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Chair's Column

Curbing Domestic Violence: A Family Lawyer's Ethical Obligation

by Timothy F. McGoughran

This volume of *New Jersey Family Lawyer* is dedicated to a review of domestic violence laws, trends, statutes and top cases in New Jersey. The practice of family law is often emotionally charged, based on the personal impact of the process and outcome. Domestic violence abuse brings the impact to devastating levels that can have lifelong consequences, not only for the survivor, but the family's children and, indeed, also for the batterer. As family lawyers, we need to be vigilant in our sensitivity to family circumstances and the wellbeing of all family members. I believe we have an ethical obligation to do so.

A review of bills pending in the 2016-2017 legislative session identifies no less than 99 separate bills or resolutions regarding domestic violence. These proposed actions cover topics including electronic monitoring, elder abuse, mandatory training for judges and judicial personnel, expanding the domestic violence statute to encompass minors ages 16 and older, rental and lease protections for survivors of domestic violence, termination of alimony based upon conviction for a crime or offense involving domestic violence, cyber harassment, minimum terms of imprisonment for crimes involving domestic violence, mandatory batterers' intervention programs, and many other efforts to curb and discourage domestic violence.

We, as family law practitioners, know that domestic violence includes more than just the spouse as the victim. Since many of our clients have been survivors of either physical or emotional abuse at the hand of their spouse, it is right and just for us to advocate for their protection and for services available through the court. But that is not where our obligation begins and ends.

It is also our obligation to insure that we advocate for the children, who are either direct survivors of domestic violence or witnesses to this abuse. I have been practicing long enough to have the misfortune of representing children of parents I divorced many years ago. It is truly

humbling to hear from that adult, once the child, how the divorce I handled affected their lives. As I sat and listened in one particular case, I recalled the story my client had told me regarding what happened in the marriage, and the position I advocated for that client many years ago. It is not hard to imagine that what I thought was going on back then was not the reality experienced by that child, who was living in the household. Our attempt at zealous advocacy must always be tempered with the goal of contributing to the welfare of the family as a whole. When our clients are doing something destructive, we have an obligation to counsel to the contrary, and not just sit idly by or, worse, advocate a position we know to not be in the best interests of the children.

We have an obligation to counsel the batterer to get the assistance he or she needs, and by doing so we are not only helping our client, but also helping the entire family. What I have learned over the years is that we have obligations, not only to advocate for the survivors, but to properly counsel alleged batterers in these domestic violence scenarios. Many times the violence in these spousal relationships is passed down to the children, just like hair color and looks. That 'chain of violence,' either emotional or physical, becomes the norm for what the children believe a relationship should encompass. Simply passing these batterers off to 'anger management classes,' without providing our insight into the effects of domestic violence on the children, does little to break the chain of domestic violence.

There is a bill pending in the New Jersey Legislature, A-907, to establish a New Jersey task force on domestic violence and abuse. According to the bill, the task force would consist of 16 members, as follows: the commissioners of Children and Families, Human Services, and Corrections; the attorney general; the director of the Administrative Office of the Courts; the public defender (or their designees), as *ex officio* members; two members of the Senate and the General Assembly, respectively, no more than one of whom in each case shall be of the same political party; and six public members, two of whom shall be appointed by the Senate president, two of whom shall be appointed by the speaker of the General Assembly, and two of whom shall be appointed by the governor. The public members shall include experienced domestic violence and abuse professionals and interested laypersons, including a self-advocate.

This task force would submit a report to the governor and the Legislature no later than 18 months after the organization of the task force, with recommendations for strategies to create more effective and efficient policies relating to domestic violence and abuse issues.

It is clear that a piecemeal approach to addressing domestic violence from a societal level has not worked effectively. Domestic violence issues span all races, creeds, genders/gender identities, ethnicities, sexual orientations, family statuses and economic groups. This issue requires in-depth review and study. What works and what does not work? Who are we helping and who needs the help? The solution lies in a consistent and coordinated response to domestic violence statewide, by the courts, counsellors, law enforcement and the legal profession.

The societal causes and underpinnings of domestic violence are formidable. The broad and correct answer to the roots of domestic violence are simply power and control, but other, more specific, factors need to be considered. In economic downturns, incidents of domestic violence increase exponentially. Factors associated with economic downturns, such as job loss, housing foreclosures or debt, can contribute to higher stress levels at home, which can lead to increased violence. Financial difficulties and lower socio-economic status can also limit options for survivors to seek safety or escape, and may result in difficulty finding a job to become financially independent of batterers. Poverty among survivors forces premature and unwise reconciliation, motivated solely by economic forces, to the detriment of safety and wellbeing.

As many of you are aware, in June 2016 the Supreme Court issued its report from its *Ad Hoc* Committee on Domestic Violence. This committee, chaired by Assignment Judge Georgia M. Curio, provided 30 specific recommendations for bar associations, law schools, the Judiciary, the attorney general, county prosecutors and municipal court personnel, to help make the domestic violence laws more accessible and uniform throughout the state. For the courts, it focused on the need for more education and insight into the dynamic between batterer and survivor, as well as making the process more accessible to survivors. This access ranges from expansion of advocacy programs to the more mundane but critical needs of the survivor, such as transportation, child care, employment, job training and even pet care.

In the last several years, certain high-profile domestic violence incidences regarding celebrities and sports 'heroes' has drawn public attention to this issue.

In this column, I have intentionally used the word 'survivor' as compared to the term 'victim.' I think it is

this mindset that we need to have as advocates—thinking of our clients as survivors and instilling in them the concepts of survival and safety. We need to be supportive and non-judgmental of both the batterer and the survivor. Domestic violence does not need to define these individuals for life, either as survivors or batterers. Rehabilitation is the goal, in order to rebuild a healthy family dynamic that will ultimately benefit the children and break the chain.

I think you will note, in reviewing the articles included in this volume, that the Family Law Section is trying to understand this issue as we continue to monitor legislative attempts to curb domestic violence in our state. As family lawyers, we have to remember the unique role we can play in breaking the chain of domestic violence when the issue relates to our clients, either as survivors or batterers. Regardless of who we represent, when children are involved we need to protect those who cannot protect themselves.

As Liane Moriarty said in *Big Little Lies*, "The boys had always been her reason to stay, but now for the first time they were her reason to leave. She'd allowed violence to become a normal part of their life." ■

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Editor-in-Chief's Column

Domestic Violence FRO Duration: Should Final Restraining Orders Have Expiration Dates?

by Charles F. Vuotto Jr.

As we all know, the New Jersey Prevention of Domestic Violence Act (PDVA)[1] provides for the issuance of a final restraining order (FRO) to protect a victim of domestic violence upon the finding that one of the predicate acts occurred, and that the issuance of the FRO is necessary to protect the victim.[2] There is no automatic termination of the FRO. In order for the FRO to be vacated, it is necessary for the individual against whom it has been issued to file an application in the New Jersey Superior Court in accordance with the provisions of the N.J.S.A. 2C:25-29(d), which provides that the court may, upon good cause shown, dissolve or modify any FRO, upon application to the Superior Court, Chancery Division, Family Part, but only if the judge who dissolves or modifies the order is the same judge who entered it, or has available a complete record of the hearing or hearings on which the FRO was based.[3]

In addition to the requirements of N.J.S.A. 2C:25-29(d), the applicant must satisfy the requirements of *Carfagno v. Carfagno*.[4] In *Carfagno*, the Honorable Thomas H. Dilts, JSC (Ret) provided a non-exhaustive list of factors the court should consider when determining whether the moving party has shown 'good cause' sufficient to warrant a dismissal of the FRO.[5]

There is no question that the PDVA was intended to provide victims of domestic violence the maximum protection from abuse the law can provide.[6] When a party moves to vacate an FRO, the court is required to "carefully consider the particular facts and circumstances of the case within the context of the intent of the legislature to protect the victims."[7] Therefore, the "lynchpin in any motion addressed to the dismissal of a Final Restraining Order should be whether there have been substantial changed circumstances since its entry that constitute good cause for consideration of dismissal."[8] As such, it is axiomatic that the previous history of domestic violence between the parties is fully explored and considered, to understand the totality of the circumstances of the relationship and to fully evaluate the reasonableness of the victim's continued fear of the perpetrator.[9] This may even include exploration of incidents that were not testified to at the time of the final hearing.[10] Therefore, under New Jersey law, the protection of the victim is the primary objective, as it should be. To fulfill its obligation, the court must painfully scrutinize the record and carefully consider the factors set forth under the PDVA and *Carfagno* before removing the protections afforded by the FRO.[11] All of this obviously represents a significant hurdle for a person seeking to vacate an FRO.

Clearly, the issue of domestic violence is a very serious concern. It cannot be taken lightly. The question becomes, however, in the face of such a daunting hurdle, is an indefinite FRO against an individual for what may be one or limited acts reasonable?

From 2011 to 2015, the records of the Administrative Offices of the Courts (AOC) reflect that there have been 168,439 new domestic violence complaints filed, and 30,379 FROs entered.[12] It is worth noting that most domestic violence complaints do not result in the entry of an FRO. Many are dismissed by the plaintiff or the court. About 18 percent of complaints filed result in an FRO. It is expected that with the addition of cyber harassment[13] and criminal coercion to the list of criminal offenses that may constitute domestic violence, the number of domestic violence complaints will increase as the years go on.

Notwithstanding the laudable goals of the PDVA, it must be recognized that New Jersey runs contrary to the clear majority of states with regard to the permanency of FROs.[14] As one can see from the American Bar Association compilation chart, most states provide for a restraining order to have some limited duration, which can be extended upon the application of the protected party.[15] Certainly, there are some states where the court can enter

an indefinite restraining order, but it is usually up to the judge, based upon the facts of the case. Some states have certain criteria for permanency.[16] New Jersey's PDVA does not appear to permit the trial judge to put a termination date on an FRO. Therefore, unlike in most states, unless a person against whom an FRO has been entered in New Jersey can meet the stringent requirements of the statute and *Carfagno*, he or she will always be under the threat of possible criminal conviction for violating the terms of the FRO, as well as numerous other negative ramifications, due to having an FRO entered against him or her.

The original rational for the permanent order was that long-term relationships, such as marriage and couples with children in common, lead to long-term threats on the well-being of the victim. The subsequent addition of stalking to the list of predicate offenses considers perpetrators with an irrational attraction to the victim that is not likely to change. Domestic violence victim advocates can cite cases from other states in which the expiration of an order has led to the subsequent assault on a victim. Therefore, it cannot be denied that the burden to the victim to request an extension must be weighed against the potential impact on the defendant.

There was a recent article in *The Economist*[17] indicating that lawmakers in Russia were moving to decriminalize domestic violence. The article suggests that Vladimir Putin's family values are impacting lawmakers. The article notes that the Duma (Parliament) voted in the last week of January of this year to decriminalize domestic violence against family members unless it was a repeat offense or caused serious medical damage. No one is suggesting that New Jersey take such drastic steps (or anything close to it). One could argue that such action based upon Putin's 'family values' (which one could argue are founded in paternalism and misogyny) support opposition to a change in New Jersey's approach. The decriminalization of domestic violence in Russian families could be viewed as a license to ensure the primacy of the male. However, a primary argument for not changing the durational nature of New Jersey's FROs is that such an approach would require a victim (in some cases) to be subjected to the emotional abuse of the defendant all over again.

There are various options, however, available to the Legislature regarding this issue. Yes, the most extreme would be to provide that FROs would be entered for a fixed period. If that is too extreme, however, there could be a presumption that an FRO would terminate after a certain period, unless the victim requests that it be extended. Alternatively, the duration of an FRO could be an issue for the trial court to decide at the conclusion of any domestic violence hearing where an FRO is to be entered. The Legislature could include the factors for a trial court to consider when addressing the duration of the FRO. Perhaps there are even less onerous approaches to across-the-board durational limits. Perhaps FROs based on harassment (that are the most susceptible to abuse) could be made self-expiring after 12 months. Further, perhaps the standards for dissolution of an FRO could be made less stringent, basing it more on the objective standard of risk rather than the subjective fear of the victim, and giving significant consideration to the lapse of time since the entry of the FRO and the absence of any violations at the time the dissolution of the restraining order is sought.

One way or the other, there should be some mechanism to balance the need to protect victims of domestic violence against the onerous impact against the abuser resulting from the issuance of an indefinite final restraining order. Therefore, this author suggests the issue of the permanency of final restraining orders be investigated and reconsidered. ■

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Endnotes

1. N.J.S.A. 2C:25-17 *et seq.*
2. *Silver v. Silver* 387 N.J. Super. 112 (App. Div. 2006).
3. In cases where the motion judge did not enter the final restraining order, the "complete record" requirements of the statute include, at a minimal, all pleadings and orders, the court file, and a complete transcript of the final restraining order hearing. Without the ability to review the transcript, the motion judge is unable to properly evaluate the application for dismissal. *Kanaszka v. Kunen*, 313 N.J. Super. 600, 606 (App. Div. 1998) (Emphasis added). Moreover, in light of this significant volume of cases handled by the family part judges, even if the motion was heard by [the same judge entering the FRO], it would still be challenging for the judge to make an appropriate determination without the benefit of a transcript, if a significant time has passed since the FRO hearing. *Id*. A review of the underlying transcript enables the motion judge to "fully understand the totality of the circumstances and dynamics of the relationship and the application." *Id*. at 606-607. Without same, "confusion and difficulty" can arise. *Id*. at 606.
4. 288 N.J. Super. 424 (Chancery Div. 1995).
5. Judge Dilts provided for 11 factors for an application to vacate an FRO as follows:
   (1) Whether the victim consented to lift the restraining order;
   (2) Whether the victim fears the defendants;
   (3) The nature of the relationship between the parties;
   (4) The number of times that the defendant has been convicted of contempt for violating the order;
   (5) Whether the defendant has continuing involvement with drug or alcohol abuse;
   (6) Whether the defendant has been involved in other violent acts with other persons;
   (7) Whether the defendant has engaged in counseling;
   (8) The age and health of the defendant;
   (9) Whether the victim is acting in good faith when opposing the defendant's request;
   (10) Whether another jurisdiction has entered a restraining order protecting the victim from the defendant;
   (11) Other factors deemed relevant by the court.
6. N.J.S.A. 2C:25-18.
7. *Kanaszka, Supra,* 313N.J. Super. at 605.
8. *Id*. at 609.
9. N.J.S.A. 2C:25-29a(1).
10. *Kanaszka* at 607.
11. *A.B. v. L.M.*, 289 N.J. Super. 125 (App. Div. 1996); *See Torres v. Lancellotti,* 257 N.J. Super. 126, 131 (Ch. Div. 1992) and *Carfagno v. Carfagno*, 288 N.J. Super. 424 (Ch. Div. 1995).
12. New Jersey Administrative Office of the Courts, Domestic Violence Annual Reports, 2011-2015.
13. The PDVA was amended on Dec. 5, 2016, to add cyber harassment. *See* N.J.S.A. 2C:33-41.
14. "We reject the suggestion in *M.V. v. J.R.G.* that a one-year time period be engrafted onto N.J.S.A. 2C:25-29d. Such a determination is deferred for legislative action. The linchpin in any motion addressed to dismissal of a final restraining order should be whether there have been substantial changed circumstances since its entry that constitute good cause for consideration of dismissal." *Kanaszka v. Kunen*, 313 N.J. Super. 600, 608 (App. Div. 1998).
15. *See* American Bar Association chart listing Domestic Violence Civil Orders (CPOs) by state at http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/dv_cpo_chart.authcheckdam.pdf.
16. *See* M.D. Code Ann., Fam. Law Sections 4-506 (h-1)(2009).
17. Jan. 28, 2017, issue.

