DISTRICT OF COLUMBIA
COURT OF APPEALS

YARKIA TANNER, Respondent/Appellant, v. CHARLES CALDWELL, Petitioner/Appellee.	)	_____
JACQUELYNN WYNN Respondent/Appellant, v. CHARLES CALDWELL, Petitioner/Appellee.	)	_____

APPELLANTS' EMERGENCY MOTION TO MODIFY CIVIL PROTECTION ORDERS PENDING APPEAL

Pursuant to Rule 8(a)(2), Appellants Jacquelynn Wynn and Yarkia Tanner respectfully move this Court for a modification pending appeal of the Civil Protection Orders (CPOs) entered against them in the Domestic Violence Unit of the D.C. Superior Court. Those CPOs have rendered Ms. Wynn and Ms. Tanner homeless, with all of the attendant harms to their physical and psychological well being. This homelessness constitutes irreparable harm that would be ameliorated by the relief sought in this motion. Moreover, Ms. Tanner and Ms. Wynn are likely to prevail on appeal for two reasons. First, the Intrafamily Offenses Act does not apply here because the Appellee (Charles Caldwell) does not "share a mutual residence" with Ms. Tanner

and Ms. Wynn. Although they all live within the same edifice, this building is a "Two Family Rental," encompassing an upstairs main residence where Ms. Tanner and Ms. Wynn reside, and a separate downstairs English basement where Mr. Caldwell lives. Second, the CPO that renders Ms. Tanner and Ms. Wynn homeless is unnecessarily broad in scope; the Criminal Division determined that a no-contact order that allows them to stay in their home sufficiently protects Mr. Caldwell's safety and security. The public interest further favors the modification of the CPO to avoid unnecessary homelessness and to allow for the adjudication of this appeal on the merits as well as the adjudication of the currently-pending case between these same parties in the Landlord-Tenant Branch.

STATEMENT OF FACTS

Charles Caldwell owns the building at 9 T Street, NE, which, at his request, has been licensed by the District of Columbia as a "Two Family Rental." *See* Attachment A (Government Certificate for 9 T Street, NE as a "Two Family Rental"). As Mr. Caldwell testified, "it's a two-unit – the basement is separate from upstairs," and Mr. Caldwell lives in the basement. Attachment P (August 3, 2015 Transcript), at 3. The upstairs unit is the main residence, which Mr. Caldwell operates as a rooming house. *See* Attachment B (photographs of the exterior of 9 T Street, NE); Attachment M (August 17, 2015 Transcript), at 23-27 (Mr. Caldwell's testimony). From August of 2014 until the entry of the orders at issue in this appeal, Yarkia Tanner and Jacquelynn Wynn lived in the upstairs main residence, where they rented from Mr. Caldwell a room he designated as "unit (5)" and where they also had access to common areas (including bathrooms, the dining room, and the kitchen) shared with the other tenants of that main residence rooming house. *See* Attachment C (Complaint and Docket in the Landlord and Tenant Branch).

A. The Landlord-Tenant Action

In January of 2015, Mr. Caldwell began expressing his wish to end Ms. Tanner's and Ms. Wynn's tenancy in Unit 5. He first sent a letter purporting to terminate their lease, then provided a 30-day notice to correct or vacate, and finally, on April 30, 2015, filed a complaint for possession in the Landlord-Tenant Branch of the D.C. Superior Court. *See* Attachment O (August 26, 2015 Transcript), at 28-30; Attachment C. On June 1, 2015, Ms. Tanner and Ms. Wynn filed an answer and counterclaim, alleging they had overpaid rent due to substantial violations of the D.C. Housing Code, including a lack of heat, mouse infestation, roach infestation, bedbug infestation, mold, holes, and problems with door locks. On July 29, 2015, the court entered a protective order by consent, permitting Ms. Tanner and Ms. Wynn to pay their rent to the court, rather than to Mr. Caldwell, during the pendency of the case, which remains pending before the Landlord-Tenant Branch. *See* Attachment C.

