas’s statutory definition includes the same three factors for judges to consider in making determinations of eligibility: nature, frequency, and

49. R.I. GEN. LAWS § 8-8.1-5(b) (1997).

50. MD. CODE ANN., FAM. LAW § 4-501(d) (West 2006).

51. *See, e.g.*, DEL. CODE ANN. tit. 10, § 901(12) (1999); GA. CODE ANN. § 19-13-1 (2004); 750 ILL. COMP. STAT. 60/103(6) (1999); KY. REV. STAT. ANN. §§ 403.720(2), (3) (West 1999); MD. CODE ANN., FAM. LAW § 4-501(d).

52. CAL. FAM. CODE § 6211(b); COLO. REV. STAT. § 13-14-101(2) (2005); GA. CODE ANN. § 19-13-1.

53. 750 ILL. COMP. STAT. 60/103(6).

54. *See* W. VA. CODE § 48-27-305(3) (2004).

55. *See* MASS. GEN. LAWS, ch. 209A, § 1 (2007); 23 PA. CONS. STAT. § 6102 (2001); TEX. FAM. CODE ANN. § 71.0021(b) (Vernon 2005).

56. *Compare* TEX. FAM. CODE ANN. § 71.0021(b), *with* N.Y. FAM. CT. ACT § 812(1)(e) (McKinney Supp. 2009).

duration.⁵⁷ Massachusetts's law is similar but differs in three respects: (1) "dating relationship" is categorized as "substantive dating relationship,"⁵⁸ (2) the phrasing "are or were" is used to acknowledge consanguinity, affinity, marriage, and shared residence in both past and present times,⁵⁹ and (3) "the length of time elapsed since the termination of the relationship" is also a determining factor.⁶⁰ These differences appear to embrace a more restrictive access scheme than that applied in New York.⁶¹ Pennsylvania's definition of "family or household members" reads more simply: "[s]pouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood."⁶² Certainly the phrase "current or former sexual or intimate partners" appears to be quite inclusive,⁶³ especially in comparison to the New York, Texas, and Massachusetts statutes.⁶⁴

If the statutory language from these other states is analogous to New York's scheme, then case law from these jurisdictions may portend what lies ahead. One 2003 Texas case, *B.C. v. Rhodes*,⁶⁵ may serve as an example. In *Rhodes*, a minor male student at the Texas School for the Deaf sexually assaulted a minor female student in a school bathroom.⁶⁶ The male student, according to the Texas Court of Appeals, had been dating

57. TEX. FAM. CODE ANN. § 71.0021(b) ("For purposes of this title, "dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship."). In addition, the Texas statute states that "[a] casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a 'dating relationship' under Subsection (b)." *Id.* § 71.0021(c).

58. MASS. GEN. LAWS. ch. 209A, § 1.

59. *Id.*

60. *Id.*

61. See N.Y. FAM. CT. ACT § 812(1)(e).

62. 23 PA. CONS. STAT. § 6102 (2001).

63. *Id.*

64. Compare 23 PA. CONS. STAT. § 6102, with MASS. GEN. LAWS. ch. 209A, § 1 (2007), N.Y. FAM. CT. ACT § 812(1)(e), and TEX. FAM. CODE ANN. § 71.0021(b) (Vernon 2005).

65. 116 S.W.3d 878 (Tex. App. 2003).

66. *Id.* at 879-80.

the female student for just two weeks prior to the incident and she expressed to a counselor her fear of him due to his “tendency . . . to blow up.”⁶⁷ Later, she told several friends about the incident and eventually ended the relationship.⁶⁸ Although the school initially attempted to protect her from the male student, they were placed on the same bus just a week after the incident.⁶⁹ Subsequently, the female student’s father sought and obtained a family court order of protection on his daughter’s behalf.⁷⁰

Although counsel for the male student argued that the Texas statute allowed only adults to seek protection,⁷¹ the *Rhodes* court interpreted the statute’s language as clearly allowing an adult to seek protection on behalf of his or her child.⁷² Additionally, the court deferred to the trial court’s finding that the relationship between the two students was sufficient to satisfy the requirements for a “dating relationship” under the statute, despite the young ages of the two students and brief duration of their relationship.⁷³ Given that the statute interpreted in this case is similar to New York’s new law⁷⁴ and that the *Rhodes* court construed the definition of “dating relationship” broadly,⁷⁵ the *Rhodes* case may be instructive.

In Massachusetts, commonwealth courts also appear to have broadly interpreted that state’s statute. The Massachusetts Appeals Court illustrated this approach in *Sorgman v. Sorgman*.⁷⁶ In *Sorgman*, the court issued a civil order of protection in favor of the plaintiff, despite the fact that the defendant was her former stepfather who had divorced the plaintiff’s mother over twenty years prior to the order and had not since lived with the plaintiff.⁷⁷ The court noted that “[t]he defendant resists this result by suggesting that the statute was not meant

67. *Id.* at 880.

68. *Id.* at 880.

69. *Id.*

70. *Id.*

71. *Id.* at 882.

72. *Id.* at 883.

73. *Id.* at 884.

74. Compare N.Y. FAM. CT. ACT § 812(1)(e) (McKinney Supp. 2009), with TEX. FAM. CODE ANN. § 71.0021 (Vernon 2007).

75. See *Rhodes*, 116 S.W.3d at 884.

76. 729 N.E.2d 1141 (Mass. App. Ct. 2000).