Executive Editor's Column

Invisible Victims: Children Who Witness Domestic Violence

by Ronald G. Lieberman

Domestic violence victims take many forms. Researchers have determined that a wide range of developmental outcomes in children are compromised by their exposure to domestic violence, including their emotional, cognitive, and general health, creating a risk factor for developmental harm in children.[1] Exposure to domestic violence creates a negative impact on the children's behavioral functioning over and above other external factors not related to domestic violence.[2] Although exposure to domestic violence is harmful to the child, given that no population is homogeneous, it is often difficult to establish a direct cause and effect between exposure to domestic violence and negative impact on a child's development.[3] But, that difficulty in causation does not mean the harms are not real. Practitioners and judges need to be sensitive to those harms.

There are long-lasting effects on a child who witnesses domestic violence, so judges should be in tune with them in crafting relief in a final restraining order. A child exposed to violence and abuse between family members accommodates such events and forms a hyper-vigilant, insecure approach to future relationships—often marked by strong emotions—as a defensive mechanism.[4]

Domestic violence, which is acute and stressful, creates chronic adversity in a child and puts the child's successful development at risk; additionally, children exposed to violence often have difficulties similar to the victims of violence.[5] The age and sex of a child who has been exposed to domestic violence are important variables in determining just what effects the child faces.[6]

Research has also demonstrated that adults tend to vastly underestimate the extent to which their children are exposed to and affected by domestic violence.[7] Children are exposed to domestic violence and involved in it, ranging from hearing the sequence of violence and being passive observers of it to actually attempting to intervene or seek help during it.[8]

Research has revealed that the exposure to violence and its attendant problematic outcomes for children also involves other patterns of damaging relationships that exist when there is domestic violence.[9] In other words, the exposure to violence is a complex phenomenon that has to be viewed within the context of the child's home environment, (*i.e.*, family) and the child's own characteristics (age and sex). Practitioners and judges need to realize that abused spouses/partners and their children have tremendous challenges in escaping their batterers, including repeated separations, ongoing violence during visitation, and prolonged custody battles.[10]

Unfortunately, children exposed to violence have demonstrated symptoms analogous to post-traumatic stress disorder, raising the real possibility of a relationship between the trauma and negative effects on the developmental stage of the child at the time that the child is exposed to the violence.[11] Are judges and practitioners addressing these negative effects during or at the conclusion of a domestic violence trial?

It is untrue that all children will be affected the same way when they witness violence. Children who witness the violence have often been determined to be children who experienced violence.[12] So witnesses and victims of violence can be one and the same, and such facts should be presented in court.

Boys and girls exhibit different behaviors from experiencing violence. Generally, boys have appeared to be more hostile and aggressive, while girls tend to become more depressed and complain of somatic episodes.[13] Also, children in preschool exhibit more problems than other age groups if they are exposed to violence.[14]

Children appear to exhibit fewer problems the longer the time span since their last exposure to violence.[15] That passage of time would seem to be a factor in granting a final restraining order to permit the cessation of violence.

With the research clear about the effects on children who witness domestic violence, what can or should be done? When judges are informed during the hearing on the entry of a temporary restraining order and/or a final restraining order that a child witnessed domestic violence, the judges should be presented with evidence of the influences in a child's development associated with their exposure to domestic violence. Judges have latitude under the Prevention of Domestic Violence Act[16] to enter various remedies, including an assessment of risk of harm to the child or children posed by unsupervised parenting time with the defendant, before allowing parenting time.[17] There is no reason why this risk assessment could not include a psychological assessment of the child or children exposed to domestic violence.

The statute is clear that a victim can ask for an order restraining or suspending parenting time, and a hearing then needs to be held on whether parenting time will threaten the safety or well-being of the child or children.[18] Given that social science studies show that harm to the child from exposure to domestic violence takes time to materialize and be recognized,[19] a practitioner may only hypothesize about harm to the child immediately following the entry of a final restraining order. Thus, it is hoped that judges who enter a final restraining order and are informed that a child or children were exposed to such violence, would order that the children have or continue to have counseling so that any adjustment issues or effects on the child's social, emotional, behavior, cognitive, or any other general health function could be properly addressed. After all, it is the defendant who caused the violence, and it is the defendant who is responsible for the effects the exposure of the violence would have on the child.

The issues caused by a child witnessing domestic violence are many. The victim should not be left alone to address the effects of domestic violence on a child witness, the practitioner should be sensitive to this situation, and judges should be receptive to arguments for any counseling to the children, so that any effects on the developmental outcomes of a child exposed to domestic violence can be quickly and swiftly remedied and minimized.

The invisible victims of domestic violence—children witnesses of such violence—need to be seen and protected.

Endnotes

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Protection for Victims of a Sexual Offense: The Issuance of a Temporary Protective Order

by Shoshana Gross

Pursuant to the Sexual Assault Survivor Protection Act of 2015 (SASPA), victims of certain sexual offenses are eligible for relief in the form of a protective order under N.J.S.A. 2C:14-14, *et. seq.* Protective orders are very similar to domestic violence restraining orders, but with a few key differences.

Who Can Get a Temporary Protective Order (TPO)

A person can get a temporary protective order if they have been a victim of nonconsensual sexual penetration, nonconsensual sexual contact, lewdness or the attempt of any of those crimes. The victim does not need to have a particular relationship with the offender, but the offender must be at least 18 years old.

If the victim is under 18, a parent or guardian would have to apply for the temporary protective order on the victim's behalf.

SASPA took effect on May 7, 2016, and amendments were enacted on Jan. 9, 2017. In the amended act, a very significant exception was carved out. Namely, if the victim is an unemancipated minor, and the offender is a parent, guardian, or other person having care, custody, and control of the child, a temporary protective order cannot be entered under SASPA. Rather, the incident should be reported to the Division of Child Protection and Permanency for further action.

If the offender is a current or former spouse, co-parent, current or former dating partner or now or at any time a household member, the victim would be eligible for a domestic violence restraining order instead of a protective order. A victim cannot apply for both types of orders simultaneously. If a victim is eligible for a restraining order, he or she must file for that order. The court should guide a victim to make sure the proper application is made. If a mistake is made, and a judge determines the wrong application was made, the victim will have to re-file from the beginning of the process, at the domestic violence unit.

Crimes that Occurred Before SASPA Took Effect

The amended act clarified that SASPA applies to conduct that occurred before the effective date of SASPA. A victim should bear in mind, though, that the court will consider whether or not an order is necessary to protect the safety and well-being of the victim. If a significant amount of time has elapsed since the crime occurred, and there is no evidence the victim is unsafe, a judge may find the order unnecessary.

Qualifying Crimes

The crimes encompassed by SASPA are sexual assault, criminal sexual contact, and lewdness. In addition, the attempt at any of these crimes can be the basis for a temporary protective order.

Sexual assault is defined as an act of sexual penetration with another person, using physical force or coercion. Injury is not required as a result of the act. Penetration means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of a hand, finger or object into the vagina or anus, either by the actor or upon the actor's instruction.[1] Criminal sexual contact is an act of sexual contact using physical force or coercion. Again, no injury is required. Sexual contact includes an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present.[2]

Lewdness includes any flagrantly lewd and offensive act—including the exposing of genitals—which the actor knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed. This may include when a person exposes his intimate parts for the purpose of gratifying [his or someone else's] sexual desire where the actor knows or reasonably expects he is likely to be observed by a child who

is less than 13 years of age or by a person who, because of mental disease or defect, is unable to understand the sexual nature of the actor's conduct.[3]

Obtaining a Temporary Protective Order

To apply for a protective order, the victim must go to the family court between 8:30 a.m. and 3:30 p.m., Monday through Friday. Unlike domestic violence restraining orders, the police *cannot* issue temporary protective orders. If the court is closed, the victim will have to wait until it reopens to file.

The victim can go to the court in the county where the incident occurred, where the victim lives, where the offender lives, or where the victim is sheltered. A judge can grant an order without the victim being present if the judge determines that exigent circumstances exist sufficient to excuse the absence of the victim. Under those circumstances, a representative of the victim may also be able to file for the order. For instance, an attorney may file on behalf of a client who is hospitalized.

The Victim's Role in Court

The application will be made at the domestic violence unit, where a probation officer will record the details of the incident and the reason the victim feels he or she is in danger. The victim will have a chance to review the document, request any changes for accuracy and completeness, and sign. Then, a judge or hearing officer will listen to the allegations on the record, and if the judge or hearing officer decides an order is necessary to protect the safety and well-being of the victim he or she will sign it and issue the temporary protective order. The decision of a hearing officer can be appealed to a judge.

Relief Contained in a Temporary Protective Order

The protective order prohibits all contact from the offender, and bars the offender from contacting or going to the residence, school, or workplace of the victim or the victim's family. If the parties are coworkers, boss/employee, or fellow students, the offender can be prohibited from the common workplace or school. In a school setting, it is possible that rather than barring the offender from the entire campus, the order would restrain him or her from specific locations or sharing the same class as the victim.

The court is authorized to grant any relief necessary to protect the safety and well-being of the victim.

The offender must be personally served with the temporary protective order, and the court will schedule a hearing for a final protective order within 10 days. The temporary protective order will stay in effect until further order of the court.

The Attorney's Role in Filing for a TPO

It is important for the TPO to be as accurate and complete as possible. To that end, an attorney should suggest to a client that he or she write out what he or she wants to say in the TPO, as a way to remember both the details and the sequence of events of the incident(s) that occurred. This will also help the client relate his or her account of the incident in a cohesive way.

If a client feels he or she is not safe, an attorney can help brainstorm with the client to construct a safety plan. Every safety plan should be unique to the individual, but can include, for example, staying with friends or family, changing locks, improving lighting, securing doors and windows, and raising privacy and security settings on social media applications.

An attorney can also refer a client to local and national sexual assault hotlines maintained by New Jersey Coalition Against Sexual Assault (NJCASA). Every county in New Jersey has a local NJCASA office, as does the Office for Violence Prevention and Victim Assistance at Rutgers University. ■

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Endnotes

1. N.J.S.A. 2C:14-1(c).
2. N.J.S.A. 2C:14-1(d).
3. N.J.S.A. 2C:14-4(a-b).

Current Trends in Domestic Violence Laws

by Marla Marinucci and Jennifer W. Millner

The highly publicized incidents of domestic violence involving celebrities over the past few years have resulted in a drastic increase in the number of domestic violence bills introduced in the New Jersey Legislature. In the 2016-2017 legislative session alone, there were approximately 64 such bills introduced, and, thus far, only one has been signed into law by Governor Chris Christie. This article will give a brief overview of the current trends in the area of domestic violence law, and how the most recent domestic violence bills that are currently floating around the Legislature could ultimately impact the practice of law if they are signed into law.

On Dec. 5, 2016, Governor Christie signed A-1946 into law, which added cyber harassment to the list of the predicate acts that constitute domestic violence pursuant to N.J.S.A. 2C:25-19. The cyber harassment statute, found at N.J.S.A. 2C:33-4.1, which the governor signed into law on Jan. 21, 2014, provides in pertinent part:

> A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person:
> (1) threatens to inflict injury or physical harm to any person or the property of any person;
> (2) knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person; or
> (3) threatens to commit any crime against the person or the person's property.[1]

The potential impact this 19th predicate act of domestic violence will have on family law practitioners who handle these types of matters remains to be seen. However, attorneys who regularly litigate domestic violence matters know all too well that photos and posts from Facebook and other social media outlets can often 'make' or 'break' the case. It is of paramount importance to not only be familiar with the cyber harassment statute as it relates to domestic violence, but also to understand the ramifications if one's client, who has to defend against a temporary restraining order on the grounds of cyber harassment, is also charged criminally.

As indicated above, the addition of cyber harassment as a predicate act of domestic violence was the only bill, of the 64 domestic violence bills that were introduced in the 2016-2017 legislative session, to become a law. The next few bills that will be touched upon, which were introduced during the most recent legislative session, seem to be gaining momentum:

The first noteworthy bill is S-805, which revises certain laws concerning domestic violence and firearms. In a nutshell, the bill proposes to enhance protections currently afforded to victims of domestic violence by requiring attackers to surrender their firearms while domestic violence restraining orders are in effect, or when they are convicted of a domestic violence crime or offense.[2] The bill also requires firearms purchaser identification cards and permits to purchase handguns to be revoked if the holder of the card or permit is convicted of a domestic violence crime or offense.[3] The bill passed the Senate on March 14, 2016, and the Assembly on April 7, 2016. It was conditionally vetoed by Governor Christie on May 23, 2016. In his statement to the Senate, the governor wrote: "This bill contains redundant restrictions on firearms ownership while ignoring the larger problem of domestic violence, which in most cases does not involve a firearm."[4] He further stated, "I am recommending a comprehensive plan to combat domestic violence, focusing on deterring and punishing abusers and protecting victims instead of limiting just one instrument of violence (which the law already restricts)."[5] The bill was then sent back to the Senate with various proposed amendments.[6] One such amendment involved expediting firearms purchaser cards and permits to purchase a handgun for victims of domestic violence.[7]

A-1957 expands the Address Confidentiality Program[8] to include victims of stalking or sexual assault. The Address Confidentiality Program provides qualified individuals who have been victims of domestic violence and fear further violent acts from their assailants with a designated address to be used as their mailing address.[9] The bill passed the Assembly on Feb. 18, 2016, and was referred to the Senate Judiciary Committee later that month. It stalled, possibly because the Office of Legislative Services estimates the bill would require the creation of one additional full-time equivalent position to operate the program, costing the state approximately $100,000 annually.[10]

A-2061 also appears to have some support. It is important to note that the bill also comports with the governor's desire, as set forth in his previously addressed conditional veto on May 23, 2016, to deter incidents of domestic violence by increasing the criminal penalties for the aggressors.[11] Specifically, A-2016 provides that an assault that occurs during a domestic violence incident in which the defendant knowingly obstructs the victim's breathing or blood circulation by applying pressure on the throat or neck, or blocking the nose or mouth of such person, thereby causing or attempting to cause bodily injury, would constitute an aggravated assault.[12] Under current law, such an act would most likely be considered a simple assault.[13] By upgrading this type of assault to an aggravated assault, the defendant's resulting punishment would be substantially increased if convicted.[14] The bill passed the Assembly on June 27, 2016, and was referred to the Senate Judiciary Committee on June 30, 2016.