B. The Criminal and Civil Protection Order Cases

Mr. Caldwell alleges that two days later, on July 31, 2015, as part of their ongoing landlord/tenant dispute, Ms. Tanner and Ms. Wynn separately threatened him. Specifically, he alleges that Ms. Tanner stated that she and her girlfriend were going to kill Mr. Caldwell and that, later, Ms. Wynn stated that she was going to finish out that threat. Attachment J (Order Denying Motion for Modification Pending Appeal in Superior Court Case Nos. 2015 CPO 3061 and 3062), at 7-8. Ms. Tanner and Ms. Wynn were arrested and charged with misdemeanor attempted threat. As a condition of their release from custody, Ms. Tanner and Ms. Wynn were initially ordered not to contact Mr. Caldwell and to stay at least 100 yards away from him, *see* Attachment D (initial conditions of release), but the trial court modified this condition to require them to stay only at least 10 feet away from Mr. Caldwell, *see* Attachment E (modified

conditions of release); Attachment F (docket entries in the criminal cases). The criminal cases are also ongoing.

At the same time, Mr. Caldwell asked the Domestic Violence Unit to issue Temporary Protection Orders (TPOs) and Civil Protection Orders (CPOs) specifically requiring Ms. Tanner and Ms. Wynn to vacate their home at Unit 5 of 9 T Street, NE – the same relief that Mr. Caldwell was simultaneously seeking from the Landlord-Tenant Branch but which that Branch had not granted. As the sole basis for jurisdiction by the Domestic Violence Unit, Mr. Caldwell asserted that he shared a mutual residence with his tenants. *See* Attachment G. The court issued the TPOs and ordered Ms. Tanner and Ms. Wynn to vacate the premises immediately, rendering them homeless.

On August 17, 2015, Ms. Tanner and Ms. Wynn filed Motions to Dismiss Mr. Caldwell's petitions for CPOs. They argued that the Domestic Violence Unit lacked authority to adjudicate these cases because they did not share a "mutual residence" with Mr. Caldwell and that this matter belonged in the Landlord-Tenant Branch rather than the Domestic Violence Unit. They also pointed out that Mr. Caldwell was abusing the CPO process in order to end-run the tenant protections provided in the Rental Housing Act, and that the Court should look with skepticism on a landlord trying to evict a tenant through the CPO process instead of by obtaining a writ of eviction in Landlord-Tenant Court. Mr. Caldwell opposed the motion on the ground that his use of some common areas in the upstairs rooming house meant that he shared a mutual residence with his tenants.

Mr. Caldwell's counsel told the court that Mr. Caldwell lived in the basement of 9 T Street, NE. Attachment M, at 23-24. Mr. Caldwell further testified that he sleeps in the basement, where he lives with his fiancée. Attachment N (August 25, 2015 Transcript), at 17-18,

106. This basement apartment unit has "a separate entrance," "one bedroom," a "living room," a "kitchen," (with four burners, a sink, and cabinets) and "a bathroom." Attachment M, at 24-27; *accord* Attachment N, at 17-21, 23, 104-105, 126. He also testified that he registered 9 T Street, NE with the District as a Two Family Rental. Attachment A; Attachment N, at 16-17.

Mr. Caldwell additionally claimed that he uses portions of the upstairs group home at various times, including the bathrooms, dining room, kitchen, and hallways. These assertions were disputed, but ultimately accepted by the trial court. *See* Attachment J, at 6. There was similarly conflicting testimony regarding the events of July 31, and the court again credited Mr. Caldwell's version. *See* Attachment J, at 10. Accordingly, the court concluded that Ms. Tanner and Ms. Wynn had committed the intrafamily offense of threats and issued a CPO requiring them to vacate their home (which, in light of the previously issued TPOs, meant continuing to stay away from their home). *See* Attachment H (CPOs). The court specifically rejected Ms. Tanner and Ms. Wynn's proposed 10-foot stay-away order that would have paralleled the orders issued in their pending misdemeanor cases.

On September 3, 2015, Ms. Tanner and Ms. Wynn filed notices of appeal from the CPOs, Attachment I, as well as motions to modify the CPOs pending appeal to conform with the orders issued by the Criminal Division. The trial court denied these motions on September 17, 2015. Attachment J. Given the irreparable harm that Ms. Tanner and Ms. Wynn suffer daily (and, more importantly, nightly) from the extant CPOs, Ms. Tanner and Ms. Wynn respectfully seek relief from this Court pending appeal.

ARGUMENT

To stay or modify an injunction pending appeal, the Court must balance the moving party's likelihood of success on the merits, whether irreparable injury will result to the moving party if relief is denied, whether opposing parties will be harmed by the requested relief, and whether the request is in the public interest. *See Salvattera v. Ramirez*, 105 A.3d 1003, 1005 & n.1 (D.C. 2014); *Akassy v. William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 310 (D.C. 2006). "A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. U.S. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). As discussed in greater detail below, all four factors weigh in favor of modifying the CPOs here pending appeal.

