

In the Supreme Court of New Jersey

Docket No.

	:	On Certification from the
	:	Superior Court of
D.N.,	:	New Jersey, Appellate Division,
	:	granted , 2013
Plaintiff/Respondent,	:	
	:	Civil Action
v.	:	
	:	Sat Below:
K.M.,	:	Trial Court:
	:	Hon. Marie White Bell, J.S.C.
	:	Appellate Division:
Defendant/Petitioner.	:	Hon. Marie E. Lihotz, J.A.D.
	:	Hon. John C. Kennedy, J.A.D.
	:	Hon. Mitchell E. Ostrer, J.A.D.

Brief of Amici Curiae

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Statement of Interest

Amici Curiae, Domestic Violence Clinic and Domestic Violence Project at Rutgers School of Law - Camden (collectively, the "Amici" or the "Programs"), are committed to providing free legal services and information to victims of domestic violence in southern New Jersey. As advocates for domestic violence litigants, the Amici have a substantial interest in ensuring that the domestic violence restraining order process remains meaningfully accessible for all litigants, regardless of their income level.

Statement of Identity of *Amici Curiae*

Since 1995, Rutgers School of Law - Camden's students and faculty have delivered high-quality, free legal services to domestic violence survivors. These efforts have dramatically increased the quantity and quality of legal services to victims of domestic violence in Camden and other counties in southern New Jersey. The Amici offer a wide range of integrated services, including:

- providing legal information about the domestic violence restraining order procedures to assist unrepresented litigants;
- providing high quality legal representation to victims of abuse who cannot afford the services of an attorney;

- serving as a statewide legal resource on domestic violence issues.

Rutgers School of Law - Camden's domestic violence programs promote three separate initiatives: the provision of legal information to parties appearing without an attorney through our Domestic Violence Pro Bono Volunteer Project; the provision of free legal representation through the Domestic Violence Clinic and Advanced Domestic Violence Clinic courses; and offering free community education on domestic violence and its prevention. Since 2006, Rutgers' programs have provided free legal services to over 4,000 victims of domestic violence.

Annually, the Domestic Violence Pro Bono Project (the "Project") provides free legal resources and information to 700 domestic violence litigants. The Project, through a corps of trained law student volunteers, inform plaintiffs about the New Jersey Prevention of Domestic Violence Act, the civil restraining order process and their legal rights. Law student volunteers identify cases appropriate for referral to free legal services, particularly cases involving young plaintiffs, plaintiffs with disabilities, or plaintiffs facing barriers to fair process, including a represented defendant.

The Domestic Violence Clinic provides individual representation to domestic violence litigants. The Domestic

Violence Clinic contributes over 4,000 hours of free legal services to the community each year. Clinical Professors Victoria L. Chase, an accomplished trial attorney and member of the Steering Committee for the New Jersey Victims' Assistance Academy and the Administrative Office of the Courts Committee on Access to the Courts, and Ruth Anne Robbins, who co-authors the New Jersey practitioner's treatise, New Jersey Domestic Violence Practice and Procedure, currently in its third edition (N.J. Inst. CLE, 2009), supervise clinic students.

Collectively, the clinical programs at Rutgers - Camden includes multiple practice areas and contributes over 30,000 hours of free legal services to people who otherwise could not afford an attorney—making Rutgers - Camden one of the largest providers of free legal services in southern New Jersey.

Preliminary Statement

Domestic Violence Final Restraining Order hearings in New Jersey operate under special conditions, designed to maximize a speed of process. Cases for restraining orders brought under the Prevention of Domestic Violence Act occur as summary trials before a superior court judge, within seven to ten days of the date of the entry of an *ex parte* Temporary Restraining Order's ("TRO"). N.J.S.A. 2C:25-29(a). At the moment the TRO is entered, a defendant may be immediately evicted from his or her residence, given moments to collect personal items, and have the right to see his or her own children temporarily suspended. Weapons are collected, and the right to possess weapons is restricted. N.J.S.A. 2C:25-28. At the trial to determine whether or not the TRO should be converted to a Final Restraining Order ("FRO"), parties are expected to bring any physical or documentary evidence they may have, call witnesses, cross-examine, object, and argue their cases.

Domestic violence actions require the parties to gather admissible evidence (and collaterally, to authenticate such evidence, as necessary), call witnesses, cross-examine, object and argue their cases. The legal tests and standards trial courts must apply, as this Court addressed in J.D. v. M.D.F., are no longer simple. 207 N.J. 458 (2011). They involve

complicated questions of proper notice; potentially difficult determinations of whether a history of domestic violence is related to the alleged predicate act; and an analysis of whether the parties "need" a restraining order--an analysis that is entirely inferential.

Further, the entrance of an FRO leaves a defendant subject to twenty different types or permanent relief that the court may order which range from limitations on liberty, to monetary consequences, to the loss of the right to occupy a residence, possess a weapon, or to see one's children. N.J.S.A. 2C:25-29(b) (1)-(12) and (14)-(18); N.J.S.A. 2C:25-29.4; N.J.S.A. 2C:25-29.1; N.J.S.A. 2C:25-30. The declaration that someone has committed an act of domestic violence and should be subject to a restraining order is a branding by the courts that the defendant is an "attacker," see N.J.S.A. 2C:25-21, -23, or, in common parlance, a "batterer." Id. These are permanent and stigmatizing labels, and a record of them is made and maintained in the Domestic Violence Registry. N.J.S.A. 2C:25-34. Further, plaintiffs face the oft-daunting task of proving a complicated prima facie case. If the plaintiff loses, he or she faces the possibility of returning home to that defendant, after the plaintiff made public the dispute, and after subjecting the defendant to eviction, expense, and potential stigma. For

plaintiffs, it is a high-stakes risk. If they win, they may be able to secure some protections that will help them live independently and safely, with the promise of assistance of heightened police intervention. If they lose, they are at their most vulnerable point.

Separately, as all attorneys who practice in this area know, not all domestic violence litigants are treated in the same manner. For those families who have children in common or who are going through divorce, and who have the benefit of an attorney, trial courts will facilitate the entrance of a consent order (a "civil restraint") on a non-domestic violence docket, using an "FD" or "FM" docket number. Domestic Violence Procedures Manual, Sec. 4.19.2 (October 2008), available at <http://www.judiciary.state.nj.us/family/dvprcman.pdf>. Civil restraints do not implicate many of the twenty potential consequences to a defendant: there are no civil penalties or domestic violence surcharges or Domestic Violence Registries involved. Weapons are not forfeited except by consent. Parties without counsel, in contrast, have no ability to communicate with each other by virtue of the TRO in place and by statutory decree, N.J.S.A. 2C:25-29(a). Therefore they are unable to negotiate such a settlement, and must proceed to the FRO hearing, or dismiss all protections altogether. In other words, cases with counsel allow

more opportunities for resolution. Moreover, parties without the qualifying relationship for Civil Restraints entered under a different family court docket number--such as parties who are dating or household members but do not have children in common-- may be able to enter into a private agreement to settle the matter if assisted by counsel.

This Court recognized a right to counsel in other summary proceedings where less is at stake: those in municipal court. If, for instance, a case centered on the suspension of Ms. Novak's driver's license or a substantial monetary fine in municipal court, she would have been afforded the right to counsel. Guidelines for Determination of Consequence of Magnitude in Municipal Court, in Pressler & Verniero, Current N.J. Court Rules, Second Appendix to Part VII to R. 7:3-2 at 2465.

If she had been charged for the underlying crime of harassment in municipal court she would be afforded the right to counsel, even though the criminal penalties are lesser in scope than those implicated by the FRO entered against her.

By expanding the right to counsel to include both sides in a domestic violence restraining order action, this Court can ensure that indigent litigants will not suffer consequences of magnitude without first receiving the protection of counsel.