Following are a few noteworthy bills that have been introduced or re-introduced from prior legislative sessions, but have not made much progress.

A-1193/S-525 has the potential of impacting family law attorneys exponentially. The bill seeks to amend N.J.S.A. 2A:34-23 by prohibiting an award of alimony to domestic violence offenders. Further, it would allow termination of alimony based on conviction for a crime or offense involving domestic violence.[15] The bill was previously introduced during the 2014-2015 legislative session, and prior to the enactment of the revised alimony statute in Sept. 2014. The proposed bill seeks to create a paragraph (j), (which is currently in use), and add the following language:

> The court shall not award alimony to any person convicted of a crime or offense involving domestic violence as defined in section 3 of P.L.1991, c.261 (C.2C:25-19) by the victim of that crime or offense. If the recipient of an existing alimony award is subsequently convicted of a crime or offense involving domestic violence against the payer spouse or partner, such conviction shall constitute changed circumstances for the purposes of a petition to terminate the alimony award. Nothing in this subsection shall be construed to limit the authority of the court to deny alimony for other bad acts.[16]

It is clear from the above-cited text that if alimony has not yet been adjudicated, and if a person has either a final restraining order against them or has been convicted of a crime involving domestic violence, that alone precludes the person from receiving alimony from the victim. However, if said person is receiving alimony from the victim and, thereafter, is convicted of a crime or offense involving domestic violence, this would constitute changed circumstances, permitting the victim to petition the court to terminate the alimony. What is interesting is that in those cases in which alimony is already in pay status, the language of the statute is not clear that the victim is entitled to an automatic termination, only that such an incident would constitute changed circumstances. A discussion of the impact this particular bill would have on matrimonial attorneys is probably not necessary, as one can only imagine how many high-wage earners either facing an alimony obligation or currently paying one, would flock to the courthouse seeking temporary restraining orders.

A-3089/S-1984 attempts to increase the punishment for defendants who commit an assault in the context of an incident of domestic violence. Similar to Assembly Bill 2061, discussed above, the bill seeks to upgrade a simple assault to an aggravated assault if the assault occurs during an act of domestic violence.[17] However, where A-2061 requires a strangulation, under A-3089/S-1984, there is no such requirement, and the assault is automatically upgraded to an aggravated assault if the act occurs during an incident involving domestic violence.[18]

Likewise, A-3577/S-1905 seeks to establish minimum terms of imprisonment for offenders who commit physically violent acts of domestic violence.[19] Specifically, the bill provides that a person will be sentenced as follows: 18 months for a crime of the fourth degree, five years for a crime of the third degree, 10 years for a crime of the second degree, and 20 years for a crime of the first

degree, unless the provisions of any other law provide for a mandatory minimum term.[20]

Two more bills that aim to increase penalties for offenders of domestic violence are A-4466 and S-748. A-4466 would amend N.J.S.A. 2C:44-1 to add an aggravating factor for courts to consider when sentencing an individual who has committed a domestic violence offense against a minor.[21] S-748, a carryover from the 2014-2015 legislative session, also seeks to amend N.J.S.A. 2C:44-1, whereby the mere fact that the offense committed involved domestic violence would, in and of itself, be considered an aggravating factor for purposes of determining the appropriate sentence for the defendant.[22]

In addition to the above, there are numerous proposed bills involving mandatory domestic violence training for law enforcement and assistant county prosecutors;[23] judges and judicial personnel;[24] municipal prosecutors;[25] and public employers,[26] just to name a few. Some of the other bills introduced in the 2016-2017 session that do not fall into any one specific category, but demonstrate current trends in domestic violence laws, are as follows:

A-2308/S-524: This bill authorizes the court to include in domestic violence restraining orders a provision making the order applicable to a pregnant victim's child upon birth.

A-2813: Under this bill, all persons would be required to report incidents of domestic violence to law enforcement, and a failure to report would be a disorderly persons offense.

A-2814: This bill establishes the Domestic Violence Tuition Waiver Program, which would provide state-paid tuition or a tuition waiver, for one semester, to persons who are victims of domestic violence and who, as a result of the domestic violence, were unable to complete a course of study at an institution of higher education.

A-4280: Under this bill, domestic violence victims would be permitted to cancel television and telephone service contracts without paying an early termination fee, if they submit the request in writing and provide the service company with a copy of their restraining order.

A-4530: New Jersey cosmetology and hairstyling licensees would be required, under this bill, to complete domestic violence and sexual assault awareness education.

The domestic violence laws in this state are constantly evolving, and it cannot be understated how vital it is to stay current not only with the laws that are currently in effect, but also those that are being introduced in the Legislature. It appears one of the more dominant trends in the area of domestic violence law today involves increasing the punishment to domestic violence offenders in an effort to prevent such acts from occurring. Just knowing these types of bills are pending can have a significant impact on how one advocates for domestic violence clients in the future, even if the majority of the bills introduced never make it to the governor's desk. ■

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Endnotes

1. N.J.S.A. 2C:33-4.1.
2. S-805, introduced Jan. 12, 2016.
3. *Id.*
4. Governor Chris Christie's Conditional Veto to S-805, May 23, 2016.
5. *Id.*
6. *Id.*
7. *Id.*
8. N.J.S.A. 47:4-1 *et seq.*

9. *Id.*
10. A-1957, Fiscal Estimate, Feb. 25, 2016.
11. Governor Chris Christie's Conditional Veto of S-805, May 23, 2016.
12. Assembly Bill 2061, introduced Jan. 27, 2016.
13. N.J.S.A. 2C:12-1(a).
14. A-2061, introduced Jan. 27, 2016.
15. A-1193, introduced Jan. 27, 2016; S-525, introduced Jan. 12, 2016.
16. A-1193, introduced Jan. 27, 2016; S-525, introduced Jan. 12, 2016.
17. A-3089, introduced Feb. 18, 2016; S-1984, introduced April 18, 2016.
18. *Id.*
19. A- 3577, introduced April 4, 2016; S-1905, introduced March 10, 2016.
20. *Id.*
21. A-4466, introduced Jan. 10, 2017.
22. S-748, introduced Jan. 12, 2016.
23. A-4040, introduced July 21, 2016;S-2546, introduced Sept. 26, 2016.
24. A-3390, introduced March 3, 2016.
25. A-2185, introduced Jan. 27, 2016; S-2547, Sept. 26, 2016.
26. A-4124, introduced Sept. 19, 2016; S-907, introduced Jan. 10, 2017; A-4125, introduced Sept. 19, 2016.

Dismissal of Final Restraining Orders: Analysis of *Carfagno* and Issues Arising Thereunder

by J. Patrick McShane III

This article explores the procedural and policy considerations of dismissing domestic violence final restraining orders. New Jersey's Prevention of Domestic Violence Act provides for a 'second chance' or 'forgiveness.' N.J.S.A.2C:25-29(d) provides as follows:

> Upon good cause shown, any final order may be dissolved or modified upon application to the Family Part of the Chancery Division of the Superior Court, but only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based.

Carfagno v. Carfagno[1] thoroughly analyzes that statutory language. *Carfagno* highlights the fact-intense nature of the inquiry when a party seeks dismissal of a final restraining order.

In *Carfagno*, on May 21, 1992, the court determined that the husband committed harassment by telephoning his wife four times per day, waiting at her home and taking her automobile without permission. By Sept. 3, 1992, the husband had violated and pled guilty to the violation of the final restraining order and received a non-custodial sentence. Less than two weeks later, on Sept. 16, 1992, the court entered a final restraining order arising out of a new incident in the husband's favor against the wife, restraining her from contacting him except to discuss the welfare of the child. Approximately 18 months later, in March 1994, the husband was found guilty of contempt for a second time, for telephoning the wife on her car telephone, stating that he was following her. He received a 30-day custodial term, plus one year of probation. About 18 months later, on Nov. 8, 1995, the court considered the argument of counsel and testimony of the parties on the defendant's application to dismiss the May 21, 1992, final restraining order. The court made findings of fact regarding the husband's desire to exert power and control over the wife, the wife's fear and that she did not consent.

The court, in *Carfagno*, noted that there was no case law guiding the court's determination of dismissal of a domestic violence restraining order in the absence of a reconciliation. The court offered the following analytical framework of 11 factors:

1. **Whether the victim consented to lift the restraining order**—In *Carfagno*, the wife objected to lifting the restraining order. However, in analyzing the factor as related to a plaintiff's request for dismissal of a final restraining order, the court in *Carfagno*, stated as follows:

> The legislature intended that the court should follow the victim's request to dissolve a domestic violence order or dismiss a domestic violence complaint without further legal analysis…The policy of the Act is to provide broad protections to the victim…The court notes that the legislature provided that a restraining order should be a civil remedy…and that the victim—not the state—files the complaint to obtain the restraining order.
>
> If judges disregard the victim's wishes in determining whether to dismiss a complaint or dissolve a restraining order on the victim's request, this has the effect of discouraging victims from filing complaints when necessary. If the victim perceives that the courts would not be responsive to their request to dismiss the action, that victim or other victims may refrain from filing a domestic violence complaint in the future. Certainly this is not what the legislature intended. Thus, if the victim voluntarily requests the court to dismiss a domestic violence action or dissolve a restraining order, the court should grant the request without conducting any further legal analysis.[2]

As will be later discussed, other courts have taken a different view, particularly if dismissal is sought due to reconciliation.

2. **The victim's fear of the defendant**—The court, in *Carfagno,* determined that courts should focus on objective fear. The reason to use the 'objective fear' standard is twofold: First, if the standard is subjective fear, and the victim simply states he or she did not wish to lift the restraining order out of fear, then no further legal analysis is necessary. That is not what is intended by the good cause standard of the statute. Second, the duration of an injunction should only be as long as necessary to protect the injured party. Hence, objectively reasonable fear, defined as whether a reasonable victim, similarly situated, would have feared the defendant under the circumstances, is the applicable standard.

   In applying that standard to the facts of *Carfagno*, the court determined the wife's fear was objectively reasonable. Specifically, there was an incident where the husband had failed to pick up the child from school for two hours, and the wife called the husband and remonstrated him, calling him a "jerk." The court perceived that but for the existence of the restraining order, the wife might not have made that call. The court pointed out that her objectively reasonable fear of the husband, if the order did not remain in effect, could diminish her capacity to make decisions in her child's best interest.
3. **Nature of the relationship between the parties today**—In considering this factor, one of the key elements is whether the parties had children. Another key factor is whether the parties have moved on: Are they married to other people? Are they still residing proximate to each other, or do they live further away? Is there a likelihood of continuing control and domination?

   In the *Carfagno* case, given the arguments that had occurred with respect to the parties' child, the factor militated against dissolving the restraining order.
4. **Contempt convictions**—Willingness to abide by court orders is an important factor, according to *Carfagno.* The two violations were a factor lending to continuation of the restraining order.
5. **Alcohol and drug involvement**—According to the *Carfagno* court, 39 percent of all domestic violence incidents involved drugs or alcohol. However, there was no such involvement in the *Carfagno* case, nor was the husband so accused. Thus, this factor militated against the continuation of the restraining order.
6. **Other violent acts**—This factor is defined in *Carfagno* as violent acts perpetrated against someone other than the victim. A case demonstrating the critical importance of this factor with regard to a *plaintiff's* application to dismiss a final restraining order is the 1998 case of *Stevenson v. Stevenson.*[3] That case will be discussed in more detail subsequently herein. The fact that the husband in that case had been involved in a number of admitted bar fights and physical confrontations with others at children's sporting events was an important factor in the court's *denial of the plaintiff's* request for a dismissal of her domestic violence final restraining order.
7. **Whether the defendant has engaged in domestic violence counseling**—Particularly when counseling is ordered, it must be completed. Because the husband in *Carfagno* did not complete domestic violence counseling, that fact favored maintenance of the restraining order.
8. **Age/health of the defendant**—The husband was a physically fit 33-year-old male. Were he to have been physically disabled or otherwise, the factor might militate against continuation of the order; however, his physical fitness and young age favored continuation of the order.
9. **Good faith of the victim**—The motion to dismiss the final restraining order in *Carfagno* arose in the context of the husband's desire to obtain employment with a local police department. The wife argued that was not a sufficient reason to nullify the order protecting her, in light of her objective fear and the two previous violations. The court found her opposition to be in good faith.
10. **Orders entered by other jurisdictions**—If there is an order from another jurisdiction, such an order may be entitled to full faith and credit. No such order existed in the *Carfagno* case.
11. **Other factors deemed relevant by the court**—The *Carfagno* court indicates that courts should consider any other factor raised by the court in support of or against the dissolution of the restraining order. No such factors existed in *Carfagno.*

The analysis is not simply quantitative, a numbering of the factors that weigh in favor or against maintenance of the final restraining order, but a qualitative weighing of

the factors to arrive at the appropriate mosaic of decision making. For example, fear of future acts of violence may be so objectively reasonable based upon circumstances particular to a case, that it outweighs other factors. The linchpin for the *Carfagno* decision is the general rule of law that a restraining order can be dissolved wherever substantially changed circumstances render the continued enforcement of the restraint inequitable, oppressive, unjust or in contravention of the policy of law.[4]

A number of issues arise from the *Carfagno* analysis. Those issues and their subsequent case law analysis are addressed below.