I. THE UNMODIFIED CPOs CAUSE IRREPARABLE HARM.

The most important inquiry in determining whether to provide relief from an injunction pending appeal is the inquiry into irreparable injury. *Akassy*, 891 A.2d at 309. The (unmodified) CPOs here unquestionably cause irreparable harm because they require Ms. Tanner and Ms. Wynn to vacate their home. "[T]he upheaval of the tenant from his home, even if he can find alternative housing, creates a cognizable irreparable injury." *Id.*; *see also Salvattera*, 105 A.3d at 1005. The harm to Ms. Tanner and Ms. Wynn is greater here than it was in *Akassy* both because they have no alternative housing (and therefore have been rendered homeless) and because they are both particularly vulnerable individuals for whom homelessness poses a greater risk of psychological, emotional, and physical harm.

Since the trial court first ordered Ms. Tanner and Ms. Wynn to vacate Unit 5 at 9 T Street, NE, they have been truly homeless. As their numerous attempts to find housing have been unsuccessful, they have slept in parks, emergency rooms, a shelter, a trailer without electricity or water, a hotel, and a family friend's apartment. *See* Attachment K (Declaration of

Yarkia Tanner); Attachment O, at 71. They have no alternatives. They shower, when they can, at a non-profit organization. Attachment K. The imminent danger of this homelessness to Ms. Tanner and Ms. Wynn's health, safety, and psychological well-being is extreme and will only increase during the pendency of their appeal as the nighttime temperatures drop. *See id.* (describing in detail how it has been dangerous, unsanitary, stressful, uncomfortable, depressing, and sad for Ms. Tanner and Ms. Wynn to be homeless).

Moreover, as explained during the CPO hearing, Ms. Tanner and Ms. Wynn are both particularly vulnerable individuals for whom homelessness – an obviously irreparable harm for anyone – presents even greater dangers. Both suffer from bipolar disorder, and Ms. Wynn also suffers from autism and has so significant disabilities that she receives SSI. Attachment K (Declaration of Jacquelynn Wynn). They will suffer greatly and irreparably from continued homelessness during the pendency of the appeal if the CPOs are not modified.

The trial court erroneously suggested that the extensive caselaw holding that eviction constitutes irreparable harm is inapposite on the basis that "this is not a landlord-tenant case." Attachment J, at 13. But *Salvattera* was a sexual assault case, not a landlord-tenant matter, and, at any rate, irreparable harm is the same, regardless of the Branch issuing the order. *See also District of Columbia v. Reid*, 104 A.3d 859, 877 (D.C. 2014) (administrative review case holding that housing otherwise homeless families in congregate, rather than apartment-style, housing causes irreparable harm). The trial court also erroneously asserted that Ms. Tanner and Ms. Wynn "failed to demonstrate irreparable injury because the court acted within the scope of the Intrafamily Offenses Act." Attachment J, at 14. This statement is wrong as matter of law, as explained in Section II, below. More importantly, the existence of irreparable harm is a question separate from the propriety of any order inflicting such harm. *Compare Salvattera*, 105 A.3d at

1013 (holding that a court order requiring the perpetrator of sexual assault to vacate his apartment caused irreparable harm and therefore would be stayed pending appeal), *with Salvattera v. Ramirez*, 111 A.3d 1032 (D.C. 2015) (ultimately upholding that same order as being within the power of the issuing court).

II. MS. TANNER AND MS. WYNN ARE LIKELY TO PREVAIL ON APPEAL.

As an initial matter, to obtain relief pending appeal, a movant need not show a "mathematical probability of success on the merits." *Akassy* 891 A.2d at 310 *(*quoting *In re Antioch Univ.*, 418 A.2d 105 110 (D.C. 1980)). Rather, the degree of probability of success that must be demonstrated varies according to the court's assessment of the other factors pertinent to the analysis. Because the harm of homelessness here is extreme and irreparable, as noted above, Ms. Tanner and Ms. Wynn need only demonstrate a "substantial case on the merits" to obtain interim relief. *See id.* For the reasons below, they not only have such a substantial case, but are, in fact, likely to prevail on appeal.