Statement of Facts

Appellant Debra Novak and Respondent Kenneth Moretz appeared before the Chancery Division, Family Part, on cross complaints for final restraining orders. (4:6-9). Each party alleged assault as a basis for the restraints. Ms. Novak alleged events that took place after defendant concededly pursued her in his truck to a Walmart parking lot on December 5th. (40:22-41:3). Respondent alleged events that took place at the parties once-shared home on December 6th. (14:13-17:7). The parties had been before the court for prior temporary restraining orders as the record mentions at least two that were filed by Ms. Novak and dismissed by other judges, and two that were filed by respondent that were similar dismissed. (74-46). The record also alludes to a consent order in which Ms. Novak ceded possession of the residence to Mr. Moretz. (8:11-9:1). These prior cases prompted the court to note upon the parties return to court at the outset of the proceeding. (3:1-2).

Mr. Moretz was represented by counsel. (3:8-10). Ms. Novak, unemployed and unable to afford an attorney, was not represented, although the trial court did press her at length concerning the advisability of having counsel. (3:14-5:11). Prior to the filing of the cross-complaints for restraining orders, the parties were due to return to court at Ms. Novak's

request for mediation to pursue parenting time for their daughter-in-common, Alayna (age 12). (60:21-24, 67:12-16). The record notes that Ms. Novak was concerned about the delay in the court-ordered counseling for herself and her daughter (54:24-55:18) caused by Mr. Moretz's failure to reinstate health insurance that would allow the counseling to occur. Ms. Novak had been unable to see her daughter since September 2011 because of Mr. Moretz's delay in reinstating health insurance coverage. Id.

During the course of the December 22, 2011 proceeding, the court arguably heard hearsay testimony as Mr. Moretz's attorney marked and showed him police reports of the current and prior incidents, without following the requisite strictures concerning refreshing recollection or other requirements for proper use of extrinsic, non-admissible evidence. This occurred over Ms. Novak's untutored objection. 19:17-22:23. The remainder of the proceeding was rife with inadmissible hearsay in the form of police statements (17:19, 24:20-23, 25:5-8, 27:4-8, 30:1-2); the parties' daughter's statements (18:24-25, 28:6-9, 30:14-16, 30:17-22, 45:8-9, 96:14-16); court personnel (61:12-18); and statements by DYFS (31:11-13, 31:20-23). The record similarly contained improper speculation (30:17-22; 32:6-7); leading (26-27); and, notably improper medical testimony about Ms. Novak's

mental health condition (32:19-33:17, 33:21-23). Specifically, Mr. Moretz, in response to a leading question by counsel testified that Ms. Novak spent three weeks in a mental health hospital when the parties were first together, that she has been diagnosed with bipolar disorder, and that she has taken a variety of medicines for mental health issues including "psychotic behavior, and everything." (32:19-33:8)

It is also clear that the court failed to consider undisputed testimony concerning whether Mr. Moretz's decision to avail himself of self-help on December 5, as he chased Ms. Novak in his car to the Walmart parking lot. There he confronted her, and she alleges assaulted her with his car--all indicating a lack of need for a restraining order as required by J.D. v. M.D.F., 207 N.J. 458 (2011) and Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). (82-86, 88:23-89:9, 89:15-95).

At the end of the hearing, and without hearing any summation or closing arguments, the Judge ruled that Ms. Novak had presented insufficient evidence to prove a prima facie case needed for her complaint. Accordingly, the Judge dismissed Ms. Novak's Temporary Restraining Order against Mr. Moretz. (99:4-11). At the same time, based on the evidence the Judge heard including the hearsay evidence, the Judge granted Mr. Moretz's Final Restraining Order, based on a finding that Ms. Novak

committed an act of harassment (99:25-100:4). As part of that Order, the Judge prohibited Ms. Novak from any and all future contact with Mr. Moretz (100:8-10, 17-19); from owning or possessing any weapons (100:24-25); and from returning to the marital home (100:11-14), and from Mr. Moretz's place of work (100:14-15). The court gave Ms. Novak a limit of twenty minutes to remove her boxed belongings from the marital home (102:23-25). She was ordered to pay a fine--although that fine was suspended because the Judge was unsure of Ms. Novak's ability to pay (101:3-6).

Ms. Novak was also told that she would be fingerprinted and photographed, and that her name would be entered into a national registry (101:7-9). Finally, and based on Mr. Moretz's improper testimony about Ms. Novak's mental health, the judge further ordered Ms. Novak to undergo a psychiatric evaluation (100:23-24).

In all, the Judge's order resulted in Ms. Novak facing at least nine different consequences as a result of the entry of the Final Restraining Order. Mr. Moretz, who admittedly chased Ms. Novak away from the once-shared house, to a Walmart parking lot, faced no consequences.

Legal Argument

I. The twenty forms of relief render domestic violence proceedings categorically different from proceedings previously addressed under New Jersey's civil right to counsel principles.

Given the many types of consequences flowing from a domestic violence proceeding, such proceeding falls squarely within the ambit of New Jersey's right to counsel jurisprudence. The Act provides civil relief based upon specifically incorporated criminal statutes, and safeguards such civil relief through future access to the criminal justice system, as necessary. The quasi-criminal nature greatly accentuates the significance and magnitude of the proceedings for the individual litigants.

The civil nature of domestic violence restraining hearings does little to undercut their significance to either party particularly because, as noted by this Court, the adverse consequences of a civil proceeding "can be as devastating as those resulting from the conviction of a crime." Pasqua v. Council, 186 N.J. 127, 142 (2006).

These proceedings differ greatly from the other areas in which this Court has recognized a right to counsel, because of the number, severity and breadth of the relief that the New Jersey Prevention of Domestic Violence statute allows. N.J.S.A.

2C:25-17 et seq. ("the Act"). When this Court has found a civil right to counsel in other causes of action, this Court has done so after addressing and concluding that one specific loss, e.g., loss of a motor vehicle license or the termination of parental rights, triggered a right to counsel. In contrast, a FRO proceeding subjects the litigant to a potential of twenty different consequences, including, without limitation, loss of residence regardless of joint ownership, a requirement that a defendant undergo psychiatric evaluation and possible treatment, monetary payments and penalties, the seizure of firearms and the loss of the right to possess same. See N.J.S.A. 2C: 25-29(b) (1)-(19). In no other context in this State would such an array of penalties be available to courts without the parties having the assistance of counsel.

This Court, and the body of law in New Jersey, has thus found that, as a matter of fundamental fairness, the right to counsel attaches to:

1. Loss of motor vehicle privileges or a substantial fine in municipal court;
2. Child support enforcement proceedings;
3. Involuntary commitment proceedings
4. Megan's law tier classification hearings

5. Loss of liberty such as the ability to own weapons or to move freely;
6. Criminal contempt for violations of FROs; and
7. Proceedings regarding abuse, neglect, or termination of all parental rights.

There can be no principled reason why an indigent facing loss of motor vehicle privileges or a substantial fine in municipal court would be conferred the right to counsel, but an indigent facing, or prosecuting, a domestic violence matter would not have a similar right. A litigant subject to a domestic violence proceeding can hardly be distinguished from such litigants, and thus, the due process guarantee of the New Jersey Constitution compels the assignment of counsel.

A. The body of law in New Jersey broadly conceives the civil right to counsel.

This Court's conception of the civil right to counsel under the body of law in New Jersey--particularly when viewed through the prism of the aggregate of consequences arising out of a domestic violence proceeding--supports the attachment of a right to counsel. This Court has already noted that, due process principles require the appointment of counsel in civil matters that implicate fundamental rights or result in some "other consequence of magnitude." Pasqua, 186 N.J. at 148 (quoting Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971)). After all,

the right to counsel ranks among the most "precious constitutional rights because it is the necessary means of securing other fundamental rights." Pasqua, 186 N.J. at 133; see also Rodriguez, 58 N.J. at 295-96 (1971). Moreover, it "has long been recognized that the right to a fair trial would be an empty promise without the right of counsel." Ibid. Accordingly, this Court has extended the right to counsel far beyond only those situations involving a loss of physical liberty, broadening the interpretation of United States Supreme Court. Pasqua, 186 N.J. at 142 (citing Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 25 (1981)).