Timing

New Jersey's Prevention of Domestic Violence statute does not provide a timeframe after which final restraining orders are deemed null and void/ineffective, while some other states do so provide. Examples of other states' timeframes are set forth in the New Jersey decision *M.V. v. J.R.G.*[5]

J.R.G., a sheriff's officer, desiring reinstitution of his ability to carry firearms for employment purposes, sought dismissal of a final order within eight months of its entry. The trial court denied the request. It set forth a one-year time requirement as a bright line rule. That bright line rule was subsequently reversed in *Kanaszka v. Kunen*.[6] However, in the course of its decision, the court in *M.V. v. J.R.G.* pointed out that, for example, Massachusetts, Pennsylvania and Connecticut placed the affirmative duty on the victim to reapply for continuation of the protective orders. In 1997, Massachusetts law provided for restraints lasting up to one year, at which time the victim must appear in court to request an extension. Pennsylvania law likewise contained a one-year provision, requiring a formal petition on the part of the victim, with notice and an opportunity to be heard by the defendant, before an extension would be granted. Connecticut had a six-month timeframe with the burden on the plaintiff.

The 1991 amendment to the New Jersey Prevention of Domestic Violence Act contained the legislative statement in N.J.S.A. 2C:25-18. That statement set forth the public policy of New Jersey, which recognized the problems faced by victims of domestic violence. New Jersey law intends maximum protection for victims; hence, there is no timeframe in the New Jersey law after which domestic violence final restraining orders dissolve.

Under New Jersey law, the critical consideration is not time. The critical consideration is whether substantially changed circumstances have occurred that constitute good cause for dismissal of a final restraining order.[7] A review of reported cases reflects the following:

In *Sweeney v. Honachefsky*,[8] a final restraining order was entered on March 6, 1997. The defendant filed for dissolution of the restraints in June 1997, approximately three months later. Notwithstanding the following facts, the trial court denied the defendant's application to dismiss.

The plaintiff agreed to dissolution of the restraining order for stated reasons including:

- She didn't need it anymore.
- She was reassured on account of the defendant's completion of anger management.
- She wanted to be done with the defendant entirely.
- She wanted not to be involved in any further court proceedings.
- She had a new romantic interest.
- The parties lived at least 26 miles apart.
- Importantly, she and her roommate (who had called the police on the night of the incident resulting in the final restraining order) had gone to a nightclub where they knew the defendant was the bouncer, thus reflecting absolutely no fear.
- The domestic violence incident resulting in the final restraining order involved the defendant placing a rose and note in the plaintiff's purse, making contacts attempting to rekindle the relationship, and specifically on the night of the incident, the defendant had pounded on the door and was screaming.

The defendant appealed. The Appellate Division characterized the underlying facts leading to the final restraining order as "marginal at best." The Appellate Division reversed the trial court's denial of dismissal of the final restraining order so the defendant could pursue his desire for a federal law enforcement career.

In *Kanaszka v. Kunen*, *supra*, a final restraining order was entered on Oct. 3, 1995. About 16 months later, on Feb. 12, 1997, the defendant filed his motion seeking dissolution of the restraints. There was a conflict regarding exactly what happened at the final hearing, which led to the denial of the motion to dissolve the restraints on both substantive and procedural grounds. The importance of the procedural grounds will be discussed subsequently in this article. The *Carfagno* application had been made approximately 18 months after the last violation.

Recent unreported cases offer examples of the timelines involved, and how relatively unimportant that

timing is compared to the application of all of the *Carfagno* factors. Stated quite simply, the lapse of time in and of itself is not determinative.

In *A.F.F. v. C.H.G.*,[9] the defendant sought to dissolve a 2010 final restraining order in 2014. Because the trial court determined, without taking any testimony, that the plaintiff was in fear, and on the "supposition that it was too soon for the dissolution of the final restraining order," the application was denied. The Appellate Division reversed and remanded.

In *S.H. v. L.H.*,[10] the defendant, in 2014, sought to dissolve a final restraining order entered in 2004. Based upon a clear indication of the plaintiff's lack of good faith and use of the restraining order to adversely affect the defendant's relationship with his daughter, and based upon its own analysis of the record, the court remanded the matter to the family part for the entry of an order dissolving the 2004 final restraining order in the best interest of the child, and on all of the facts and circumstances.

In *B.R. v. J.A.*,[11] the defendant sought relief from a 2004 final restraining order in 2014. The plaintiff and the defendant had appeared before a trial judge in September, when the defendant's dismissal application was adjourned. Later, an order denying the dissolution request was entered in October, by a different judge, who relied upon the court clerk's rendition of the plaintiff's appearance at the September court appearance before the first judge. The second judge subsequently supplemented the record by reviewing the September tape, but because the defendant and his counsel were never afforded the opportunity to examine the plaintiff regarding the reasonableness of her alleged fear, the dismissal was reversed.

In *J.R. v. Y.R.*,[12] an April 2014 final restraining order was granted on a default basis. The defendant sought to dissolve the final restraining order in Dec. 2014. There was no record other than a certification of the defendant, which the Appellate Division deemed inadequate to explain reasons to dissolve the final order, nor was there any record of the plaintiff's opposition. The dismissal of the order was reversed and the matter remanded for appropriate fact finding on the *Carfagno* factors.

A repeated theme throughout the cases is the importance of development of the record regarding what happened at the time of the domestic violence incident. Plaintiffs are permitted to explain additional circumstances beyond what was in the record at the time of the final order hearing in defense of an application to dismiss that final restraining order. An example of the kinds of analysis and the importance of having the transcript of the domestic violence final restraining order is the unreported case of *K.V. v. E.N.*[13] In that case, the trial judge looked closely at the original complaint, reviewed the transcript of the final restraining order hearing, and determined that the plaintiff objectively feared the defendant. Because the defendant failed to address many of the *Carfagno* factors to the trial judge's satisfaction, the Appellate Division affirmed the denial of a dissolution.

The lesson of the case law is that it is not time, but *facts,* substantial changes in circumstances that sufficiently negate the underlying need for protection and continuation of the restraints, that govern the decision making process on motions to dissolve final restraining orders.

Procedural Requirements

The statute requires the motion to dissolve the restraints be brought before the same judge who entered the order *or* the judge who modifies or dissolves the order must have the complete record of the hearing or hearings on which the order is based. That section of the statute was further explained by the Appellate Division in *Kanaszka v. Kunen*.[14] As often happens, the judge who originally entered the final restraining order 14 months prior to the defendant's dismissal motion was assigned to another division. That motion judge was not provided the transcript of the domestic violence hearing, and there was a factual dispute regarding what occurred at that hearing. Specifically, the defendant took the position that he consented to a final restraining order and that allegations of prior domestic violence were not the basis of the order. The trial court's denial of the motion to dismiss, in part upon the inadequacy of the record, was affirmed.

The Appellate Division directed that the term 'complete record' includes, at a minimum, the following from the file at the time the final order was entered: 1) all pleadings, 2) all orders, 3) the complete court file, 4) a complete transcript of the final restraining order hearing, 5) the complete file should accompany the motion for dissolution of a final restraining order to enable the motion judge to fully understand the totality of the circumstances. Also, the changed circumstances—what is different now—facts which warrant dissolution of the final restraining order, should be set forth in a detailed certification addressing the 11 *Carfagno* factors.

As discussed in *I.J. v. I.S.*,[15] application of the requirement of the same judge is tenuous at best. "The more

time that elapses between the FRO hearing and the 'dismissal hearing,' the greater the same judge requirement is diluted."[16] In the *I.J. v. I.S.* case, 12 months had elapsed. The court pointed out that it is highly unlikely any trial judge would recall the facts of a particular case 12 months later. Hence, regardless if the application is before the same judge or a new judge, the *Kanaszka* requirements must be met.

Of critical importance is the ability of the trial court determining a motion to dissolve to fully explore, consider and understand the prior history of the domestic violence, the totality of the parties' relationship and the other *Carfagno* factors.

Reconciliation

In *A.B. v. L.M.*,[17] a final order was entered on June 13, 1990, which included liberal visitation to the defendant with the parties' child. In Sept. 1994, the plaintiff requested dissolution. Because of the stormy nature of the parties' relationship, the motion judge denied her 1994 motion to dissolve the restraints and, therefore, the final restraints in the June 1990 order remained in effect. In April 1995, the defendant petitioned for enforcement of visitation. The trial court could not determine whether the parties were living together, but the parties admitted a sexual relationship. The trial judge decided that constituted a reconciliation. The reconciliation was deemed a waiver of rights under the domestic violence act; therefore, the trial judge dismissed the 1990 final restraining order. The plaintiff appealed the trial court's dismissal of the 1990 final restraining order on the defendant's motion for expanded visitation. The Appellate Division determined that reconciliation, in and of itself, is not good cause for dissolution of a final restraining order.

Earlier decisions, such as *Mohamed v. Mohamed*[18] and *Hayes v. Hayes*,[19] held that reconciliation terminates final restraining orders. However, the Appellate Division distinguished those decisions because they were made under the predecessor statute. The passage of the 1991 act provides much greater responsibilities on the part of police and the courts for the protection of victims of domestic violence. Against the backdrop, the Appellate Division, citing *Torres v. Lancellotti*,[20] determined that it would be unwise to automatically vacate an order based upon reconciliation or "mutual violations." Thus, the Appellate Division determined reconciliation is not a sufficient basis to automatically terminate final restraining orders because: 1) The 1991 act was designed to provide maximum protection to victims. 2) The 'good cause' requirement and burden of proof on the defendant for dissolution of orders requires the court to have discretion in determining dissolution of restraints. 3) The reality is that family violence is cyclical. Reconciliations seldom end violence between parties with a history of a violent relationship. Thus, there is no per se rule.

The Appellate Division, reviewing the record, reversed the dismissal of the 1990 order on the basis of reconciliation, reinstated that order on its original jurisdiction, and provided that the trial court's order of visitation and curbside pick up and drop off would remain in effect.

Application to Plaintiffs

Two Camden County cases come to opposite conclusions on the issue of the application for dissolution brought by under N.J.S.A. 2C:25-29(d).

The first is *Stevenson v. Stevenson*, *supra*. In that case, the court was confronted with a battering of a wife, resulting in a medical evacuation to a trauma center, where she spent several days, including intubation for a collapsed lung sustained in the beating, which also resulted in a fractured skull. The beating had occurred in the presence of the parties' 10-year-old child. The defendant was ordered to pay counsel fees in installments and to undergo various other treatments. He did not pay the fees. He went to certain treatments as required in the preparation of his criminal case, which resulted in various risk analyses with regard to visitation. These resulted in findings of multiple incidents of physical confrontations and fights throughout the defendant's history, and repeated alcohol and drug abuse. Notwithstanding the history and notwithstanding the severity of the abuse, in March 1998, the plaintiff claimed she reconsidered her relationship with the defendant and wanted him to be involved with their son. However, she asked that a condition be imposed: "No future violence."[21] Citing that fear, and the severity of the defendant's conduct, the trial court denied the plaintiff's application.

Approximately 18 months later, in Nov. 1999, a different Camden County judge decided *I.J. v. I.S.*, *supra*. In reaching his decision, the second judge cited changes to the domestic violence statute and domestic violence manual, in particular N.J.S.A. 2C:25-27, which provides that "[i]n any case where the court order contains a requirement that defendant receive professional counseling, no application by the defendant to dissolve the restraining order shall be granted unless, in addition

to any other provisions required by law or conditions ordered by the court, the defendant has completed all required attendance at such counseling." Similar language is contained in N.J.S.A. 2C:25-29(b)(5). This was deemed protective of plaintiffs.

The second judge also analyzed the difference between criminal and civil actions. Civil actions for domestic violence are private actions between the plaintiff and the defendant. Thus, the good cause requirement should only apply to a defendant seeking dismissal of a private matter. So long as the plaintiff has had the proper counseling, there is no coercion and the dismissal request is voluntary, the order should be dismissed.

The Appellate Division's determination on this issue is probably best defined by *Kanaszka v. Kunen*'s reliance upon *A.B. v. L.M.,* which it cited as follows:[22]

> When confronted with a party's request to vacate a domestic violence order on the ground of reconciliation, the court should closely scrutinize the record to determine whether there is a likelihood that violent conduct will be repeated…

The Appellate Division in *Kanaszka v. Kunen* went on to state as follows:[23]

> We extend that reasoning to *any* application to dissolve a final restraining order. With the protection of the victim the primary objective, the court must carefully scrutinize the record and carefully consider the totality of the circumstances before removing the protective shield.

Other Circumstances Involving Dissolution or Modification of Final Restraining Orders

Dismissals of domestic violence restraining orders do not automatically result in a return of forfeited weapons.[24] Prosecutors retain the authority over weapons seized pursuant to temporary restraining orders. Dismissal of restraining orders at the request of the victim takes the discretion from the prosecutor regarding whether the perpetrator is an appropriate person to maintain weapons, and places it in the hands of the victim. The clear policy of the weapons forfeiture section of the statute is that the authority remains with the prosecutor.

Mugrage v. Mugrage,[25] authored by the same judge who decided *Carfagno*, provides the example of a modification of a domestic violence restraining order and entry of a protective order permitting depositions to occur in a courthouse, to be attended by the parties to a domestic violence restraining order and the terms and conditions under which both could attend.

Grover v. Terlaje[26] and *Finamore v. Aronson*[27] are examples of modifications of the parenting time provisions of final restraining orders. In *Grover v. Terlaje*, the issue presented was the impact of the final restraining order on a father's subsequent request for joint legal custody of his six-year-old son. The father appealed from a June 2004, order that denied his application to amend an Aug. 23, 2001, order to include joint legal custody. In dealing with the issue, the Appellate Division was confronted with the presumption in the Prevention of Domestic Violence Act, stating as follows:

> The court shall presume that the best interests of the child are served by an award of custody to the non-abusive parent.[28]

The court in *Grover v. Terlaje* concluded that the presumption and favor of awarding custody relates to legal as well as physical custody, although the presumption weakens as time passes without any conduct that can be said to jeopardize the non-abusive spouse or child. The court noted that the defendant did not seek vacation of the final restraining order, only joint legal custody and the related ability to participate in decision making. In making such an application to amend a final restraining order, to include a change of custody or parenting time, the Appellate Division noted that the full record should have been provided per *Carfagno* and *Kanaszka v. Kunen*.