The trial court made at least two dispositive errors. First, as a matter of law, the parties in this case do not share the "mutual residence" necessary to proceed under the Intrafamily Offenses Act absent any other familial, sexual, or intimate relationship. Second, the trial court abused its discretion in requiring Ms. Tanner and Ms. Wynn to vacate when it had less drastic options that would have served the purpose of the intrafamily statute without rendering them homeless. These errors are especially clear in light of the "entire mosaic" of the parties' relationship, which reflects a landlord battling his tenants over rent and housing conditions.

A. The parties in this case do not share a "mutual residence."

Although the underlying facts are disputed, this motion raises no factual issues. The trial court "credited the testimony of Mr. Caldwell [and his witnesses] Mr. Reeder[] and Mr. Norris"

with regard to the residency issue, Exhibit J, at 6, and this motion assumes, *arguendo*, that their testimony was accurate. This Court is likely to reverse on appeal not because of any factual question but because all of the facts asserted by Mr. Caldwell fail to establish that he shared a mutual residence with Ms. Tanner or Ms. Wynn. That is a legal question which this Court will decide *de novo* on appeal. *See, e.g., A.R. v. F.C.*, 33 A.3d 403, 405 (D.C. 2011) (the existence of a relationship that makes a matter appropriate for Domestic Violence Court is a "legal question").

The Intrafamily Offenses Act provides for the entry of a CPO only when the petitioner and the respondent have a specified relationship or in cases involving sexual assault, sexual abuse, or stalking. *See* D.C. Code § 16-1001. The sole basis for application of the Intrafamily Offenses Act here is the claim that Ms. Tanner and Ms. Wynn "shared a mutual residence" with Mr. Caldwell. D.C. Code § 16-1001(7); *see* Attachment G (CPO petitions asserting that Mr. Caldwell "Now or Previously Shared the Same Residence" with Ms. Tanner and Ms. Wynn). Ms. Tanner and Ms. Wynn are likely to succeed on appeal because Mr. Caldwell is a landlord who lives in an entirely separate "English basement" apartment with its own facilities and does not therefore "share[] a mutual residence" with Ms. Tanner or Ms. Wynn.

Mr. Caldwell registered 9 T Street, NE with the District of Columbia as a "Two Family Rental." *See* Attachment A. By regulation, a Two Family Rental encompasses two separate residences: (1) an "English basement apartment, converted basement apartment, or carriage house in a single-family home," and (2) "the main residence." 14 DCMR § 201.1(b). The property at 9 T Street, NE fits this description. Mr. Caldwell lives in the English basement portion of the Two Family Rental. *See, e.g.* Attachment M, at 23-24 ("THE COURT: Basement. That's where your client lives? MR. MITCHELL [Mr. Caldwell's counsel]: That's where my

client lives"); Attachment P, at 3 ("THE COURT: And which – and you're in the basement? MR. CALDWELL: Correct."). Mr. Caldwell and his counsel both repeatedly refer to his "basement apartment," Attachment M, at 6, 27; Attachment N, at 104, 124, and his unit meets the legal definition of an apartment, *see* 14 DCMR § 199.1 (defining "apartment" as "one or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupant of the room(s)." *See* Attachment N, at 162 (Caldwell's counsel's closing argument, stating "He does not say that he does not have a basement apartment. That's, that's what we, we testified in open court that he has a space in his English-style basement that he lives."). By contrast, Ms. Tanner, Ms. Wynn, and others live in the "main residence" portion of 9 T Street, NE, which Mr. Caldwell operates as a rooming house. Like the basement apartment, the rooming house has its own separate entrance, doorbell, bedroom(s), living room, kitchen, and bathroom(s). The parties thus occupy different residences and do not share a mutual residence as a matter of law, especially where, as here, these two separate residences have nothing in common except they are separate parts of a single building that has one common roof, one common foundation, one common street address, and some common outdoor space.

Moreover, as used in both common parlance and domestic violence law, the phrase "share a mutual residence" refers to roommates, that is, individuals who occupy the same "dwelling unit," which is defined as "any room or group of rooms forming a single unit which is used for living, sleeping, and the preparation and eating of meals." D.C. Code § 47-813(d)(3). This Court's two decisions addressing what constitutes sharing a mutual residence reinforce that view. In *Shewarega v. Yegzaw,* 947 A.2d 47, 50 (D.C. 2008), the parties both resided in a rooming house, which is a single residence in which the residents have separate bedrooms but share a kitchen, living room, hallways, entrance, and bathrooms. This Court left undisturbed the