Indeed, with respect to certain offenses, an allegation of domestic violence subjects the offender to greater penalties than under the penal code--despite the Act's specific incorporation of the exact provisions enacted in the New Jersey Code of Criminal Justice (the "Penal Code"), N.J.S.A. 2C:1-1, et seq. For example, the potential penalties for a FRO predicated upon harassment--the predicate act in the FRO entered against Ms. Novak, for example--far exceed the consequences for the same offense in the criminal context. See "Applicable Penalties in a Harassment Proceeding[,]" infra. Yet under current law, a right to counsel would, under the right circumstances, attach in the criminal context, where the offender is subject to only four

possible penalties, and not the domestic violence context, despite the availability of twenty penalties under the Act.¹ Only in the domestic violence context are litigants exposed to such wide-ranging penalties and relief in a summary *civil* setting, without the assistance of counsel. These particularities, effectively acknowledged by the Appellate Division in Crespo v. Crespo, 408 N.J. Super. 25 (2009), aff'd 201 N.J. 207 (2010), now require this Court to analyze the proceeding through a fundamentally different lens than the matters previously presented to the Court for review.

The table on the next page is a graphical representation of the differences in penalties in two situations: an FRO based on the predicate act of harassment, and a criminal charge for the underlying crime of harassment.

¹ In municipal court, if a motor vehicle suspension is involved, the defendant is afforded the right to counsel, under the Guidelines for Determination of Consequence of Magnitude, Pressler & Verniero, Current N.J. Court Rules, Second Appendix to Part VII to R. 7:3-2 (2013).

Applicable penalties in a harassment proceeding	
FRO proceeding	Criminal proceeding
<u>N.J.S.A. 2C:25-19a(13)</u> (specifically incorporating N.J.S.A. § 2C:33-4); <u>N.J.S.A. 2C:25-29(b)(1)-(19)</u> (collectively, "The Prevention of Domestic Violence Act" or "The Act")	<u>N.J.S.A. 2C:33-4</u> of The New Jersey Code of Criminal Justice
Order of restraint;	Fine up \$500, plus assessments;
Order granting exclusive possession of the residence to the plaintiff, irrespective of ownership;	Presumption of non-incarceration;
Order restricting parenting time, as necessary;	Forfeiture of public office, as applicable; and
Evaluation by applicable child welfare agencies;	Motor vehicle suspension, but <i>only if</i> a motor vehicle was involved in the underlying act.
Potential suspension of parenting time;	
Monetary compensation to victim;	
Mandated counseling;	
Restraint from victim's family and specified places;	
Limitations on communication with victim and others;	
Payment of Rent or mortgage on residence even if not living there;	
Loss of specified personal property including animals or pets;	
Emergency monetary relief to include punitive damages;	
Temporary loss of custody of a minor child;	
Police-supervised removal of belongings from prior home;	
Other appropriate relief, as requested;	
Monitoring by the intake unit of the Family Part;	
Order prohibiting possession, purchase, or use of firearms;	
Order prohibiting stalking, following or threatening other persons not a party to the FRO action;	
Mandated psychiatric evaluations; and	
Civil penalties ranging from \$50-500;	
Mandated surcharge to fund domestic violence grants, of \$100.	

B. Domestic violence proceedings give rise to myriad consequences in excess of the "consequences of magnitude" already recognized by this Court's right to counsel jurisprudence.

This Court, as directed by the United States Supreme Court, discerns the process due a litigant based "on the extent to which [the] individual will be 'condemned to suffer grievous loss.'" See Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also Doe v. Poritz, 142 N.J. 1 (1995) (stating same). Accordingly, "whenever the particular nature of the charge [or proceeding]" threatens a "consequence of magnitude," the indigent litigant "should have counsel assigned," unless the litigant makes the informed decision to proceed pro se. Rodriguez, 58 N.J. at 295-96 (emphasis added); Pasqua, 186 N.J. at 148; R. 7:3-2(b) ("If the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude . . . , the court shall assign the municipal public defender to represent the defendant.").

Moreover, this court may look to municipal court hearings, as a closely analogous picture of what happens in an FRO hearing. In municipal court, defendants, as in FRO hearings, face potentially significant consequences after a summary proceeding. In both courtrooms, the summary actions are designed for rapid resolution. See, Perreti v. Ran-Day's County Kosher, 289 N.J. Super. 618, 623 (App. Div. 1996) (Summary actions" are

"designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment."). Because they are summary proceedings, neither domestic violence nor municipal court proceedings-- absent a separate court order--involve the same sort of pretrial discovery that would take place in other civil or superior court criminal cases. R. 5:5-1 (domestic violence); R. 7:7-7 (municipal court). But, the two types of summary proceedings are different in that the New Jersey Court Rules specifically include an appendix defining a "consequence of magnitude" in municipal court hearings. As defined by the Municipal Court Guidelines, "consequences of magnitude" include, among other things:

- (1) Any sentence of imprisonment;
- (2) Any period of (a) driver's license suspension, (b) suspension of the defendant's non-resident reciprocity privileges or (c) driver's license ineligibility; or
- (3) Any monetary sanction imposed by the court of \$750 or greater in the aggregate, except for any public defender application fee. A monetary sanction is defined as the aggregate of any type of court imposed financial obligation, including fines, costs, restitution, penalties and/or assessments.

It should be noted that if a defendant is alleged to have a mental disease or defect, and the judge, after examination of the defendant on the record, agrees that the defendant may have a mental disease or defect, the judge shall appoint the municipal public defender to represent that defendant, if indigent, regardless of whether the

defendant is facing a consequence of magnitude,
if convicted.

Guidelines for Determination of Consequence of Magnitude in
Municipal Court, Pressler & Verniero, Current N.J. Court Rules,
Second Appendix to Part VII to R. 7:3-2 at 2465 (hereafter
"Municipal Court Guidelines").

Beyond the fundamental interests impacted by domestic violence proceedings, an indigent party faces no fewer than twenty potential consequences, which in the aggregate, exceed the "consequences of magnitude" imagined by this Court in municipal proceedings, necessitating a right to counsel. Because of the complex nature of domestic violence proceedings, the potential for substantial loss of privileges, and monetary sanctions, right to counsel attaches in domestic violence proceedings. FRO cases are handled as summary proceedings precisely because the courts recognize the severity of the FRO's (and even the TRO's) consequences, and want the parties to have a swift resolution. Depos v. Depos, 307 N.J. Super. 396, 399-400 (Ch. Div. 1997) (The immediacy of domestic violence proceedings is intended to avoid the "serious and irreversible consequences to the victim" that would be caused by any delay.).

1. Domestic violence orders result in a substantial loss of essential privileges.

This Court has held that the suspension of a driver's license is a consequence of magnitude because "a license to drive in this State 'is nearly a necessity,' as it is the primary means that most people use to travel to work and carry out life's daily chores." State v. Moran, 202 N.J. 311, 326 (2010) (internal citations omitted); see also State v. Hrycak, 184 N.J. 351, 361 (2005). A necessity that, "no one would suggest. . . can [be] taken away. . . on a whim or capriciously." Moran, 202 N.J. at 326. If the suspension of driving privileges for a reckless-driving conviction, or DWI, constitutes the paradigmatic consequence of magnitude in New Jersey that triggers the right to counsel, then the cumulative effect of the twenty penalties in the domestic violence context--which exceed those DWI penalties--must also trigger the right to counsel. The penalties involved in the entry of an FRO affect the necessities of daily life such as the ability to live in one's home, the ability to contact people, the ability to have the use of one's possessions, and the ability to see one's children.