Finamore v. Aronson is similar. Therein, the scope of a domestic violence final restraining order was the issue. The plaintiff argued that the no-contact restraint meant that the defendant husband could not attend the child's school or other activities at any time when she attended them. The plaintiff refused to provide the defendant with notice of when she would be attending the events, effectively precluding him from attending events at the risk of 'contact' and violations of the restraints. The Appellate Division viewed the defendant's application as one requesting modification of the prior order restricting his attendance at the child's school. That had to be determined in the context of the entirety of the case, includ-

ing the *Carfagno* factors and the complete record. Focus should also be on the child's relationship with the parent, which is a developing factor under the cases cited above.

Conclusion

The analysis of the issues makes it clear that when presenting a case for dismissal or modification of a final restraining order, the prior record and, in particular, all pleadings, the order and the transcript of proceedings on the final restraining order hearing must be presented as well as, very importantly, a certification of the new, changed circumstances.

A careful analysis of the *Carfagno* factors, with particular focus on the impact of the continuation or dissolution of the order upon the defendant's relationship with his or her children, should be made.

At the same time, the use of a dissolution application as a further potential abuse of the victim must be carefully considered.

The bottom line of the analysis is that within the framework of maximum protection for victims of domestic violence, where the underlying need for continuing restraints is no longer present, defendants should have the opportunity to rebuild and move forward. Where there is a risk of future harm based upon objectively reasonable fear, the application should be denied. ■

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Endnotes

1. 288 N.J. Super. 424 (Ch. Div. 1995).
2. *Id.* at 435-436.
3. 314 N.J. Super. 350 (Ch. Div. 1998).
4. 288 N.J. Super. at 433-434.
5. 312 N.J. Super. 597 (Ch. Div. 1997).
6. 313 N.J. Super. 600 (App. Div. 1998).
7. *Id.* at 609.
8. 313 N.J. Super. 443 (App. Div. 1998).
9. A-2063-14T2, May 26, 2016.
10. A-2410-14T4, May 4, 2016.
11. A-1442-14T2, April 15, 2016.
12. A-2464-14T3, Feb. 9, 2016.
13. A-1918-14T1, Feb. 19, 2016.
14. *Id.*, 313 N.J. Super. at 606-607.
15. 328 N.J. Super. 166 (Ch. Div. 1999).
16. *Id.* at 179.
17. 289 N.J. Super. 125 (App. Div. 1996).
18. 232 N.J. Super. 474 (App. Div. 1989).
19. 251 N.J. Super. 160 (Ch. Div. 1991).
20. 257 N.J. Super. 160 (Ch. Div. 1992).
21. *Stevenson*, *supra*., 314 N.J. Super. at 357.
22. *A.B. v. L.M.*, *supra*., 289 N.J. Super. at 131, *cited at Kanaszka v. Kunen*, *supra*. 313 N.J. Super. at 605.
23. *Id.*
24. *State v. Volpini,* 291 N.J. Super. 401 (App. Div. 1996).
25. 335 N.J .Super. 653 (Ch. Div. 2000).
26. 379 N.J. Super. 400 (App. Div. 2005).
27. 382 N.J. Super. 514 (App. Div. 2006).
28. N.J.S.A. 2C:25-29(b)(11).

Available Forms of Relief under the Prevention of Domestic Violence Act

by Abigale M. Stolfe

Under the Prevention of Domestic Violence Act,[1] there are several forms of relief available to victims of domestic violence. In fact, contained within the legislative intent section of the statute, the New Jersey Legislature outlines two basic forms of relief available for victims.[2] Generally, these include both civil relief (in the form of obtaining a restraining order) and criminal relief[3] (allowing a victim to file a criminal complaint against the abuser).[4]

It is important to determine who may seek relief under the Prevention of Domestic Violence Act. The plaintiff who is seeking relief must be at least 18 years old, or be an emancipated minor. Further, he or she must be the victim of domestic violence by a spouse, former spouse, or former or current household member. Regardless of the plaintiff's age, the defendant may be someone the plaintiff has or anticipates having a child in common with, or a person with whom he or she has had a dating relationship.

Relief Offered to Victims of Domestic Violence in Civil Court

The initial relief offered to victims of domestic violence is a temporary restraining order (TRO). A TRO may be granted by either a domestic violence hearing officer or a judge, and is considered without notice to the defendant. Upon the entry of a TRO, the plaintiff will be given a return date for a hearing within 10 days, to determine the issuance of a final restraining order (FRO). A TRO provides temporary relief to a victim of domestic violence until the scheduled FRO hearing occurs.

Further relief is granted to a victim of domestic violence upon the entry of a FRO. For a FRO to be granted, the court must consider if the plaintiff proved, by a preponderance of the evidence, a predicate act was committed within the applicable statute and, if so, whether the court should enter a restraining order to protect the victim.[5] Upon the issuance of a FRO, there are several areas of relief the court may grant. Some relief is non-discretionary, as will be discussed.

Barring the Defendant from Contacting or Communicating with the Plaintiff

To help ensure that no future acts of domestic violence will be committed against the victim, this is a common form of relief granted by the court. The defendant may be barred from the plaintiff's residence, place of employment, or other enumerated locations. Further, he or she may be prohibited from having any oral, written, personal or electronic form of contact or communication with the plaintiff and others who may be associated with the victim. The defendant will also likely be prohibited from making or causing another to make harassing communications to the plaintiff or his or her associates.

Additionally, a defendant may be prohibit from stalking, following, or threatening to harm, stalk or follow the plaintiff or his or her associates.

Requiring the Defendant to Pay Monetary Relief to the Plaintiff

There are several forms of monetary relief available to victims of domestic violence. These include counsel fees, damages and medical coverage.

Counsel Fees

Upon a finding by the court that an act of violence has occurred, and that there is a need for a FRO, the court shall order counsel fees upon a review of a certification of service prepared by counsel.[6] The certification shall be limited to those factors enumerated in RPC 1.5 and R. 4:42-9, but shall specifically exclude any consideration to the defendant's ability to pay, good faith, and the plaintiff's need.[7] The court's analysis is limited to a determination that the fees are the direct result of domestic violence, that the fees are reasonable and that they are presented via an affidavit.[8]

The court's authority is subject only to compliance with RPC 1.5(a). RPC 1.5(a), which permits the court to enter an award of attorney's fees as long as the fee is

reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent.

Counsel should provide a thorough certification of services that details the factors enumerated in RPC 1.5.

Damages

As a result of domestic violence, there may be damage to personal and/or real property of a victim. This can include, but is not limited to, car damage and broken furniture. The plaintiff may be required to submit an invoice or estimate to the court to repair the damage caused by the defendant. It is likely the court will award such an amount to the plaintiff if there is damage to his or her property.

Medical Coverage

If a FRO is granted, a victim and his or her dependents may receive medical coverage. This will allow the victim and dependents to receive appropriate medical attention and to ensure coverage in the future.

Ordering the Defendant Attend Substance Abuse Counseling or Other Evaluations

Given the particular facts and circumstances of a case when entering a FRO, the court may order a party attend substance abuse counseling or other types of evaluation, including anger management. A court may likely order this form of relief if there is a history of past drug or alcohol abuse by the defendant.

Possession of Residence Shared between the Plaintiff and Defendant

As the court will likely grant a victim relief from any communication or contact with the defendant, a victim may also see an order necessitating the defendant to relocate from the parties' residence. If the parties are not permitted to be within 100 feet of one another, it would be impossible for them to reside in the same home. Therefore, if the parties were living together at the time of the incident, the court may order the plaintiff retain exclusive possession of the residence they shared.

Temporary Custody of the Parties' Children, and Child Support

Based upon a parent's behavior or the outcome of the domestic violence hearing, a court may award temporary custody of the parties' children. This can, of course, be joint or sole, legal or physical. The court should consider the factors enumerated in N.J.S.A. 9:2-4 when determining custody of children. Included in these factors is a parent's history of domestic violence. Therefore, a parent's history of domestic violence may have a permanent effect on custody. As a party may receive temporary custody of their children, a court may order an appropriate child support award.

Other Relief the Court Deems Just and Equitable

As with all areas of the law, the court may award additional relief that it deems just and equitable. This allows the court to craft an appropriate award based on the circumstances of an individual case. ■

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Endnotes

1. N.J.S.A. 2C:25-17 *et. seq.*
2. N.J.S.A. 2C:25-17.
3. This article will focus on the relief received in civil court. It is important to note that if a police officer observes visible signs of injury, he or she must sign a criminal complaint. The criminal complaint must be filed where the alleged act occurred, where the defendant resided, where the plaintiff resides, or where the plaintiff is sheltered or staying temporarily.
4. *See* N.J.S.A. 2C:25-17 *et. seq.*
5. *Silver v. Silver*, 387 N.J. Super. 112, 126-27 (App. Div. 2006).
6. *McGowan v. O'Rourke*, 391 N.J. Super. 502 (App. Div. 2007); N.J.S.A. 2C:25-17.
7. *Id.*
8. *Id.*

New Jersey's 10 Leading Domestic Violence Law Cases

by Michael A. Weinberg

This article will explore 10 of New Jersey's most influential and significant reported decisions in the area of domestic violence.

Peranio v. Peranio

In *Peranio v. Peranio*, the plaintiff obtained a temporary restraining order against the defendant during pending divorce proceedings, while the parties were living separate and apart.[1] In her domestic violence complaint, the plaintiff alleged the defendant had "forced entry" into her home; "pushed" her and the parties' child; stated, "I'll bury you;" and used "extreme foul language."[2] The complaint also alleged "verbal harassment and assaults for the past two years" in violation of N.J.S.A. 2C:33-4(c).[3]

Although a finding was made at trial that there was an "absence of any history of assaultive behavior" by the defendant, the trial judge concluded the defendant's comment, "I'll bury you," could be construed as alarming, "certainly causing annoyance and alarm to the plaintiff in the context in which it was uttered and given the fact of the fear that she was experiencing by him making that comment."[4] Thus, a final restraining order was entered on behalf of the plaintiff, based upon the predicate act of harassment under N.J.S.A. 2C:33-4(c).[5]

On appeal, the Appellate Division explained that domestic violence is "a term of art which defines a pattern of abusive and controlling behavior injurious to its victims," and that N.J.S.A. 2C:25-18 reflects that "the focus of the Legislature was regular serious abuse between spouses."[6] Moreover, the Appellate Division cautioned that while New Jersey's domestic violence law incorporates various existing criminal statutes:

> …it is clear that the drafters of the law did not intend that the commission of any one of these acts automatically would warrant the issuance of a domestic violence order. The law mandates that acts claimed by a plaintiff to be domestic violence must be evaluated in light of the previous history of violence between the parties including previous threats, harassment and physical abuse, and in light of whether immediate danger to person or property is present. N.J.S.A. 2C:25-29a(1) and (2). This requirement reflects the reality that domestic violence is ordinarily more than an isolated aberrant act and incorporates the legislative intent to provide a vehicle to protect victims whose safety is threatened.[7]

Integral to a finding of harassment under N.J.S.A. 2C:33-4(c) is "the establishment of the purpose to harass," along with "a course of alarming conduct or repeated acts intended to alarm or seriously annoy another."[8] In reviewing the matter, the Appellate Division found neither of these elements had been established.[9] Specifically, there was no finding that the defendant intended to harass the plaintiff. Moreover, the Appellate Division explained that even if such a finding had been made, "that purpose, standing alone, would not have satisfied the definition of harassment under N.J.S.A. 2C:33-4c unless it was manifested by a course or repeated acts of alarming conduct."[10]

Based upon the foregoing, the Appellate Division found the defendant's conduct was "plainly never contemplated by the Legislature as domestic violence," as there was no history of domestic violence between the parties, "who were on the threshold of dissolving their marriage when a conflict over property occurred."[11] In so holding, the Appellate Division concluded:

> Although it can safely be observed that defendant's conduct was no model, application of the domestic violence law to it diminishes the suffering of true victims of domestic violence and misused the legislative vehicle which was developed to protect them. It also had a secondary negative effect: the potential for unfair advantage to a matrimonial litigant….

> Our hope, like plaintiff's, is that all children of divorce can be spared arguments and recriminations. But this needs to come from the good intentions of their parents and not from the misapplication of the domestic violence law, which law was intended to address matters of consequence, not ordinary domestic contretemps such as this.[12]

Corrente v. Corrente

In *Corrente v. Corrente*, the plaintiff filed a domestic violence complaint against the defendant, from whom she was separated, asserting the defendant called her "at work threatening drastic measures if plaintiff did not supply defendant with money to pay bills."[13] According to the plaintiff's complaint, there was no history of domestic violence between the parties.[14]

The plaintiff testified during trial that the defendant called her at work twice a day, even though he knew that she could not talk, and disconnected the home telephone service without notice to her.[15] The defendant testified, however, that he could not afford to pay all of the household bills, due to the plaintiff's failure to contribute toward them, and that he did not believe or know that disconnecting the telephone service would cause the plaintiff to be alarmed or annoyed.[16]

The trial judge found domestic violence had occurred, concluding the defendant's conduct caused the plaintiff alarm, thus constituting harassment.[17] The defendant appealed, arguing the acts complained of were not domestic violence.[18]

In considering the matter, the Appellate Division held that there had not been any finding of intent to harass with respect to the defendant's calls to the plaintiff at work, only that the plaintiff felt alarmed by the calls.[19] Additionally, while the trial judge found an intent to harass in the defendant disconnecting the home telephone, the Appellate Division concluded the act was not repeated, nor a course of conduct.[20] Instead, the Appellate Division held that "neither the phone calls (which plaintiff testified requested her to move out of the house and pay her share of the household costs) nor the turning off of the phone, which plaintiff remedied immediately by having the phone service restored in her own name, were acts which can be characterized as alarming or seriously annoying."[21] Thus, in reversing the trial court, the Appellate Division explained:

> …defendant's conduct was plainly never contemplated by the Legislature when it addressed the serious social problems of domestic violence. Plaintiff's complaint asserted that there was no history of domestic violence, and there was no finding by the judge of a history of abuse or an immediate threat to safety. What occurred between these parties, whose relationship had ended and who were living apart, was a conflict over finances and possession of the marital premises. During an argument, tempers flared and defendant threatened drastic measures. He carried out his threat with the childish act of turning off the phone. While this was not conduct to be proud of, plaintiff was neither harmed (except in the most inconsequential way) nor was she subjected to potential injury. As such, the invocation of the domestic violence law trivialized the plight of true victims of domestic violence and misused the legislative vehicle which was developed to protect them. It also had a secondary negative effect: the potential unfair advantage to a matrimonial litigant….
>
> The domestic violence law was intended to address matters of consequence, not ordinary domestic contretemps such as this. We conclude that on plaintiff's puny proofs, the domestic violence order was unwarranted. Thus we reverse.[22]