trial court's conclusion that these elements constituted a single mutual residence. *Id.* at 52. By contrast, in *Salvattera v. Ramirez,* 111 A.3d 1032, 1036 (D.C. 2015), this Court correctly noted that a sexual assault victim "never lived with [her] assailant," despite the fact that both lived in the same apartment building and used the same staircase to access their respective apartments whose entrances were within a few feet. In that case, each apartment had its own kitchen, bathroom, and living space, and neither their close proximity within the same building nor their shared entrance and internal stairwell made these two separate dwelling units a single shared mutual residence. Again, in common parlance, co-residents of a single rooming house may be characterized as roommates or housemates, while residents of separate apartments within a single building cannot. *See Robinson v. Block*, 869 F.2d 202, 209 (3d Cir. 1989) ("Indicia of not living together might include, *inter alia*, separate entrances and locks, separate finances, utility bills and telephones, and essentially separate living quarters."). It is further relevant that, under federal law, the precise facts of this case (namely, a basement apartment with a separate entrance and its own kitchen and bathroom that lacks an interior passage to the upstairs main residence of a house) constitute two separate residences. *See Cohen v. United States*, 999 F. Supp. 2d 650, 670 (S.D.N.Y. 2014) (applying 26 C.F.R. § 1.121-1(e)(2)).

The trial court based its erroneous legal conclusion that Mr. Caldwell shared a mutual residence with Ms. Tanner and Ms. Wynn, not on where any of the parties *lived* but, instead on Mr. Caldwell's allegations that he "regularly *uses* the common areas" upstairs, specifically, that "although he uses the bathroom in the basement he *sometimes* uses the upstairs bathroom," "showers in the upstairs bathroom three times or more each week," "interacts with his tenants every day in the main level of the house," "uses the dining room area to conduct business about six times a month," and "[o]n holidays and special occasions, . . . uses the kitchen on the main

level and back porch." Attachment J, at 3-5 (emphasis added); *see* Attachment N, at 107-111. Mr. Caldwell also stores items upstairs. Attachment N, at 111-112. This argument is unlikely to succeed on appeal because it is unprecedented and, because, as a matter of law and common sense, *using* a space is very different from *residing* in that space. Indeed, the regulation defining a "rooming house," specifically notes that the "occupants" (*i.e.* residents) do not have exclusive control over and/or access to common areas, and thus Mr. Caldwell's "use" of those areas – no matter how extensive – does not, as a matter of law, make him a resident of the rooming house. Such extensive use is, instead, consistent with being a mere visitor or invitee (or a trespasser), and Mr. Caldwell's friend testified that he visited the common areas in upstairs main residence just as Mr. Caldwell himself did. *See* Attachment N, at 122-133, 165-166 (Mr. Caldwell's longtime friend Ricky Norris testifying that he had used the front and back porches, and upstairs dining room, kitchen, and bathroom at 9 T Street, NE as a visitor). *See Parker v. Martin*, 905 A.2d 756, 760 n.13 (D.C. 2006) (quoting regulation distinguishing between a "resident" and a "regular visitor to the residential premises who spends a substantial portion of his time in the residential premises"); *Childs v. Purll*, 882 A.2d 227, 234 & n.11 (D.C. 2005) (same); *United States v. Gonzalez*, 436 F.2d 298, 299 (D.C. Cir. 1970) (distinguishing between a resident of an apartment and a frequent visitor); s*ee also United States v. Anderson*, 533 F.2d 1210, 1214 (D.C. Cir. 1976) (noting non-resident access to rooming house common areas); *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060-61 (D.C. 2014) (tenants have the right to allow visitors in common areas); *Brown v. United States*, 627 A.2d 499, 503-04 (D.C. 1993) (uninvited visitor on apartment stairwell landing); *Curry v. United States*, 520 A.2d 255, 265 (D.C. 1987) (individuals found in an apartment and possessing keys to the apartment, one of whom paid rent for the apartment, "were not residents" of that apartment because they appear not to have slept there).

Indeed, a close friend or personal assistant to one of the residents of the rooming house might well use all of the common areas just as Mr. Caldwell allegedly does, but that would not convert the friend or personal assistant into a resident, especially when that friend or personal assistant – like Mr. Caldwell here – had his own separate residence with its own sleeping, eating, bathing, and living spaces.