Domestic violence proceedings may also have profound implications on litigants' abilities to be employed. Especially in the cross-complaint scenario involved in this particular case, the FRO hearing places in jeopardy the litigants'

employment and professional licenses. The mere allegation that an individual has committed an act of domestic violence--even if without merit--suffices to place a nursing license, among other professional certifications, on probationary status. Even more than a driver's license, which this Court deemed "nearly a necessity" to "travel to work and carry out life's daily chores," a professional license comprises the core of an individual's ability to survive, provide for a family, and participate in daily life--all as contemplated by this Court in Moran.

Moreover, entry of an FRO restrains the offender's movement and interaction with individuals beyond the victim. The denial may collaterally impact the victim's movement, who may, for reasons of safety, be inhibited from free and unimpeded travel. There is no more essential right than an individual's autonomy to move freely in his or her respective community, and no policy justifies revocation of such right on a whim or capriciously, without the assistance of counsel.

2. Domestic violence orders carry significant monetary sanctions.

The monetary penalties arising out of a domestic violence hearing may easily exceed the \$750 deemed a sufficient consequence of magnitude by this Court's Municipal Court Guidelines, and also may easily exceed penalties in other

analogous proceedings. Appendix to Part VII to R. 7:3-2 at 246, supra; see also State v. Hermanns, 278 N.J. Super. 19, 29 (App. Div. 1994). In Hermanns, the Appellate Division deemed the defendant's aggregate monetary penalty of \$1,800, accrued over the course of a single proceeding, as giving rise to the right to counsel. The defendant had been convicted for eight violations of city ordinances, including having a prohibited vehicle, an oversized fence, and an accumulation of trash on her property.

By statute, the entry of a FRO will result in civil penalties specific to domestic violence cases. N.J.S.A. 2C:29.1, 29.2 (mandating a civil penalty for certain domestic violence offenders); N.J.S.A. 2C:25-29.4 (mandating a separate surcharge for domestic violence offenders, to fund grants). The entry of a final restraining order may also involve the imposition of child and spousal support, emergency payments, and even, compensatory and punitive damages. See N.J.S.A. 2C:25-29(b) (providing for monetary compensation for losses, punitive damages, emergency support, and continuation of rent or mortgage payments despite lack of occupancy). Such sanctions can easily exceed the monetary amounts set out in the Municipal Court Guidelines. The ability to have access to counsel in the FRO hearings thus seems appropriate, particularly because all of these monetary

consequences can be ordered by the family court judge in the summary proceeding, without the benefit of pre-trial discovery detailing the parties' financial situation.

C. Even if domestic violence proceedings do not give rise to consequences of sufficient magnitude, such actions impact fundamental interests.

Beyond the "consequences of magnitude" language used by New Jersey courts, this Court, as directed by the United States Supreme Court, discerns the process due a litigant based "on the extent to which [the] individual will be 'condemned to suffer grievous loss.'" See Morrissey, 408 U.S. at 481; see also Doe v. Poritz, 142 N.J. 1 (1995) (same). The individual interests implicated by domestic violence proceedings touch core constitutional principles that individually and in the aggregate obligate the provision of appointed counsel. See A.B. v. Y.Z., 184 N.J. 599, 604 (2005) (generally discussing due process guarantees accorded litigants in the civil context); H.E.S. v. J.C.S., 175 N.J. 309, 321-23 (2003) (same). Thus, in civil proceedings where the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental[,]" due process principles of the New Jersey Constitution may require the provision of appointed counsel. Doe, 142 N.J. at 120 (1995) (setting forth New Jersey's doctrine of fundamental fairness).

1. Domestic violence actions engender significant social consequences and stigma.

Entrance into the National Domestic Violence registry inures significant social consequences to DV litigants, sufficient to trigger the right to counsel, particularly when considered in conjunction with the proceeding's potential infringement on property and parental rights. As recognized by this Court in Doe, an indigent litigant has a protected "liberty [or fundamental] interest" in the stigmatization or social consequences of conviction, requiring the right to counsel under the New Jersey Constitution. See Doe, 142 N.J. at 30-31. In the context of Megan's Law tier classification hearings, convicted sex offenders must be notified of their right to retain counsel and, if indigent, appointed counsel because of the social stigma arising out of such classification. Id. Even though sex offenders are subject *only to* expanded stigmatization of their reputations in their communities depending on their tier classification, they have a due process right to counsel in such proceedings.

Similarly, the body of law in New Jersey requires the assistance of counsel in the context of involuntary commitment to a mental institution, which "can engender adverse social consequences to the individual." In re Civil Commitment of D.L., 51 N.J. Super. 77, 89 (App. Div. 2002) (hereinafter, "D.L.");

see also N.J.S.A. 30:4-27.11 (affording "the right to be provided with an attorney paid for by the appropriate government agency" to patients involuntarily committed to psychiatric facility who cannot afford to hire counsel); In re S.L., 94 N.J. 128, 137 (1983) (holding due process guarantees the assignment of counsel to indigents in involuntary civil commitment proceedings because commitment effects a substantial restraint on individual liberty). Broadening its conception of such a consequence, the court noted that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." Id. ((citing Vitek v. Jones, 445 U.S. 480, 492 (1980) (involuntary transfer to a state mental hospital triggers appointment of counsel) (quoting Addington v. Texas, 441 U.S. 418, 425-26 (2005)).

The social stigma of national registration and fingerprinting in the domestic violence context results in the same stigma derived from Megan's Law or civil commitment cases—yet, the right the counsel only attaches in the latter class of cases. The entry of a domestic violence order requires fingerprinting and entrance into the national domestic violence registry—a publicly accessible, and easily searchable, database. As in Megan's Law tier classification or involuntary

commitment to a mental institution, fingerprinting and registration can substantially impact litigants and their reputations in their respective communities.

2. Domestic violence orders result in a loss of liberty.

Entry of a domestic violence order also potentially subjects either litigant to loss of residence (either party), materially restricts the defendant's movement and ability to communicate with individuals other than the victim, and precludes the defendant from possessing firearms--all of which collectively effect a significant loss of liberty. The body of law in New Jersey already recognizes that domestic violence proceedings, in part, give rise to a right to appointed counsel in the criminal contempt setting. See State v. Ashford, 374 N.J. Super. 332, 333, 337 (App. Div. 2004) (applying a right to counsel in contempt prosecutions). However, loss of liberty in this context extends far beyond the contempt setting, given how domestic violence orders potentially infringe individual movement, speech, and constitutionally protected rights. See District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (noting that the right of the keep to bear and bear arms, as embodied by the Second Amendment to the United States Constitution, fundamentally protects citizens' right to purchase and own weapons for lawful purposes); N.J.S.A. 2C:25-29b ("any

restraining order issued by the court *shall* bar the defendant from purchasing, owning, possessing or controlling a firearm”) (emphasis added).

Along with protecting individual liberty, no interest can be more fundamental--and sufficient to trigger a right to counsel--than a right explicitly protected and embodied by a Constitutional Amendment. A domestic violence order potentially forecloses an individual's ability to own, keep, and bear arms for a lawful purpose. Such preclusion cannot be justified under the Second Amendment, or the Supreme Court's interpretation in *Heller*, without the due process protection of appointed counsel. The availability of additional relief--most notably, courts' ability to limit physical movement and contact with others--further amplifies the loss of liberty effected by entry of a domestic violence order.

3. Domestic violence orders impact fundamental parental and property rights already recognized as sufficient to support a right to counsel.