77. *Id.* at 1142.

to protect 'ex-stepchildren' such as the plaintiff, particularly those whose 'ex' status has persisted for so many years."⁷⁸ Rejecting this argument, the court held that "[n]othing in the statute or case law supports this."⁷⁹ Although chapter 209A, section one of the Massachusetts General Laws lists four specific factors to consider in determining whether an individual belongs within the protected class of family members,⁸⁰ the *Sorgman* court chose to interpret the statute broadly.⁸¹

Pennsylvania courts have had to determine the scope of the phrase "current or former sexual or intimate partners" without the assistance of any such list from its legislature.⁸² The resulting decisions have interpreted this statutory language just as broadly as those of Texas and Massachusetts. For example, in the 1999 case of *D.H. v. B.O.*,⁸³ the petitioner and the respondent were former same-sex partners who had only been involved for "one and one-half months."⁸⁴ Although the respondent's petition was dismissed on other grounds,⁸⁵ the Superior Court of Pennsylvania held that the nature and short duration of the relationship did not preclude the respondent from seeking such an order in family court⁸⁶ and that the "evidence was sufficient to demonstrate an intimate relationship."⁸⁷

V. A Separate Challenge: Greater Number of Petitioners, Same System Capacity

The case law from Texas, Massachusetts, and Pennsylvania may help forecast how New York Family Court judges will interpret the Expanded Access to Family Court Act. There is, however, a concern that expanding access to family court may result in a substantial increase in persons filing for orders of protection. In fact, in July 2008, the Honorable Judith S. Kaye, the recently retired Chief Judge of New York, publicly ex-

78. *Id.*

79. *Id.*

80. MASS. GEN. LAWS ch. 209A, § 1 (2007).

81. *See Sorgman*, 729 N.E.2d at 1142.

82. 23 PA. CONS. STAT. § 6102 (2001).

83. 734 A.2d 409 (Pa. Super. Ct. 1999).

84. *Id.* at 410.

85. *Id.* at 412.

86. *Id.* at 410.

87. *Id.*

pressed concern that the family courts might suffer from a crisis of capacity by having to handle this expanded caseload.⁸⁸

New York State currently employs a total of 127 family court judges.⁸⁹ Judge Kaye reported that in 2007, family court judges issued approximately fifty thousand orders of protection.⁹⁰ Assuming each family court judge in New York State had a similar caseload, this would amount to 394 protection orders per judge.⁹¹ The legislature, nonetheless, denied a request to hire an additional thirty-nine judges in 2007.⁹²

To address this crisis of capacity, the Expanded Access to Family Court Act authorizes judicial hearing officers and court referees to conduct the initial *ex parte* hearings in which temporary orders of protection are granted.⁹³ The Act also requires OPDV to train these officials.⁹⁴ Despite this, Judge Kaye expressed concern that by taking these judicial hearing officers and court referees away from the judges for stretches to oversee these hearings, the judges may find themselves compromised in their ability to fully perform their own duties.⁹⁵ Hence, the “very good intention” of the new access scheme may be undermined.⁹⁶ “This legislation is wonderful,”⁹⁷ Judge Kaye told WNYC. “We just need to be sure we have the resources so we can do the job that we’ve been called upon to do. That’s what’s concerning me very, very deeply.”⁹⁸

VI. A New Beginning

Until the recent passage of New York’s Expanded Access to Family Court Act, thousands of victims were denied an effective way to protect themselves from “intimate relationship” vio-

88. Radio Interview by Brian Lehrer, Host, Nat’l Pub. Radio, with Judith S. Kaye, N.Y. State Chief Judge (July 11, 2008) [hereinafter Kaye, Radio Interview].

89. *Id.*

90. *Id.*

91. The authors derived this figure by dividing the estimated number of family court protection orders by the number of family court judges employed by the state.

92. Kaye, Radio Interview, *supra* note 88.

93. Ch. 326, § 14, 2008 N.Y. Laws 326.

94. *Id.*

95. Kaye, Radio Interview, *supra* note 88.

96. *Id.*

97. *Id.*

98. *Id.*

lence.⁹⁹ Rather than having access to the family court, where the primary goal is to protect instead of punish, such victims were left with the intimidating option of seeking protection through the police and criminal courts—where already alarming situations were at risk of being intensified.¹⁰⁰

While this new law now allows many additional victims of abuse to obtain relief in family court, it simply remains to be seen over time how it will be applied and interpreted by the courts. It is as if the state legislature has traveled a long and winding road and opened the door to a new house, but has neglected to furnish it, hang the drapes, or even put up the dry-wall. So, it appears that this shell of a house still needs its certificate of occupancy and more on-the-job contractors to ensure a seamless structure. Now it is incumbent upon the various stakeholders to supply the finishing touches to the “house” for the benefit of *all* victims of domestic violence seeking safety and protection in family court.

99. See Stashenko, *supra* note 2.

100. See N.Y. FAM. CT. ACT § 812(1)(a)-(d) (McKinney 1998) (current version at N.Y. FAM. CT. ACT § 812(1)(a)-(e) (McKinney Supp. 2009)).