It is particularly noteworthy that Mr. Caldwell has access to the common areas of the rooming house because he is the landlord, and he would have this same right of access regardless of whether he lived in the attached English basement, a unit next door, a house down the street, or miles away. *See George Washington Univ. v. Weintraub*, 458 A.2d 43, 53 (D.C. 1983) (apartment landlord retains responsibility for and access to common areas). The holding below gives all landlords the ability to become their tenants' co-residents (and thus to obtain legal rights under the Intrafamily Offenses Act), just by exercising the rights of access that belong to all landlords. The absurd result of interpreting the Act in this manner would allow landlords to become co-residents with *all* of their tenants in all of the properties they owned throughout the District, again merely by exercising their right of access to "use" the common areas in all of those properties. That result would subvert both domestic violence law (which was never intended to cover landlord/tenant relationships at the landlord's will) and rental housing law (which was intended to broadly cover disputes between landlords and tenants, specifically with respect to attempts by landlords to evict tenants). Indeed, this case is a prime example in which a landlord, having failed obtain an eviction in Landlord-Tenant Court, turned instead to the Domestic Violence Unit to achieve that same result, despite the fact that he does not live with his tenants. The decision below, which allows a landlord to both dramatically expand the reach of

domestic violence law far beyond any possible intent and, at the same time, end-run the Rental Housing Act in this manner, is unlikely to survive on appeal.

The trial court made little effort to explain or support its ruling with respect to mutual residence. Specifically, the trial court's only written explanation – its 16-page order denying the motion for modification pending appeal – devotes only four sentences to the mutual residence issue:

> It is the opinion of this court that the respondents have failed to demonstrate they are likely to succeed on the merits. This court carefully considered all of the evidence as well as all of the factors for determining the credibility of witnesses. It credited the testimony of Mr. Caldwell, Mr. Norris, and Mr. Reeder, and found that the parties lived in a shared residence. Thus, in this court's view, the relationship between the petitioner and the respondents falls within the 'mutual residence' requirement defined by the Intrafamily Offenses Act.

Attachment J, at 11-12. As demonstrated above, however, even accepting the credibility of the listed witnesses and assuming the truth of their testimony, Mr. Caldwell failed to demonstrate a mutual residence with Ms. Tanner and Ms. Wynn as a matter of law. That evidence shows that Mr. Caldwell resided in a separate English basement apartment, and never lived with Ms. Tanner or Ms. Wynn, despite his visits upstairs.

B. The court abused its discretion in requiring Ms. Tanner and Ms. Wynn to vacate their home.

Ms. Tanner and Ms. Wynn are further likely to succeed on appeal with respect to the scope of the CPO. "[O]rdering a person to vacate his or her home . . . is a serious step, not to be lightly undertaken." *Robinson v. Robinson*, 886 A.2d 78, 86 (D.C. 2005). Although a CPO constituting a practical eviction may be appropriate in certain circumstances, the trial court must weigh the facts carefully, balancing the respondent's property rights against the need to safeguard the petitioner's security and peace of mind. *See id.*; *Salvattera*, 111 A.3d at 1037-38.

And in shaping a remedy under the statute, the court must consider the "balance of harms" that will result from an order of one kind or another. *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991); *Salvattera*, 111 A.3d at 1037. The trial court purported to balance these harms but instead appeared to simply conclude that any harm to Ms. Tanner and Ms. Wynn was irrelevant. *See* Attachment J, at 14 (asserting that overwhelming evidence of threats negates irreparable injury).

Here, the Criminal Division of the Superior Court was charged by statute with reasonably assuring Mr. Caldwell's safety. *See* D.C. Code § 23-1321(c)(1)(B). Applying this standard, the court determined that a 10-foot stay-away order that did not require Ms. Tanner and Ms. Wynn to vacate their home was sufficient to protect Mr. Caldwell. *See* Attachment E. Given this judicial determination, it was an abuse of discretion for the Domestic Violence Unit to order Ms. Tanner and Ms. Wynn to vacate their home – ostensibly for the same purpose of assuring Mr. Caldwell's safety – without adequately explaining how the Criminal Division had erred. This is particularly true because the law required the Criminal Division to consider Mr. Caldwell's safety (and the safety of the broader community) without reference to Ms. Tanner and Ms. Wynn, while the Domestic Violence Unit was required to also consider any adverse impacts of any CPO on Ms. Tanner and Ms. Wynn.

The Domestic Violence Unit gave only two reasons for its disagreement with the decision of the Criminal Division. First, the judge in the Domestic Violence Unit opined that the criminal case should have been papered as a domestic violence case. But, as noted in Section I above, that assertion is incorrect as a matter of law. Moreover, the standard for issuing conditions of release is *not* dependent upon whether a case is papered as a domestic violence case or not, so there is no basis to believe that the Criminal Division would have acted differently with respect to the conditions of release even if the case had been papered as a domestic violence case.