This court has already determined that the termination of parental rights implicates a fundamental liberty interest, requiring the assistance of counsel. See N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 305 (2007) (citing Pasqua v. Council, 186 N.J. 127, 147 n.5) (hereinafter, "B.R."); Crist v. N.J. Div. of Youth & Family Servs., 135 N.J. Super. 573, 575

(App. Div. 1975) (per curiam). As emphasized by this Court, "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and [r]ights far more precious than property rights.' " B.R., 192 N.J. at 305 (citing N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986) (hereinafter, "A.W.") (quoting Stanley v. Ill., 405 U.S. 645, 651 (1972))). Domestic violence actions implicate this interest and the due process guarantee of the New Jersey Constitution thus "serves as a bulwark against the loss of parental rights without counsel being afforded." Pasqua, 186 N.J. at 147 n.5 (citing Crist, 135 N.J. Super. at 575).

The entry of a domestic violence order--a state-enforced order--potentially forecloses the litigant's regular access to his or her home, and suspension of parenting time until a plenary record can be developed in a full custody hearing. If parental termination proceedings in child abuse and neglect cases require appointed counsel, domestic violence proceedings, which potentially give rise to material changes to custody arrangements must likewise require the right to counsel.

Moreover, domestic violence orders can limit or preclude an individual's right to access his or her home--irrespective of ownership or contractual rights. As impliedly concluded by this Court in B.R., property and family rights are "precious" and

protected by the constitution through the assistance of counsel. No justifiable basis exists to permit such proceedings without the safeguard of appointed counsel.

D. Providing a right to counsel to indigents in domestic violence proceedings is a pragmatic solution to the constitutional concerns inherent in such proceedings.

For all of the foregoing reasons, extension of a right to counsel in domestic violence proceedings pragmatically recognizes the complexities and unique risks of such actions. Indeed, as more fully set forth supra, the interests implicated by domestic violence actions are indisputably "important enough to require the city or state to furnish him a lawyer."

Rodriguez, 58 N.J. at 288. A domestic violence proceeding implicates fundamental rights, effects consequences of sizable magnitude, and the provision of counsel protects a core constitutional provision—the guarantee of "fundamentally fair" adversarial proceedings. Absent such a safeguard, domestic violence litigants are left impermissibly vulnerable.

II. The right to court-appointed counsel in domestic violence proceedings must flow to both parties.

Providing both litigants in domestic violence proceedings with a right to counsel accords with this State's jurisprudence, agency, and legislative actions, as well as fundamental principles of equity. Many factors demonstrate how high of a

priority the New Jersey legislature, agencies and courts have given to the protection of victims of domestic violence. Protective orders in this State are permanent, and a broad category of victims qualify for that protection. Per this Court and agency directives, there is specialized training for police and court staff to deal with the needs of the victims. The courts are required to consider the totality of the relationship giving rise to the request for a protective order, and victims are given a higher degree of latitude to amend their complaints.

In most of the other instances where this Court has found that a defendant is entitled to counsel, it is noteworthy that both parties are afforded counsel.² That is true in cases where a defendant may lose his or her driver's license, where there is the threat of incarceration, loss of parental rights, or when there is stigmatization arising from registry in a sex offender database. In each of those situations, the government or a government agency is represented by counsel on the other side.

² Although this Court in Pasqua found defendants in child support hearings are entitled to a right to counsel, the issue of whether plaintiffs are also so entitled was not addressed. In Pasqua, the plaintiff's interests were remedial in nature—the repayment of past due obligations. Remedies in domestic violence proceedings, by contrast, are diverse and individualized to address the plaintiff's ongoing need for protection. Thus, the plaintiff's interests in a domestic violence proceeding are distinguishable from the interest in Pasqua, where the plaintiff's interest in the defendant's incarceration was limited to the right to recover the delinquent support obligations. Pasqua, therefore, is not instructive with respect to a plaintiff's right to counsel in domestic violence proceedings.

Restraining orders carry far-reaching consequences for both litigants. As discussed in detail below, both parties in domestic violence proceedings have substantial interests at stake that require a right to consult counsel. But, even if victims of domestic violence had less at stake than defendants, there is simply no analogous situation that warrants imposing such a disproportionate burden on one side of a judicial proceeding. Thus, if this Court were to find only defendants in domestic violence proceedings are entitled to counsel, this would create a unique and highly inequitable proceeding.³

Further, as family court is a court of equity, it would be particularly inappropriate to require unrepresented victims of domestic violence to pursue relief from an abusive relationship against a defendant who is entitled to court-appointed representation. Abusive relationships are characterized by an imbalance of power, which imbalance would be carried forward by granting defendants the advantage of counsel in the FRO proceeding. It runs contrary to both principles of equity and common sense to allow the mechanism by which victims of domestic

³ While a right to counsel does not attach to an individual who initiates an involuntary commitment proceeding against another, that situation is substantially different. First, a petitioner in an involuntary commitment proceeding is acting for the benefit of the person being committed. Second, there is a specialized screening service in place that assesses what medical services are necessary in each case. See N.J.S.A. 30:4-27.4. Second, an action can only be commenced by referral from a screening service or if an application is supported by two clinical certificates prepared by a qualified psychiatrist and reviewed by both the court and the office of the county adjuster. See N.J.S.A. 30:4-27.6(b).

violence are supposed to free themselves from abuse to favor their abusers. By granting only defendants in domestic violence proceedings a right to counsel and thereby failing to account for the power imbalance that gave rise to the problem in the first place, this Court would run a substantial risk of frustrating legitimate demands for court-ordered protection. Such a finding would both run contrary to the purpose and findings of the Act, as well as this State's domestic violence jurisprudence.

Like defendants, victims of domestic violence have substantial interests at risk in domestic violence hearings. Unlike defendants, however, victims are exposed to an inherently greater risk of physical and emotional harm throughout the entire process. This process is all in aid of vindicating the victim's right to be free from abusive and controlling behavior. Legally unsophisticated victims risk losing their chance to obtain much needed protection not only because they may fail to understand or appreciate how to articulate the relevant information, but also because of egregious trial errors like those that occurred in the case at bar. Accordingly, plaintiffs in domestic violence proceedings should also be entitled to court-appointed counsel because it accords with this State's jurisprudence, it is necessary to preserve the efficacy of the

Act, victims of domestic violence face substantial consequences of magnitude, and plaintiffs are likewise at risk of failing to properly articulate their claim for relief due to their lack of legal sophistication.

A. Granting counsel to both parties in domestic violence proceedings fits within the protective framework established by the New Jersey Legislature and its Courts.

This State's legislature and its courts have been at the forefront of statutory and legal protections for victims of domestic violence. Unlike most other states, an FRO in this State is permanent until the victim chooses to dismiss it or it is dissolved upon a motion for good cause shown. Compare N.J.S.A. 2C:25-29d, with 23 Pa. C.S.A. 6108(d) and (e) (restraining order expires by operation of law after three years) and NY CLS Fam. Ct Act § 842 (protection orders last no longer than two years, or five years in the presence of "aggravating circumstances"). Next, the Act was amended in 1994 to further broaden the protection provided to those in abusive relationships. The definition of "victim" was expanded to include "any person, regardless of age, who has been subjected to domestic violence" by a household member or a person with whom the abused had a dating relationship. The amendment further included additional predicate offenses, additional inquiries about weapons, and a provision to ensure those who are charged

with enforcing the Act maintain adequate and regular in-service training. N.J.S.A. 2C:25-17 et seq.