State v. Hoffman

In *State v. Hoffman*, at issue was "whether the act of mailing a torn-up support order on two occasions by one former spouse to the other constitutes a violation of the harassment statute…and whether the same mailings constitute violations of a final domestic violence restraining order."[23]

The parties, Brian Hoffman (the defendant) and Mary Hoffman, were married for seven years and the parents of two children. During the course of the marriage, the defendant engaged in a course of conduct, which led to the issuance of a final restraining order on behalf of Mary.[24] The final restraining order prohibited the defendant from committing future acts of domestic violence; prohibited the defendant from having contact with Mary and her three children from a former marriage; barred the defendant from the former marital home; prohibited

the defendant from making harassing communications to Mary, her three children from a former marriage, and her mother; and directed the defendant to pay child support. In addition, the final restraining order granted Mary exclusive possession of the former marital home and temporary custody of the parties' two children.[25]

Following the entry of the final restraining order, the defendant's harassing conduct toward Mary continued, and he ultimately pled guilty to criminal trespass and contempt. The defendant was subsequently sentenced to three years of probation and required to serve 364 days in the county jail.[26]

While serving the jail time, the defendant mailed a package to Mary. The package was received by Mary and contained a notice of motion to modify a support order entered in the previous divorce proceedings; a financial statement; and a torn-up copy of the support order. Mary also received a duplicate package from the defendant via certified mail, containing the same documentation. Mary thereafter filed two complaints against the defendant for the two mailings of the torn-up support order, asserting that each mailing constituted two distinct offenses: a harassing communication, and contempt for violating the final restraining order.[27]

The trial court convicted the defendant of harassment and contempt with regard to both mailings.[28] The Appellate Division reversed.[29]

On appeal, with regard to the harassment charge, the New Jersey Supreme Court cited to N.J.S.A. 2C:33-4(a), which provides that "a person commits a petty disorderly offense if, with purpose to harass another, he [m]akes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm."[30] The Court explained that to establish a violation of N.J.S.A. 2C:33-4(a), each of the following elements must be established: "(1) defendant made or caused to be made a communication; (2) defendant's purpose in making or causing the communication to be made was to harass another person; and (3) the communication was in one of the specified manners or any other manner similarly likely to cause annoyance or alarm to its intended recipient."[31]

In considering the first two elements, the Court noted there was no dispute that the defendant had mailed the two communications to Mary.[32] The Court also explained that a finding of a purpose to harass "may be inferred from the evidence presented," and "[c]ommon sense and experience may inform that determination."[33] Thus, the Court held that, "[a]bsent a legitimate purpose behind defendant's actions, the trial court could reasonably infer that defendant acted with the purpose to harass Mary."[34]

With regard to the third element, the Court held that the Legislature intended for the term "annoyance" to derive its meaning from the conduct at issue.[35] Since it was undisputed that the two mailings had not been sent anonymously, at an extremely inconvenient hour, or in offensively coarse language, the Court focused upon whether the mailings constituted a communication in any other manner likely to cause annoyance or alarm. In this regard, the Court explained:

> The catchall provision of N.J.S.A. 2C:33-4(a) should generally be interpreted to apply to modes of communicative harassment that intrude into an individual's legitimate expectation of privacy. Many forms of speech, oral or written, are intended to annoy. Letters to the editor of a newspaper are sometimes intended to annoy their subjects. We do not criminalize such speech, even if intended to annoy, because the manner of speech is non-intrusive.
>
> Thus, in enforcing subsection (a) of the harassment statue, we must focus on the mode of speech employed. That subsection of our statute, like those elsewhere, is aimed, not at the content of the offending statements but rather at the manner in which they were communicated. Speech that does not invade one's privacy by its anonymity, offensive coarseness, or extreme inconvenience does not lose constitutional protection even when it is annoying. Because subsection (a) has criminalized communications that are made anonymously or in offensively course language or at extremely inconvenient hours, we assume that the Legislature did not intend to criminalize communications under subsection (a) that are made in inoffensive language, at convenient hours, or in the communicator's own name.[36]

While the Court held that the defendant had been improperly convicted under N.J.S.A. 2C:33-4(a) because the mailings did not invade Mary's privacy to the extent of constituting harassment, the Court cautioned that the

trial court "is permitted to examine the totality of the circumstances, especially and including the context of domestic violence, in determining whether subsection (a) has been violated."[37]

Furthermore, the Court explained that in determining whether a defendant's conduct is likely to cause the required annoyance or alarm to the victim, "defendant's past conduct toward the victim and the relationship's history must be taken into account. The incidents under scrutiny must be examined in light of the totality of the circumstances."[38] The Court further explained:

> This is particularly true in domestic violence cases in which a cycle of violent behavior is evident. Indeed, courts are required to consider "[t]he previous history of domestic violence between the [parties], including threats, harassment and physical abuse" when determining whether the 1991 Act has been violated. N.J.S.A. 2C:25-29(a)(1)….
>
> The fears of a domestic violence victim and the turmoil she or he has experienced should not be trivialized. In different contexts, a recipient of a torn-up court order may not be alarmed or seriously annoyed, but some victims of domestic violence may rightly view a course of communicative conduct as seriously annoying, alarming, or threatening, or as all of those things….
>
> We recognize that in the area of domestic violence, as in some other areas in our law, some people may attempt to use the process as a sword rather than a shield. The judicial system must once again rely on the trial courts as the gatekeeper.[39]

Finally, the Court found that since the final restraining order specifically prohibited the defendant from having any contact with Mary and her three children, or from making harassing communications to them, the defendant's act of sending the two mailings constituted written contact with Mary, in violation of the final restraining order.[40]

Cesare v. Cesare

At issue before the Court in *Cesare v. Cesare* was the standard of appellate review that should be applied, and the role that past history of abuse should play in evaluating a domestic violence complaint that alleges terroristic threats and harassment.[41]

In support of her domestic violence claim, the plaintiff asserted that during the course of an argument regarding possible divorce and related ancillary issues, the defendant threatened that she would never get custody of the parties' three children and that he would never sell their house or split the sale proceeds with her.[42] The plaintiff further asserted that when she asked the defendant if he thought he would have a choice in those decisions once the court became involved, the defendant responded, "As I've told you before, I do have a choice, and you will not get either of those things."[43] The plaintiff testified at trial that she interpreted that language as a threat on her life, because the defendant had previously threatened that he would kill her before he allowed her to get custody of the children or gave her any of the marital assets.[44]

In reviewing the matter, the New Jersey Supreme Court noted that N.J.S.A. 2C:25-29(a) requires that acts claimed to be domestic violence be evaluated in light of the previous history of domestic violence between the parties.[45] Thus, while a court is not required to find a past history of abuse before determining an act of domestic violence occurred, "a court must at least consider that factor in the course of its analysis."[46] Within this context, the Court explained that "not only may one sufficiently egregious action constitute domestic violence under the Act, even with no history of abuse between the parties, but a court may also determine that an ambiguous incident qualifies as prohibited conduct, based on a finding of violence in the parties' past."[47]

With regard to the plaintiff's claim that terroristic threats had been made by the defendant, the Court noted that terroristic threats must be measured by an objective standard.[48] To establish that a terroristic threat was made, each of the following elements must be established: "(1) the defendant in fact threatened the plaintiff; (2) the defendant intended to so threaten the plaintiff; and (3) a reasonable person would have believed the threat."[49] Moreover, the Court explained that while a plaintiff's "actual fear" should not be considered under an objective standard, "courts must still consider a plaintiff's individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat."[50] Thus, a court must consider any past history of abuse by a defendant as part of a plaintiff's individual circumstances and "factor that history into its reasonable person determination."[51]

Similarly, consistent with *State v. Hoffman*, a domestic

violence complaint charging harassment also requires an evaluation of the plaintiff's circumstances.[52] In this regard, the Court explained:

> Because a particular history can greatly affect the context of a domestic violence dispute, trial courts must weigh the entire relationship between the parties and must specifically set forth their findings of fact in that regard. Furthermore, in making their determinations, trial courts can consider evidence of a defendant's prior abusive acts regardless of whether those acts have been the subject of domestic violence adjudication.[53]

The Court further explained that the scope of review of a trial court's fact-finding function is limited, and that deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility."[54] Furthermore, since matrimonial courts possess "special expertise in the field of domestic relations," "appellate courts should accord deference to family court factfinding."[55]

Based upon the foregoing, and given the deferential standard of appellate review, the Court found that "there was sufficient, credible evidence for the trial court to have found that defendant committed an act of domestic violence against plaintiff."[56] Specifically, the Court held that sufficient, credible evidence existed for the trial court to have found that the defendant committed terroristic threats. Although the words utilized by the defendant did not contain an explicit threat to kill, the Court found the surrounding circumstances were such that the trial court could appropriately have found that "plaintiff was right in her idea of leaving her house immediately, feeling that she was threatened."[57]

The Court also concluded that credible evidence existed upon which the trial court could have based a finding of harassment. In so holding, the Court explained:

> The trial court reviewed defendant's history of threats and violence, including statements about tying his wife to the railroad tracks or blowing her up in the shed, as well as the fact that there were guns in the house, and found that "there was some other motive in this case." That motive, presumably an intent to harass, could certainly be found to "disturb, irritate, or bother" a woman in plaintiff's situation.[58]

H.E.S. v. J.C.S.

The primary issue before the Court in *H.E.S. v. J.C.S.* was "whether defendant's right to due process was violated when he received notice of a domestic violence complaint less than twenty-four hours before trial and when a finding of domestic violence was based on an allegation not contained in the complaint."[59]

The parties in the matter had been married for 18 years and were involved in divorce proceedings at the time of the alleged acts of domestic violence. As a result of the alleged acts of domestic violence, a temporary restraining order was entered on behalf of the plaintiff. The defendant was served with the temporary restraining order on Aug. 23, 2000. Trial took place the next day, Aug. 24, 2000, despite the request of the defendant's counsel for a continuance.[60]

During trial, over the objections of the defendant's counsel, the plaintiff was permitted to testify about past acts of domestic violence that were not included in the complaint. The plaintiff was also permitted to testify about the defendant's use of a hidden camera and microphone in her bedroom, even though no such allegation was set forth in the complaint. The trial court did, however, permit a one-day continuance of the matter to permit the defendant's attorney to confer with his client. The next day, the defendant's attorney requested another continuance, arguing that he did not have sufficient time to prepare his defense to the allegations of prior acts of domestic violence he had not known about until the previous day, and that additional time was needed for the issuance of subpoenas to police officers who had been called to the parties' home. The trial court denied the request for a continuance, and the trial proceeded.[61]

On appeal of the entry of the final restraining order, the defendant alleged two due process violations: 1) that the trial court erred in compelling him to defend against a final restraining order within less than 24 hours of service of the temporary restraining order; and 2) that the trial court erred by refusing to grant an adjournment of the trial after the plaintiff testified about allegations not included in the complaint.[62] The Court agreed with the defendant that his due process rights had been violated, and noted that even though the Prevention of Domestic

Violence Act requires that a final hearing be held within 10 days of the filing of a complaint, "to the extent that compliance with the ten[]day provision precludes meaningful notice and an opportunity to defend, the provision must yield to due process requirements."[63]

The Court found the defendant's due process rights were also violated by the trial court's refusal to grant an adjournment after the plaintiff alleged an incident of domestic violence not contained in the complaint (*i.e.*, use of a hidden camera and microphone in the plaintiff's bedroom), and by the trial court's decision to grant a final restraining order on the basis of that allegation. In so holding, the Court explained that "[i]t constitutes a fundamental violation of due process to convert a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which are not even alleged in the complaint."[64]

Silver v. Silver

In *Silver v. Silver*, the parties were married and the parents of two children. Following the parties' separation, the plaintiff filed a complaint for divorce.[65]

During the pending divorce proceedings, the plaintiff and the defendant each filed domestic violence complaints against the other, alleging assault and seeking the issuance of restraining orders. Both complaints stated there was no history of domestic violence. Temporary restraining orders were entered on each complaint, and the matter subsequently proceeded to trial.[66]

Although the trial judge found the defendant had committed acts of assault and criminal trespass, he held that they were not acts of domestic violence. Thus, at issue on appeal was whether the commission of acts of simple assault and criminal trespass against a person protected under the Prevention of Domestic Violence Act constitutes domestic violence.[67]

In reviewing the matter, the Appellate Division explained that the task of a trial judge considering a domestic violence complaint, where jurisdictional requirements have been met, is two-fold. First, the trial judge "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19a has occurred."[68] In performing this function, "the court must consider the evidence in light of whether there is a previous history of domestic violence, and whether there exists immediate danger to person or property."[69]

Once a finding of the commission of a predicate act of domestic violence has been made, the second inquiry is whether the court should enter a restraining order that provides protection for the victim. As to this element, the Appellate Division noted that "the Legislature did not intend that the commission of one of these acts [contained in N.J.S.A. 2C:25-19a] automatically mandates the issuance of a domestic violence restraining order."[70] Instead, the Court explained:

> This second inquiry, therefore, begins after the plaintiff has established, by a preponderance of the evidence, the commission of one of the enumerated predicate acts "upon a person protected under this act by an adult or an emancipated minor[.]" N.J.S.A. 2C:25-19a. Although this second determination – whether a domestic violence restraining order should be issued – is most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse.[71]

J.D. v. M.D.F.