Second, the judge in the Domestic Violence Unit stated that only an order requiring Ms. Tanner and Ms. Wynn to vacate their home would provide Mr. Caldwell with the security that he sought in requesting the CPOs. But a stay-away order (without an order to vacate a residence) can be sufficient even where the threat is greater than that alleged here. *See Shewarega v. Yegzaw,* 947 A.2d 47, 50 (D.C. 2008) (no order to vacate shared rooming house, although respondent was found to have both threatened *and assaulted* the petitioner); *Tyree v. Evans*, 728 A.2d 101, 103 (D.C. 1999) (no order to vacate shared apartment despite a punch to the mouth that caused bleeding). It was an abuse of discretion to order Ms. Tanner and Ms. Wynn to vacate their home here, where the Criminal Division had found a 10-foot stay-away order sufficient and where there was no allegation of actual violence.

Similarly, this Court has only allowed an order requiring someone to vacate their residence based on egregious and violent behavior far beyond threats. *See Robinson*, 886 A.2d at 86, 87 (order followed years of physical and mental abuse and property damage, topped off by post-CPO efforts to harass and intimidate); *Salvattera*, 111 A.3d at 1034 (sexual assault). Here, although the trial court found that there had been threats, there was no allegation of actual violence or assault, sexual or otherwise.

Separate from this caselaw, District statutory law required the trial court here to presume that Mr. Caldwell was alleging fear and danger on his part in retaliation for Ms. Tanner and Ms. Wynn's legitimate actions against him as their landlord. Under D.C. Code § 42-3505.02, Mr. Caldwell's allegations against Ms. Tanner and Ms. Wynn, which came within six months after they exercised their legal rights as Mr. Caldwell's tenants (by, among other things, filing a counterclaim in the Landlord Tenant Branch case and agreeing to pay their rent into the court's registry), are presumptively retaliatory. *See Gomez v. Independence Mgmt. of Del., Inc.* 967

A.2d 1276, 1289 (D.C. 2009) (paying rent into court's registry triggers presumption of retaliation). That presumption applies even taking Mr. Caldwell's allegations as true and therefore assuming that he was legally entitled to seek redress for the threats. *See id.* at 1290 (section 42-3505.02 applies even to landlord actions "that would otherwise be lawful"). Moreover, section 42-3505.02 "is triggered even in the absence of direct evidence, whether from the tenant or anyone else, that the landlord in fact acted with a retaliatory motive." *Bridges v. Clark*, 59 A.3d 978, 984 (D.C. 2013). Mr. Caldwell failed to rebut this presumption with any evidence, much less the required "clear and convincing" evidence that he lacked a retaliatory motive. *Id.* at 982, 984; D.C. Code § 42-3505.02(b). Moreover, it is clear that Mr. Caldwell was not seeking CPOs due to fear – at the time he sought them, he was already protected by the initial order of the criminal court requiring Ms. Tanner and Ms. Wynn to stay a full 100 yards away from him. *See* Attachment D (initial conditions of release dated August 1, 2015); Attachment G (CPO petitions filed August 3, 2015).

Thus, both as a matter of law and fact, Mr. Caldwell's motivation for seeking the CPOs was unrelated to his safety and security and based instead on his desire to evict Ms. Tanner and Ms. Wynn. This reflects the "entire mosaic" of the relationship between the parties, which the trial court failed to analyze properly. *Cruz-Foster*, 597 A.2d at 930; *see Tyree*, 728 at 106 (in a CPO action seeking an order to vacate a home, "the court is bound to consider the 'entire mosaic.'"). This is not a situation of intimate partner or familial violence, sexual assault, or stalking. Rather, the "entire mosaic" here reveals a landlord seeking to rid himself of troublesome tenants through whatever process was available to him. At the time he sought a CPO, Mr. Caldwell's safety and security were already secured by an order of the Criminal Division. He turned to the Domestic Violence Unit, not out of fear for his safety, but in order to

obtain the eviction order that had eluded him in the proper forum – the Landlord and Tenant Branch. Indeed, Mr. Caldwell, through counsel, is currently invoking the CPO as a basis requiring Ms. Tanner and Ms. Wynn to remove their possessions from the unit, and those efforts have nothing to do with the safety and security interests that are supposed to be paramount with respect to CPOs and everything to do with the financial and business interests of Mr. Caldwell as a landlord that are supposed to be adjudicated in the Landlord-Tenant Branch.