Furthermore, this Court has not only “embraced and enhanced the Act’s procedural components by adopting R. 5:7A,” but it also created and participates in the regular update of the Procedures Manual. The Procedures Manual is intended to facilitate the complicated and emotionally charged proceedings, as well as promote uniformity and guide the implementation of the Act. Crespo, 408 N.J. Super. at 34; see also J.L. v. G.D., 422 N.J. Super. 487, 490 (Ch. Div. 2010) (noting “all three branches of New Jersey Government have participated in establishing the existing protocols utilized in domestic violence cases.”). Put another way, the Procedures Manual is another tool to ensure victims of domestic violence receive efficient and effective protection. Among other things, the Procedures Manual coordinates state-wide law enforcement efforts by setting forth standardized procedures and specifying what the minimum training and protocol is necessary to effectuate the purpose of the Act. The Procedures Manual has been critical in providing guidance to the courts where equity requires a result that is not explicitly provided for in the Act. See J.L., 422 N.J. Super. at 491-492 (finding the Procedures Manual supports a

finding that an unrepresented minor plaintiff is entitled to representation in a proceeding against a represented adult).

In addition to the Procedures Manual, there are established victim advocate groups in place that are intended to ensure that law enforcement remains sensitive to the needs of victims. The New Jersey State Police Victim Services Unit was established to "ensure that victim's needs are met and their rights are upheld in an effort toward reducing the frequency of violent injuries and deaths as a result of domestic violence incidents." NEW JERSEY STATE POLICE FIELD OPERATIONS SECTION, <http://www.njsp.org/divorg/operations/vsu.html>. That unit is intended to assist State troopers by providing them with the knowledge necessary to assist the victim. Additionally, there are victim advocates installed in the family court to provide generalized guidance to victims of domestic violence.

Without counsel, there are, effectively, two tiers of available remedies--FROs or dismissals for litigants without counsel, and FROs or civil restraints for litigants with counsel. To guard against the inherent power imbalance that led to the filing of the temporary restraining order, the Act explicitly precludes mediation or negotiation on the issue of whether or not an act of domestic violence occurred as well as mediation on the issue of custody, child support, and other

matters once a temporary restraining order has been issued. N.J.S.A. 2C:25-29. Despite this prohibition, section 4.19.2 of the Procedures Manual provides the court with instruction on how to deal with plaintiffs who seek to dismiss a restraining order in favor of civil restraints.⁴ While an unrepresented victim of domestic violence is unlikely to be aware of this remedy, or understand the difference between a civil restraint and an FRO, counsel would be in a position to both inform the victim as well as discuss the possibility of civil restraints with opposing counsel.

This is an especially important point where an FRO would expose either party to the threat of social stigma, loss of driver's license, job loss, or any of the other consequences discussed above. Civil restraints provide a remedy that allows litigants who are unable to establish the requisite proofs or are reluctant to impose the collateral consequences on the defendants with an alternative that is at once judicially

⁴ Section 4.19.2 states, in relevant part: "Dismissals with 'Civil Restraints' - The Court should not initiate or suggest the use of "civil restraints" in domestic violence cases. If civil restraints are requested by the plaintiff, the court should question the victim on the record using the same standards as a request for a dismissal and. . . ascertain the following: A. Whether the victim is aware that the 'civil restraints' in an FM (dissolution) or FD (non-dissolution) matter will not provide the same protection as a TRO or FRO; B. Whether the victim understands that. . .there will be no arrest for the violation of 'civil restraints' and the police are unlikely to respond to a call regarding such a violation; C: Whether the victim will feel safe with the protections offered by the 'civil restraining order'; and D: Whether the victim understands [s]he has a right to obtain a new restraining order. . .even if 'civil restraints' are in effect.'"

efficient and less onerous on defendants. As a practical matter, unrepresented plaintiffs--or defendants--are left only with the drastic remedy of an FRO. Counsel for defendants cannot be tasked with the responsibility of educating both their client and their unrepresented adversary. Even if they could, a negotiation for civil restraints between defendant's counsel and an unrepresented victim of domestic violence could only occur under the shadow of a power imbalance. If, however, both sides are entitled to representation, there is an opportunity for both parties to be informed of these alternative remedies and have an opportunity to discuss them without the taint of the power imbalance.

Finally, this Court has demonstrated its commitment to effectuating the findings and purpose of the Act. In each of the domestic violence cases for which this Court has granted certification, this Court has demonstrated its commitment to ensuring the Act applies to the maximum extent possible. For example, this Court very recently recognized the greater need to provide victims of domestic violence with access to the courts by requiring that the family court "should liberally grant [an adjournment] that is based on an expansion of factual assertions that form the heart of the complaint for relief," when the complaint itself fails to provide adequate information to

support the alleged predicate act. J.D. v. M.D.F., 207 N.J. 458, 480 (2011). Previously, in its watershed decision about domestic violence, this Court in Cesare v. Cesare acknowledged the need for an in-depth, individualized review of the relationships that give rise to a need for protective order when it required the family court to review the allegations in the complaint in the context of the past history of the parties. 154 N.J. 394, 405 (1998) (finding such a review is needed to “comport[] with the legislative intent of the statute,” and thereby avoid denying protection where there is an ambiguous predicate act.).

Repeatedly, this Court has affirmed that the law is “particularly solicitous of victims of domestic violence.” J.D., 207 N.J. at 473 (quoting State v. Hoffman, 149 N.J. 564, 584 (1997)).

Each of these provisions, procedures, and cases suggest that court-appointed counsel for victims of domestic violence is not only appropriate as a matter of fundamental equity, but also a proper fit in our existing framework of the legal response to domestic violence. Moreover, given the attention attached to this substantial societal concern, this right to counsel is the next logical step to ensuring victims of domestic violence obtain the kind of access to legal protection envisioned by this State’s legislature, agencies, and courts.

B. One New Jersey court has already found that parties in a domestic violence proceeding must be on equal footing.

One family court judge refused to "turn a blind eye to the inherent inequity of requiring an unrepresented minor to conduct a domestic violence hearing against a represented adult" and sua sponte stopped a trial in order to appoint counsel for an unrepresented minor plaintiff who was attempting to prove her prima facie case against her ex-boyfriend, who was represented by counsel. J.L. v. G.D., 422 N.J. Super. 487, 493-494 (Ch. Div. 2010). In doing so, the trial judge reasoned that he felt obligated to do so because "[d]omestic violence is as real and serious an issue as exists in family court." Ibid.

The victim in J.L. alleged the defendant had punched and broken the windshield of her car while she sat inside of it. Id. at 490. She further alleged the defendant had recently struck her in the face and smashed a car window while she was sitting inside of it, indicating that the criminal mischief occurred in the context of an ongoing cycle of abuse. Id. at 490-491. The family court, noting the unrepresented seventeen year old victim was facing a represented nineteen year old defendant, adjourned and rescheduled the proceeding to determine if there was any basis to provide the plaintiff with representation. Id. at 491. While that court found no explicit basis to appoint counsel to an unrepresented minor, the Act and Procedures Manual indicated the importance of granting access to court protection to abused

teens. Id. at 491-492. That need for access could not be achieved if an unrepresented victim were required to proceed against a represented defendant. Id. at 493 (“The purpose of potentially appointing a guardian ad litem in this case is . . . to provide an adult voice in the courtroom for a minor exercising her legal right to seek protection.”). Thus, appointing counsel for the unrepresented plaintiff in that case was necessary to put that plaintiff on equal footing with the defendant, and therefore necessary to effectuate the purpose of the Act. Ibid.

The same principal applies in all domestic violence proceedings, whether or not the victim is a minor. Domestic violence occurs where there is an imbalance of power favoring the aggressor over the victim. See N.J.S.A. 2C:26-18 (noting domestic violence is a particular threat to pregnant women, children, the elderly, and the disabled). The Legislature declared such abuse “must be recognized and addressed on an equal basis. . .to fulfill our responsibility as a society to protect those who are less able to protect themselves.” Ibid. The courts, in providing “the maximum protection from abuse the law can provide,” are intended address that power imbalance through the issuance of civil restraining orders. Ibid.; see also Karla Fischer & Mary Rose, When “Enough is Enough”: Battered

Women's Decision Making Around Court Orders of Protection, 41 Crime & Delinq. 414, 420 (1995) (study finding that women look to the courts as a last resort to end a cycle of escalating violence).