At issue in *J.D. v. M.D.F.* was whether the defendant's due process rights were violated during domestic violence proceedings that resulted in the entry of a final restraining order.[72]

The parties were engaged in a long-term dating relationship, from 1993 until 2006, and were the parents of two children.[73] Following the parties' separation, the plaintiff and the parties' two children remained in the home.[74] By the time of the events in issue, the plaintiff had begun a new relationship with another male.[75]

The plaintiff alleged in the domestic violence complaint that she and her boyfriend saw the defendant outside of the residence at 1:42 a.m. taking photographs, and that the defendant then promptly drove away.[76] The plaintiff further alleged in the complaint that the defendant "did this for the sole purpose of harassing plain[tiff] and attempting to cause strain in plain[tiff]'s present relationship."[77]

During trial, the plaintiff testified regarding the basis for her request for a restraining order. The trial court thereafter inquired of the plaintiff whether there was "[a]nything else you think I should know?"[78] The

plaintiff responded by referring to "multiple incidents" that had not been included in her domestic violence complaint as being part of the prior history of domestic violence between the parties.[79] As the plaintiff's testimony continued, the trial court again asked whether there was "anything else you think I should know?"[80] In response, the plaintiff expanded her prior testimony.[81]

The court thereafter denied the defendant the opportunity to cross-examine the plaintiff's boyfriend, and entered a final restraining order on behalf of the plaintiff.[82]

In reviewing the defendant's claim that his due process rights were violated when the trial court permitted the plaintiff to testify about issues not included in her complaint, the Appellate Division explained that "ordinary due process protections apply in the domestic violence context, notwithstanding the shortened time frames for conducting a hearing that are imposed by the statute."[83] The Appellate Division reiterated that due process restricts the trial court from converting "a hearing on a complaint alleging one act of domestic violence into a hearing on other acts of domestic violence which are not even alleged in the complaint."[84]

Notwithstanding the foregoing, the Appellate Division recognized that plaintiffs seeking protection under the Prevention of Domestic Violence Act "often file complaints that reveal limited information about the prior history between the parties, only to expand upon that history of prior disputes when appearing in open court."[85] Moreover, the Appellate Division noted that it is common for the trial court to attempt to "elicit a fuller picture of the circumstances."[86] Nevertheless, the Appellate Division explained:

> That reality is not inconsistent with affording defendants the protections of due process to which they are entitled…To begin with, trial courts should use the allegations set forth in the complaint to guide their questioning of plaintiffs, avoiding the sort of questions that induced plaintiff in this appeal to abandon the history revealed in the complaint in favor of entirely new allegations. That does not mean that trial courts must limit plaintiffs to the precise history revealed in a complaint, because the testimony might reveal that there are additional prior events that are significant to the court's evaluation, particularly if the events are ambiguous. Rather, the court must recognize that if it allows that history to be expanded, it has permitted an amendment to the complaint and must proceed accordingly….
>
> [I]n all cases the trial court must ensure that defendant is afforded an adequate opportunity to be apprised of those allegations and to prepare. When permitting plaintiff to expand upon the alleged prior incidents and thereby allowing an amendment to the complaint, the court also should have recognized the due process implication of defendant's suggestion that he was unprepared to defend himself… Our courts have broad discretion to reject a request for an adjournment that is ill founded or designed only to create delay, but they should liberally grant one that is based on an expansion of factual assertions that form the heart of the complaint for relief.
>
> This is especially true because there is no risk to plaintiff based on such a procedure; courts are empowered to continue temporary restraints during the pendency of an adjournment, thus fully protecting the putative victim while ensuring that defendant's due process rights are safeguarded as well.[87]

Finally, the Appellate Division found that the defendant's due process rights had also been violated when the court denied him the right to cross-examine the plaintiff's boyfriend at trial.[88]

N.B. v. S.K.

In *N.B. v. S.K.*, the parties were married in 1993. The plaintiff obtained a final restraining order after the defendant pushed her down a flight of stairs. The defendant obtained a final restraining order against the plaintiff in 2002 for reasons not set forth in the record.[89]

The parties thereafter entered into a property settlement agreement (PSA) in 2003, while in the midst of a divorce trial. The PSA provided for the vacation of the final restraining orders, and contained the parties' mutual agreement to be "enjoined and restrained from harassing" the other.[90] The PSA also provided that all communications between the parties "shall be by e-mail and shall be related to the children only, except to the extent the communications are in the presence of or otherwise monitored by the parenting facilitator."[91] A dual judgment of divorce was thereafter entered by the trial court, incorporating the PSA.[92]

As a result of the defendant's subsequent violations of the restraints set forth in the PSA, the plaintiff moved for enforcement. That application resulted in the entry of a court order on Oct. 20, 2006, that directed the parties to stop harassing and annoying each other, and further directed that the defendant was to communicate with the plaintiff "by e-mail only, about the children only."[93]

In Jan. 2009, the plaintiff filed a domestic violence complaint alleging the defendant had made annoying and harassing communications to her. The trial judge entered an order dismissing the domestic violence action and directed adherence to the 2006 matrimonial order referenced above. The 2009 order further provided that "[a]ny violation of this directive shall allow the [d]efendant to seek the issuance of another [r]estraining [o]rder."[94]

Thereafter, in 2012, the plaintiff filed another domestic violence complaint alleging the defendant had made harassing communications when he left her several voicemail messages, and that he "called her almost every day."[95] At trial, the plaintiff attempted to provide testimony and evidence about the prior proceedings and prior court orders as context, in support of her application for a final restraining order. However, the trial judge largely prohibited the plaintiff from moving forward in this regard, finding that no court had previously found a violation of a matrimonial restraining order to constitute an act of domestic violence.[96]

Following the involuntary dismissal of the plaintiff's 2012 domestic violence complaint, the plaintiff moved for relief from the 2003 order that had vacated the 2002 final restraining order; in the alternative, she sought reconsideration of the dismissal of her domestic violence complaint. These applications were both denied by the trial court, and an appeal ensued.[97]

In reviewing the matter, the Appellate Division focused upon what significance, if any, a defendant's violation of civil restraints should be given in a domestic violence action. In considering the issue, the Appellate Division explained:

> In short, courts must consider the totality of the circumstances to determine whether the harassment statute has been violated. Whether conduct rises to the level of harassment or not is fact-sensitive, and the smallest additional fact or the slightest alternation in context, particularly if based on a history between the parties, may make a considerable difference in the application of the PDVA….
>
> Whether the five voice messages in question were meant to or did in fact alarm or seriously annoy plaintiff, thereby warranting entry of the FRO plaintiff sought, can only be fairly understood in light of this history. Plaintiff was entitled to submit evidence of the past violations of the matrimonial restraints, not because the violations of those orders are per se "acts of domestic violence"—they are not—but because those past violations support the claim that defendant engaged in acts of harassment by making communications "with purpose to alarm or seriously annoy." That evidence explains why the recipient would be alarmed or seriously annoyed by the communications.[98]

Based upon the foregoing, the Appellate Division held that the trial court erred by excluding the defendant's past violations of the civil restraints and by involuntarily dismissing the plaintiff's domestic violence complaint.[99]

State v. D.G.M.

At issue in *State v. D.G.M.* was whether the defendant "violated the 'no contact or communication' provision of an amended final restraining order…by sitting near and briefly filming [his former wife] Joan at their six-year old son's soccer game."[100]

In 2010, Joan filed a domestic violence complaint, and subsequently obtained a final restraining order against the defendant.[101] The final restraining order was later amended on a few occasions for child-related reasons.[102] The amendments did not, however, otherwise alter the standard provision in the original final restraining order that prohibited the defendant "from having any (oral, written, personal, electronic or other) form of contact or communication with" Joan.[103]

The defendant was charged with violating the final restraining order following an allegation that the defendant violated the final restraining order "by sitting directly next to" Joan during the soccer game and "us[ing] a cellular phone to videotape or take pictures" of her.[104]

At the onset of its analysis, the Appellate Division noted that while the United States Supreme Court has recognized the right "to raise one's children [is an] essen-

tial, basic right," this fundamental right may be limited when an act of domestic violence is committed.[105] The Appellate Division noted that the trial judge who entered and amended the final restraining order "could have crafted the order in any number of ways that would have rendered what occurred here a violation of the restraining order. For example, defendant could have been precluded from attending the child's soccer games, or other school events, or he could have been barred from coming closer to Joan than a particular amount of feet. We also assume N.J.S.A. 2C:25-29(b) allows our courts to specifically prohibit a defendant from photographing or filming a domestic violence victim or others."[106] The Appellate Division thus discerned from the trial judge's findings that it was the act of filming Joan that constituted "contact" that violated the terms of the final restraining order.[107]

More specifically, the Appellate Division opined that "if defendant violated the FRO it was because he was engaged in sending a message or conveying thoughts by pointing a cellphone's camera at Joan."[108] The Appellate Division explained:

> The message may not have been understandable to strangers but likely had meaning for the parties. Moreover, whether the message was intelligible is not the point. A defendant's mere act of filming or even simply staring at a victim sends a message and, in many instances, a message sufficiently alarming or annoying, or even threatening, so at to constitute the type of conduct the Legislature had in mind when enacting N.J.S.A. 2C:25-29(b)(7). Accordingly, we hold a defendant restrained by a similarly-worded FRO engages in a "communication" by pointing a camera at a domestic violence victim from a standpoint close enough as to be observed by the victim. For this reason, we conclude that defendant engaged in communication with defendant [sic] when he filmed her, albeit very briefly, with his cellphone.[109]

In the instant matter, however, the Appellate Division held that the defendant was entitled to the application of the rule of lenity (*i.e.,* that an accused is entitled to "fair warning…of what the law intends to do if a certain line is passed").[110] Accordingly, based upon the Appellate Division's finding that "until today's holding, no defendant would fairly be expected to understand that the filming or photographing of the victim falls with the scope of 'contact' or 'communication' contained in either N.J.S.A. 2C:25-29(b)(7), or an FRO crafted in accordance with that statute," the doctrine of lenity was applied and the defendant's conviction reversed.[111]

O.P. v. L.G.-P.

In *O.P. v. L.G.-P.*, the parties were married and the parents of one child, born in 2007.[112] In the parties' 2009 property settlement agreement (PSA), they agreed to significant communication with one another about their child.[113] If the parties were unable to resolve future disputes, they agreed to mediate the issues "through a mutually agreed upon mediator before seeking court intervention."[114] After various post-judgment motions were heard, a final restraining order was entered against the plaintiff on Dec. 3, 2010.[115]

Following the entry of the final restraining order, the parties again returned to court on a fourth set of *pro se* motions, at which time the court entered an order directing the parties to engage in mediation to resolve the issues raised in the pending motions.[116]

In considering the matter, the Appellate Division held that if a final restraining order "contains a prohibition against contact between the parties, and the domestic violence victim does not seek such contact, a judge in a future proceeding should not suggest that the victim amend the no-contact provision."[117] Instead, the judge in the post-judgment matrimonial matter "should have assumed that the judge who ordered the FRO no-contact provision did so pursuant to the appropriate legal standards, and should not have encouraged the domestic violence victim to lessen the protective language of the FRO."[118] Thus, the Appellate Division explained:

> Knowing that she would be in danger without such a protective order, the motion court should not have urged L.G.P. to allow O.P. greater contact with her.
>
> Neither should the court have ordered the parties to work out contested issues through mediation. Although a court rule and directive preclude mediation of certain issues when an FRO is in place, they do not address the situation where a preexisting PSA requires both parental communication and mediation.[119]

While the Appellate Division recognized New Jersey's

"strong public policy favoring enforcement of agreements," it found that "[p]rovisions in a PSA that were reasonable at the time of the agreement…may well become unreasonable upon the entry of an FRO."[120] Thus, the Appellate Division directed that when circumstances change, the parties may return to court, since "alternative dispute resolution methods are not safe when an FRO has been entered."[121] In this regard, the Appellate Division concluded:

> Our courts have recognized that those who commit acts of domestic violence have an unhealthy need to control and dominate their partners and frequently do not stop their abusive behavior despite a court order. Thus, even if mediation could be conducted in a safe environment, or the parties kept in separate rooms, and the parties are represented by counsel, the bargaining position of the parties could well be distorted by past violence. Mediation is entirely prohibited by statute in domestic violence matters….When parties agree to mediation at the time of divorce, they do not anticipate the subsequent entry of an FRO. For reasons of safety, and to conform with the strong public policy of this State, mediation should not be ordered after a subsequent FRO has been entered, even in an effort to confirm with the provisions of a PSA.[122]

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Endnotes

1. 280 N.J. Super. 47 (App. Div. 1995).
2. *Id*. at 49.
3. *Id*.
4. *Id*. at 52.
5. *Id*.
6. *Id*. at 53.
7. *Id*. at 54.
8. *Id*. at 55.
9. *Id*.
10. *Id*.
11. *Id*. at 56.
12. *Id*. at 56-57.
13. 281 N.J. Super. 243, 244 (App. Div. 1995).
14. *Id*. at 245.
15. *Id*.
16. *Id*. at 245-46.
17. *Id*. at 246.
18. *Id*.
19. *Id*. at 249.
20. *Id*.
21. *Id*.
22. *Id*. at 250.
23. 149 N.J. 564, 570 (1997).
24. *Id*. at 570-71.
25. *Id*. at 571.
26. *Id*. at 572.
27. *Id*. at 573.
28. *Id*. at 574.
29. *Id*.
30. *Id*. at 576.
31. *Id*.
32. *Id*. at 577.
33. *Id*.
34. *Id*.
35. *Id*. at 580.
36. *Id*. at 583-584 (internal citations omitted).
37. *Id*. at 584.
38. *Id*. at 585.
39. *Id*. at 585-86.
40. *Id*. at 589-590.
41. 154 N.J. 394, 397 (1998).
42. *Id*. at 406.
43. *Id*.
44. *Id*.
45. *Id*. at 402.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*. at 403.
51. *Id*. at 403.
52. *Id*. at 404.

53. *Id*. at 405.
54. *Id*. at 412 (*citing In re Return of Weapons to J.W.D.*, 149 N.J. 108, 117 (1997)).
55. *Id*. at 412-413.
56. *Id*. at 413.
57. *Id*. at 414.
58. *Id*.
59. 175 N.J. 309, 314 (2003).
60. *Id*. at 316.
61. *Id*. at 318.
62. *Id*. at 320.
63. *Id*. at 323.
64. *Id*. at 324-325.
65. 387 N.J. Super. 112, 114 (App. Div. 2006).
66. *Id*. at 115.
67. Id. at 122.
68. *Id*. at 125.
69. *Id*. at 126.
70. *Id*. at 126-127.
71. *Id*. at 127.
72. 207 N.J. 458, 465 (2011).
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*. at 466.
77. *Id*.
78. *Id*. at 467.
79. *Id*. at 468.
80. *Id*.
81. *Id*..
82. *Id*. at 470.
83. *Id*. at 478 (internal citations omitted).
84. *Id*. (*citing H.E.S. v. J.C.S.*, 175 N.J. 309, 322 (2003).
85. *Id*. at 479.
86. *Id*.
87. *Id*. at 479-480 (internal citations omitted).
88. *Id*. at 481.
89. 435 N.J. Super. 298, 301 (App. Div. 2014).
90. *Id*. at 301.
91. *Id*. at 301.
92. *Id*. at 301.
93. *Id*. at 301.
94. *Id*. at 302.
95. *Id*. at 302.
96. *Id*. at 302.
97. *Id*. at 303-05.
98. *Id*. at 307-08.
99. *Id*. at 308.
100. 439 N.J. Super. 630, 633 (App. Div. 2015).
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*. at 634.
105. *Id*. (*citing Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).
106. *Id*. at 636 (internal citations omitted).
107. *Id*. at 640.
108. *Id*.
109. *Id*. at 640-41 (internal citations omitted).
110. *Id*. at 641 (*citing McBoyle v. United States*, 283 U.S. 25, 27 (1931)).
111. *Id*.
112. 440 N.J. Super. 146, 148 (App. Div. 2015).
113. *Id*.
114. *Id*. at 149.
115. *Id*.
116. *Id*.
117. *Id*. at 154.
118. *Id*.
119. *Id*. at 154-55.
120. *Id*. at 156.
121. *Id*.
122. *Id*. at 156-57 (internal citations omitted).