While there may be circumstances in which a landlord is entitled to a CPO against a tenant (assuming they actually share a residence), the courts should scrutinize such allegations carefully, given the potential for abuse of the CPO process to avoid the protections of the Rental Housing Act. *See Leaverton v. Lasica,* 101 S.W.3d 908, 912 (Mo. Ct. App. 2003) (reversing the trial court's grant of a protection order requiring a tenant to vacate, noting that the stalking statue under which the trial court found authority to order the tenant to vacate was not intended to be a solution for disputes arising between landlords and tenants and, that "[t]he potential for abuse" of the statute was great, and that the harm that can result from such abuse is result is real and significant). That is particularly true, where, as here, the landlord does not seek a stay-away order, which is typically sought in the context of a CPO, but instead seeks an order effectively terminating a tenancy, which is the typical relief sought in Landlord Tenant Court.

Although the Intrafamily Offenses Act is a remedial statute and must be construed broadly, that broad construction applies "for the benefit of the class it is intended to protect." *Maldonado v. Maldonado*, 631 A.2d 40 (D.C. 1993). The statute was not intended to cover landlords seeking to evict their tenants. Instead, the District has enacted the Rental Housing Act, and the court has established the Landlord and Tenant Branch, to provide landlords an expedited

avenue for eviction while also recognizing the extreme shortage of affordable housing in the District and the need for broad tenant protections.

III. MODIFICATION PENDING APPEAL WILL NOT SUBSTANTIALLY HARM MR. CALDWELL.

As explained at the conclusion of the trial, Ms. Tanner and Ms. Wynn are willing to agree to a CPO pending appeal that requires them to stay at least ten feet away from Mr. Caldwell but also allows them to return to their home. They will have no contact with Mr. Caldwell and instead make any request for repairs through their attorney or a third party. There will be no need for the parties to interact regarding payment of rent, given that the tenants have already been ordered to pay into the court registry during the pendency of their landlord-tenant case.

While such an interim measure may not fully appease Mr. Caldwell, his claims of harm are statutorily presumed to be retaliatory rather than genuine, and the consequences to Ms. Tanner and Ms. Wynn of continued homelessness pose a significantly greater threat, especially as the weather gets colder. "Even under a remedial statute directed at domestic violence, the judge is obliged to apply established equitable principles," *Tyree*, 728 A.2d at 106, which require proper consideration of the harms to Ms. Tanner and Ms. Wynn. *Cf. Akassy*, 891 A.2d 291, 310 (D.C. 2006) (recognizing the landlord had a "valid interest" in evicting the tenant in a timely manner, but noting that "the landlord's interest in timely execution [of a writ] pales in comparison to the tenant's potential loss of his home before his rights could be adjudicated"). This is particularly true here, where the criminal court handling this matter has already concluded that an order requiring Ms. Tanner and Ms. Wynn to stay ten feet away from Mr. Caldwell is sufficient and appropriate.

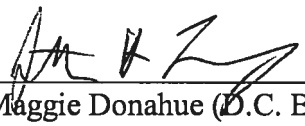
IV. THE PUBLIC INTEREST FAVORS A MODIFICATION PENDING APPEAL.

Finally, the public interest favors granting the requested relief. A modification pending appeal would protect Ms. Tanner and Ms. Wynn from remaining homeless – with whatever costs to the community that might entail – as a result of legal rulings by the trial court that this Court may subsequently reverse. It would also preserve this Court's opportunity to consider on the merits the important and novel issues presented by this case. And it would do so while providing the same level of protection to Mr. Caldwell that the criminal court deemed adequate.

CONCLUSION

For the foregoing reasons, the Court should modify the Civil Protection Orders pending appeal such that Ms. Tanner and Ms. Wynn must stay away from Mr. Caldwell and refrain from interacting with him, but need not vacate their home.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I dispatched a true and correct copy of the foregoing Motion for Modification Pending Appeal to be delivered by hand, this 16th day of September, 2015, to:

Law Office of Rodney C. Mitchell
1629 K Street, N.W., Suite 300
Washington, D.C. 20007

I further certify that I caused a true and correct copy of the foregoing Motion for Modification Pending Appeal to be delivered by email, this 16th day of September, 2015, to opposing counsel at mitchelldclaw@gmail.com.

Jonathan H. Levy