Fair and equal access to the courts must take into consideration the power imbalance that caused the victim to seek the intervention of the state in the first place. Victims of domestic violence are less able to protect themselves because of the power imbalance in their family or family-like setting. See Cesare, 154 N.J. at 399 (noting that, in the context of marital disputes, a broad application of the Act is intended to "ensure that spouses who were subjected to criminal conduct by their mates had full access to the protections of the legal system." (quoting Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995)). It is precisely for this reason that the Act provides immediate, temporary ex parte relief. Id. at 400; N.J.S.A. 2C:25:28. By granting victims a right to counsel along with defendants, this court would simply be ensuring that victims of domestic violence would maintain full and equal access to the protections of the legal system.

In contrast, granting defendants a right to counsel without a corresponding right for victims would carry from the home to the court the same power imbalance that resulted in the

underlying domestic violence. Thus, finding that victims of domestic violence are entitled to court-appointed counsel not only accords with principles of equity recognized by the court in J.L., but also helps to provide the "maximum protection from abuse the law can provide" by offsetting the power balance that made the abuse possible. N.J.S.A. 2C:26-18.

C. Victims of domestic violence, in seeking the court's protection, face significant consequences of magnitude.

When petitioning the court for a restraining order, victims of domestic violence have various, overlapping and important rights at stake—not the least of which being the right to be free from harm or the threat of harm. The Act is a vehicle by which victims of domestic violence vindicate their right to be free from abusive behavior. N.J.S.A. 2C:25-18. Victims may also be seeking a protective order to assert their personal autonomy by breaking free of an abusive and controlling relationship, or for the protection and safety of their children. See Beverly Balos, Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings, 15 Temp. Pol. & Civ. Rts. L. Rev. 557, 564, 565 (2006). Restraining orders function as a "tool to reclaim 'what abuse has systematically stripped from them: their control over their activities, their bodies, and their lives.'" Ibid. (quoting Karla Fischer & Mary Rose, When

"Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection, 41 Crime & Delinq. 414, 423 (1995)).

These interests are at stake to varying degrees throughout the entire restraining order process. Indeed, the very act of leaving the relationship and seeking outside help exposes the victim to additional risks. Many victims of domestic violence face a serious risk of retaliatory violence upon leaving the abusive relationship. See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1991) (identifying violence in retaliation for leaving an abusive relationship as "separation assault"). This risk is partially mitigated by the low threshold showing required to obtain a temporary restraining order, however that relief is contingent upon that victim's ability to articulate and prove her case at the FRO hearing. Thus, victims must attempt to vindicate their rights at the risk of exacerbating the violence at home. This risk is a weightier concern where, as is often the case, the victim seeks a restraining order only after serious violence has occurred. See Carole E. Jordan, Intimate Partner Violence and the Justice System: An Examination of the Interface, 19 J. Interpersonal Violence 1412, 1423 (2004) (finding that victims typically seek orders of protection after experiencing physical assault, beating and choking, threats of

harm or death, sexual abuse, threats with a weapon, stalking, harassment and assault of their children). Accordingly, the victim's process of attempting to vindicate his or her rights by obtaining a restraining order must be viewed in light of the threat posed by the risk of failure.

The threat posed by the abusive behavior the victim is attempting to escape is further exacerbated by the fact that protection is often sought in the context of escalating violence. In acknowledgment of this phenomenon, the Legislature directs the courts to consider, inter alia, the previous history of domestic violence between the parties to ensure that a victim's interpretation of the predicate act is given due consideration. N.J.S.A. 2C:25-29. This Court held, for example, that an ambiguous threat, in light of the history of the parties, could rise to the level of a terroristic threat. Cesare, 154 N.J. at 414-415. Thus, in assessing the history of the parties, the past violence is not only relevant to the interpretation of an ambiguous predicate act, but also to the determination of whether a restraining order is necessary to prevent further abuse. N.J.S.A. 2C:25-29(b).

In the context of an escalating pattern of abuse, there are two additional problems that highlight a plaintiff's need for court-appointed representation. First, as a matter of design,

the restraining order hearing is generally the first time the victim sees the abuser since the specific event giving rise to the victim's petition. At the time of the hearing, "[t]he victim is terrified, unclear of her legal rights, and highly susceptible to the batterer's influence and control." Catherine F. Klein & Leslie E. Orloff, Providing Legal Protection For Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 1059 (1993). The atmosphere of fear and control adversely affects a victim's ability to prosecute her case, and therefore unrepresented victims are less likely to successfully obtain a FRO. Id. at 1059-1060 (citing Peter Finn and Sarah Colson, National Inst. of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 4 (1990)).⁵ Even if they are successful, the FRO is less likely to contain all of the appropriate protective provisions relating to the exclusion from the residence and custody arrangements. Ibid.

The FRO hearing is an adversarial proceeding that requires the victim to face the abuser in a hostile setting. The victim must recount each humiliating and painful detail to the court, and be subjected to cross-examination by his or her abuser.

⁵ See also Amy Farmer and Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence, 21 Contemporary Economic Policy, 158 (2003), available at <http://www.nasams.org/DMS/Documents/1195248210.25/Explaining%20Decline%20in%20Domestic%20Violence.pdf> (finding that the only public service that reduces domestic abuse in the long-term is access to legal aid)

Though necessary to ensure defendants are not deprived of their due process rights, the FRO hearing occurs in the shadow of the abuse and therefore inherently provides abusers with the kind of leverage that can deter victims from seeking the intervention of the court in the first place. That leverage can be mitigated by court-appointed representation, but is sure to be intensified if defendants alone are afforded that right.

Second, an unsophisticated victim of domestic violence may be unaware of the particular legal relevance of the parties' history. Whereas the background of a relationship is critical to the court's analysis and outcome of the trial, see Cesare, 154 N.J. at 414-415, an unrepresented victim of domestic violence may simply assume that the particular predicate act at issue is sufficient and decline to give the background appropriate to a finding of need. This background information is especially critical to assess whether there is immediate danger to the victim. See Silver v. Silver, 387 N.J. Super. 112, 128 (App. Div. 2006).

Further, victims may be naturally averse to recounting what may be a long, embarrassing and painful history. This is especially true where, as in many cases, sexual assault is part of the cycle of violence the victim is attempting to escape. Klein & Orloff, 21 Hofstra L. Rev. 801, 857. Even if the victim

thinks it is relevant, a failure to understand just how important the history is may cause victims to risk omitting those details based on the assumption that the court will find the predicate act at issue as egregious as he or she did. Without counsel to explain the importance of the prior history, victims of domestic violence may unwittingly sabotage their own efforts to obtain a FRO.

III. Both parties in domestic violence proceedings face the risk of egregious trial errors.

As this case illustrates, unrepresented parties in domestic violence proceedings remain vulnerable to trial errors that may influence, undesirably, the outcome and deprive the litigant of a fair trial. At numerous junctures throughout the trial in this particular case, for example, Mr. Moretz testified to several inadmissible hearsay statements and improper medical testimony. His attorney was also able to engage in improperly leading questions. Finally, the court failed to make the need analysis required by J.D. v. M.D.F., 207 N.J. 458 (2011).

Individually, the court's failure to consider all of the facts relevant to Mr. Moretz's need for an FRO is a basis for reversal alone. Moreover, the cumulative effect of all of the defects amounts to harmful error, and accordingly, this Court should, at a minimum, reverse the judgment of the trial court

regardless of whether this court determines that counsel should be afforded to indigent parties in domestic violence restraining order cases.