Domestic Violence: Predicate Acts, with a Focus on Cyber Harassment

by Andrea B. White and Joseph Dellera

It is well established in New Jersey that the Legislature considers domestic violence a serious crime against society.[1] Domestic violence is a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control.[2] The Prevention of Domestic Violence Act (PDVA) lays out the following predicate acts that constitute domestic violence when committed upon a protected person under the act:

1. Homicide, N.J.S. 2C:11-1 *et seq.*
2. Assault, N.J.S. 2C:12-1
3. Terroristic threats, N.J.S. 2C:12-3
4. Kidnapping, N.J.S. 2C:13-1
5. Criminal restraint, N.J.S. 2C:13-2
6. False imprisonment, N.J.S. 2C:13-3
7. Sexual assault, N.J.S. 2C:14-2
8. Criminal sexual contact, N.J.S. 2C:14-3
9. Lewdness, N.J.S. 2C:14-4
10. Criminal mischief, N.J.S. 2C:17-3
11. Burglary, N.J.S. 2C:18-2
12. Criminal trespass, N.J.S. 2C:18-3
13. Harassment, N.J.S. 2C:33-4
14. Stalking, P.L.1992, c. 209 (C.2C:12-10)
15. Criminal coercion, N.J.S. 2C:13-5
16. Robbery, N.J.S. 2C:15-1
17. Contempt of a domestic violence order pursuant to subsection b. of N.J.S. 2C:29-9 that constitutes a crime or disorderly persons offense
18. Any other crime involving risk of death or serious bodily injury to a person protected under the Prevention of Domestic Violence Act of 1991, P.L.1991, c. 261 (C.2C:25-17 *et al.*)
19. Cyber-harassment, P.L.2013, c. 272 (C.2C:33-4.1).[3]

These predicate acts are all codified in the penal code, and are not new offenses specific to the PDVA.[4] However, this domestic violence analysis is much more expansive than in the criminal context for two key reasons: The standard of proof in the domestic violence context is "by a preponderance of the evidence"[5] and the domestic violence analysis should be holistic and consider the entire relationship between the parties, including past history, and of the alleged victim.[6] The reason these offenses are specifically codified in the PDVA in 1991 (and later for some of the new crimes added) is because the Legislature found that "even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context."[7]

As previously mentioned, the burden of proof in a domestic violence case for any type of civil penalty, such as a restraining order, is "a preponderance of the evidence."[8] While there is a list of predicate acts, they are not *per se* acts of domestic violence that warrant a restraining order.

There are essentially three steps that need to be proved by the plaintiff: 1) the relationship between the parties; 2) the predicate act of domestic violence as enumerated in the statute; and 3) the need for a restraining order.[9] The courts have ruled that in the absence of these factors, there cannot be a final restraining order entered even if there is a conviction in criminal court for the predicate act.[10] When assessing whether an act is domestic violence, the courts will rely on the previous history between the parties.[11] So, "while a single sufficiently egregious action may constitute domestic violence even if there is no history of abuse between the parties, a court may also determine that an ambiguous incident qualifies as domestic violence based on finding previous acts of violence."[12]

Moreover, any action in a domestic violence action does not preclude, nor does it bind, a criminal proceeding (or vice versa).[13] This is important because the interests at play are different in the criminal context and the domestic violence context. "As the Prevention of Domestic Violence Act demonstrates, the purpose of an action in

the Family Part, designed to protect an individual victim, is quite different than a criminal case in which the State prosecutes a defendant on behalf of the public interest. The Act was enacted 'to assure the victims of domestic violence the maximum protection from abuse the law can provide.'"[14] Moreover, there are provisions in the domestic violence statute that prohibit the use of testimony by the plaintiff or the defendant in a domestic violence matter in a criminal proceeding unless "the trial testimony of a DV complainant is used by the [witness] during cross-examination to impeach contradictory or inconsistent testimony that is material to the charges against the defendant, or to show bias, prejudice, or ulterior motives on the part of the witness."[15]

Specific Acts

As of this writing, the predicate offense with the most reported decisions is harassment, followed by assault.[16]

Cyber Harassment

The newest offense that was added to the PDVA is cyber harassment. Cyber harassment was added to the PDVA in Dec. 2016, to make it a predicate act of domestic violence.[17] Cyber harassment is criminalized in New Jersey as N.J.S.A. 2C:33-4.1, and reads as follows:

a A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person:
   (1) threatens to inflict injury or physical harm to any person or the property of any person;
   (2) knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person; or
   (3) threatens to commit any crime against the person or the person's property.

b. Cyber-harassment is a crime of the fourth degree, unless the person is 21 years of age or older at the time of the offense and impersonates a minor for the purpose of cyber-harassing a minor, in which case it is a crime of the third degree.

c. If a minor under the age of 16 is adjudicated delinquent for cyber-harassment, the court may order as a condition of the sentence that the minor, accompanied by a parent or guardian, complete, in a satisfactory manner, one or both of the following:
   (1) a class or training program intended to reduce the tendency toward cyber-harassment behavior; or
   (2) a class or training program intended to bring awareness to the dangers associated with cyber-harassment.

d. A parent or guardian who fails to comply with a condition imposed by the court pursuant to subsection c. of this section is a disorderly person and shall be fined not more than $25 for a first offense and not more than $100 for each subsequent offense.[18]

The Legislature recognized the need to include cyber harassment in the PDVA in an attempt to match with technological advancements and the affect they have on society. Some of the potential causes of action that may give rise to a violation of cyber harassment are posting threatening comments on social media, sending unwanted messages via the internet, or even the posting of 'revenge porn' on a website or on a social media network.

One of the seminal cases involving a cyber harassment-type of issue is *Elonis v. U.S.*[19] Although the case was remanded for an improper jury instruction, it demonstrated the need and necessity to have a statute that criminalized specific harassing conduct that is committed via the internet, particularly, through social media websites.[20] This was further substantiated when, on remand, the court ruled that the error was harmless and reinstituted the conviction because of the threatening Facebook posts.[21]

One of the major contributors to the cyber harassment statute was the death of Tyler Clementi, the freshman at Rutgers who committed suicide after he was covertly recorded by his roommate while in an intimate exchange with another male.[22] However, at that time, there was no crime classification of cyber harassment, and the prosecutors were limited in their options. This is just one example of a crime that highlighted the need for a cyber harassment statute.

Because the statute is so new in New Jersey, having been established in 2014, there are no precedential decisions on cyber harassment, even in the criminal context. However, one can look to New York and Pennsylvania for guidance.

The Protection From Abuse Act (PFA) is Pennsylvania's version of New Jersey's PDVA, and "the purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse."[23] Pennsylvania has ruled that some social media posts could violate the PFA and constitute criminal contempt of an order.[24] The court ruled that although the man refrained from using the victim's name in some of his social media posts, the posts and images were clearly about the victim and the recent PFA order.[25] Moreover, the court ruled that this type of government regulation, which limits someone's content-neutral freedom of expression, is not subject to strict scrutiny, and the court should apply the test from *United States v. O'Brien*.[26] The court ruled that in this instance, where the PFA order is tailored in such a specific way to bar *all* posts that *target* the victim, this passes from a constitutional perspective because it does not reference the content of the regulated speech, it is narrowly tailored to serve a significant governmental interest unrelated to speech, and it leaves open ample alternative channels for communication of the information.[27]

In New York, the court struck down a law to criminalize 'cyber bullying' harassment of school children because it was overbroad.[28] This case involved a 16-year-old posting various sexual information about his classmates on a public internet website. He was prosecuted under a cyber bullying law.[29] However, the court discussed that had the law been more narrowly tailored,[30] this type of behavior would not have been protected by the First Amendment.[31]

'Revenge porn' is a bit of a misleading term; a better description is "nonconsensual pornography that is distributed without the subject's consent, even if there was consent for the initial creation of the media," although that does not have quite the same ring to it.[32] Not only is this type of behavior degrading and a violation of one's privacy, it can alter the course of one's life. Despite this, revenge porn often is not criminalized. For example, in *People v. Barber*, a New York court dismissed the charges against the defendant because posting nude photos of the complainant, who was then his girlfriend, to his Twitter account and sending them to her employer and sister without her consent were not criminalized under any New York statute.[33]

Although New Jersey actually has criminalized revenge porn, it is one of very few states to do so.[34] Even though this statute exists in New Jersey, it does not protect someone as a predicate act of domestic violence. Therefore, if one wanted to use revenge porn in New Jersey to satisfy the PDVA, it must be tied in with one of the predicate acts, with the most sensible being cyber harassment[35] because of the ease with which these images can be disseminated through the internet.

Future Considerations

Some attacks wound the soul rather than the flesh, and New Jersey has helped to address this by including cyber harassment as the newest predicate act to the PDVA. Cyber harassment demonstrates the need for the Legislature to be proactive rather than reactive to its citizens' needs regarding technological advancements, especially in light of other states that do not criminalize such behavior, or do not include it in their domestic violence statutes.

It is also important to keep in mind that besides cyber harassment as a predicate act of domestic violence, communications via the internet, such as a Facebook message, an Instagram post, or even a Snapchat message, can be considered contact that could violate a temporary restraining order/final restraining order.

As technology advances, so must the law, to ensure order and civility. The inclusion of cyber harassment illustrates New Jersey's desire to be ahead of the curve in terms of protecting its victims of domestic violence.

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Endnotes

1. N.J.S.A. 2C:25-18; *see also N.G. v. J.P.*, 426 N.J. Super. 398 (App. Div. 2012).
2. *Corrente v. Corrente*, 281 N.J. Super. 243, 246 (App. Div. 1995).
3. N.J.S.A. 2C:25-19.
4. *Cesare v. Cesare*, 154 N.J. 394, 401 (1998) *citing Corrente v. Corrente*, 281 N.J. Super. 243, 248 (App. Div. 1995).
5. *Id*.
6. *Id. citing* N.J.S.A. 2C:25–29(a); *see also State v. Hoffman*, 149 N.J. 564, 584 (1997) (discussing whether the harassment statute was violated by looking at the totality of the circumstances).
7. N.J.S.A. 2C:25-18.
8. N.J.S.A. 2C:25-29a. *See also Crespo v. Crespo*, 201 N.J. 207, 209 (2010) (holding that the act is constitutional and "'the preponderance standard, as applied in domestic violence matters, conforms with the requirements of due process[.]'" (*quoting Crespo v. Crespo*, 408 N.J. Super. 25, 37 (App. Div. 2009)).
9. *See S.D. v. M.J.R.*, 415 N.J. Super. 417 (App. Div. 2010); *see also Silver v. Silver*, 387 N.J. Super. 112 (App. Div. 2006).
10. *Silver, supra*, 387 N.J. Super. at 124.
11. *Cesare v. Cesare*, 154 N.J. at 402.
12. § 47.2.Legislative findings and purpose, 12 N.J. Prac., Family Law And Practice § 47.2 *citing Kamen v. Egan*, 322 N.J. Super. 222, 227 (App. Div. 1999), *citing Corrente v. Corrente*, 281 N.J. Super. 243, 248 (App. Div. 1995), and *Peranio v. Peranio*, 280 N.J. Super. 47, 54 (App. Div. 1995).
13. *Id*. at 227.
14. *S.D. v. M.J.R.*, 415 N.J. Super. 417, 441 (App. Div. 2010) *citing State v. Brown*, 394 N.J. Super. 492, 504 (App. Div. 2007) (citations omitted).
15. *State v. Duprey*, 427 N.J. Super. 314, 323 (App. Div. 2012).
16. Winters and Baldwin, § 47.5.Offenses defining domestic violence, 12 N.J. Prac., Family Law And Practice § 47.5
17. *See* P.L.2013, c.272(C.2C:33-4.1).
18. N.J.S.A. 2C:33-4.1
19. *Enlonis v. U.S.*, 135 S. Ct. 2001 (2015); (husband used Facebook to post a self-made rap with disparaging and violent lyrics about his wife who left him was found to have lacked the *mens rea* necessary for a conviction under 18 U.S.C. § 875(c)).
20. *Elonis*, 135 S. Ct. at 2017 (Justice Alito, concurring in part and dissenting in part) (threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace).
21. *United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016) (on remand from SCOTUS for improper jury instruction).
22. Ian Parker, The Story of a Suicide (2012) http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide.
23. *Buchhalter v. Buchhalter*, 959 A.2d 1260, 1262 (Pa. Super. 2008).
24. *Commonwealth v. Lambert*, 2016 PA Super. 200, 147 A.3d 1221 (2016) (PFA issued against man that said he could not post on social media about the victim).
25. *Id*. at 1227.
26. 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968). *Lambert*, 147 A.3d at 1228.
27. *Id.; see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L.Ed. 2d 221 (1984).
28. *People v. Marquan M.,* 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079, 42 Media L. Rep. (BNA) 2005 (2014).
29. *Id*.
30. *Id*. at 10 (*i.e.*, limiting (1) sexually explicit photographs; (2) private or personal sexual information; and (3) false sexual information with no legitimate public, personal or private purpose).
31. *Marquan M*., 24 N.Y.3d at 8.
32. Franks, What is Revenge Porn, Cyber Civil Rights Initiative, https://www.cybercivilrights.org/faqs/.
33. *People v. Barber*, 42 Misc. 3d 1225(A), 992 N.Y.S.2d 159 (Crim. Ct. 2014).
34. N.J.S.A. 2C:14-9.
35. N.J.S.A. 2C:33-4.1(a)(2).