However, these errors are not merely basis to reverse the trial court's ruling; they are also a stunning example of why it is incumbent on the state to provide counsel to those who cannot afford it for restraining order cases. Ms. Novak was unable to adequately control the evidence placed before the trial court, something that any non-lawyer layperson would have been challenged to accomplish. She was also unable to meaningfully engage in cross-examination due to her understandable inability to comprehend the rules and procedures of a trial let alone a New Jersey-specific trial. And, ultimately, Ms. Novak never had the opportunity to cross-exam the respondent concerning her allegation of assault. Further, the judge permitted Mr. Moretz to proffer testimony relating to Ms. Novak's history of mental health without any foundation established or showing of relevancy.

It is simply an unacceptable state of affairs to place the entire burden of protecting the interests of the pro se party on the family court judge.

A. Multiple and compounded trial errors warrant reversal.

This Court may overturn a civil case based on multiple trial errors. See Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 42, 54 (2009) (holding numerous errors may cumulatively amount to reversible error). Throughout this trial, the described inadmissible evidence and procedural failures were keyed to the outcome-determinative issues. All told, the errors during Ms. Novak's trial when considered collectively erode our confidence that the trial court would have reached the same conclusion in the absence of the cumulative, inadmissible, and influential evidence.

1. The court admitted numerous hearsay statements into evidence, and overlooked egregiously leading questioning.

The line between hearsay and non-hearsay is often difficult to discern, even for trial judges and experienced counsel. See State v. Long, 173 N.J. 138, 152 (2002). Rigorous adherence to the strictures of direct examination assists in delineating appropriate testimony. Early in the proceedings, Ms. Novak attempted to object to the introduction of an unauthenticated police report. Without explanation, the report was marked, and, although not admitted into evidence, placed before Mr. Moretz as he testified. The same occurred with several other police reports, without explanation or reference to the rules of evidence, and without a need to refresh witness recollection.

Although it is not clear how Ms. Novak interpreted the court's actions after her attempted objection, it is possible she was deterred from making further objections.

The police reports present an example of the inability of the trial court judge to protect the interests of the pro se party in this instance, but the more egregious failures followed as Mr. Moretz proffered statements made by police, a Division of Youth and Family Services caseworker, and the parties' daughter. (Tr. pp. 19, 24-25, 28, 30-31). The record reveals no argument as to whether these statements were admissible as exceptions to the hearsay rule or as non-hearsay, and the Respondent failed to lay the requisite foundation for establishing admissibility. While it cannot be known what effect these statements had on the trial court, it would be foolish to assert that courts are immune to the opinions proffered by child protective services. It would also be foolish to assume that the statements by the parties' daughter were heard and repeated by an unbiased party.

Beyond the inadmissible hearsay testimony, counsel for Mr. Moretz's counsel elicited Mr. Moretz's testimony through improperly leading questions. (Tr. pp. 26-27). A question is considered leading when it "suggests what the answer should be or contains facts which in the circumstances can and should originate with the witness." State v. Abbot, 36 N.J. 63, 79

(1961). Leading questions of a non-adverse witness are only permitted to "develop the witnesses' testimony" in a way to avoid confusion or clarify testimony." See R. 611(c); see also Nobero Co. v. Ferro Trucking Inc., 107 N.J. Super. 394, 404 (App. Div. 1969). By requiring Mr. Moretz to merely agree to the facts as described by counsel, counsel effectively substituted her own testimony for Mr. Moretz's. In response to these leading questions and without proper foundation, Mr. Moretz testified about Ms. Novak's mental health, prompting the family court to order a psychiatric evaluation as part of the FRO.

This Court has found that mental illness can be as stigmatizing as a criminal conviction, and that only "an 'enlightened minority'" believe that mental illness is a disease similar to any other physical condition. State v. Krol, 68 N.J. 236, 271 n.2 (1975). Here, the mental health evidence did not present evidence of "overwhelming[ly] probative worth" sufficient to outweigh the clear prejudice of the testimony. See Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2010). This evidence was not supported by a relevant foundation and may have improperly attacked credibility. See State v. Pasterick, 285 N.J. Super. 607, 620 (App. Div. 1995).

The question immediately preceding Respondent's testimony about Ms. Novak's mental health merely asked how long the two

had been together. Respondent made no attempt to provide any objective scientific basis for his assertions and did not make clear the basis of his knowledge. Further, the link between mental health and the case at hand was not challenged or made explicit. Given these defects, it is impossible to find the "overwhelming probative worth" to overcome the clear prejudice of the testimony.

2. Ms. Novak's lack of legal expertise meant that she was unable to effectively cross-examine.

Further, Ms. Novak was unable to effectively cross-examine Mr. Moretz about these matters or his story concerning the events that led to the confrontation at the Walmart parking lot. Thus, she was unable to avail herself of her most important tool for developing her own and impeaching Mr. Moretz's telling of the facts. "Cross-examination is the greatest legal engine very invented for the discovery of truth." State v. Basil, 202 N.J. 570, 591 (2010) (quoting California v. Green, 399 U.S. 149(1970)); State v. J.D., 211 N.J. 344 (2012); see also State v. Basil, 202 N.J. 591 (2010). The rigors of cross-examination are the courts' preferred method of testing the veracity of a witness's testimony. See State ex rel. J.A., 195 N.J. 324 (2008). Thus, without cross-examination, a trial's fairness is seriously cast into doubt. Crudup, 422 N.J. Super. at 219. Because of the limited discovery afforded to litigants in the domestic violence

context and the twenty potential penalties, cross-examination, as a means to test credibility and a means to defend against an allegation of domestic violence, is often outcome-determinative.

During the first half of the proceeding, when Ms. Novak was acting as defendant, she struggled to form appropriate questions. After the court admonished her for making statements rather than asking questions, Ms. Novak stated, "I'm trying--but it's hard to put them into questions." Later in the proceeding, the court did not invite her to cross-examine Mr. Moretz concerning his version of the events at Walmart. Mr. Moretz testified that after suspecting Ms. Novak might have stolen their daughter's phone, he chased her down and engaged in self-help. This testimony contradicts the conclusion that he needed a final restraining order, thus discrediting Mr. Moretz's case as a plaintiff. But without an attorney aware of the appropriate legal test, and ability to cross-examination, this contradictory information was not developed. In short, Ms. Novak failed in her attempt to challenge the narrative offered by the opponent.

In several instances in Ms. Novak's case, however, an alternative narrative had the potential to emerge. That alternative narrative may have told the story of a woman frustrated by her lack of contact with her 12-year old daughter. It may have also told of this mother's anxious wait for the

father to complete a health insurance renewal so that she could attend counseling with the daughter in an effort to mend and strengthen the relationship. It may further have fleshed out details of how she was pursued to a Walmart parking lot based on an incorrect belief she had stolen a telephone, and how the Mr. Moretz may have attempted to drive off while she was talking to her daughter through the window of the car in an attempt to forcibly end a conversation. It may also have told a different narrative of how the events unfolded at the formerly shared residence on the very next day, and may have pointed the court in a different direction about the appropriate ruling.

The parties' ability to present alternative narratives is the grist of summary proceedings. If the litigant in an FRO hearing is precluded from a meaningful ability to present an alternative narrative, then there can be no faith in the FRO summary hearing process. Providing all parties with the right to counsel would preserve the intended balancing of a fair proceeding with a summary proceeding (particularly, one that takes place seven to ten days after a complaint is filed).

B. The litany of preventable errors is a poignant example of the need for counsel in domestic violence cases.

These errors, and the prejudice suffered by M. Novak, could have been avoided had the court recognized her right to an attorney

even if she could not afford to hire one on her own. Ms. Novak's case also makes clear that it is not only defendants that must be afforded a right to counsel, but also plaintiffs. Facing an opposing attorney only increases the challenge to an untrained layperson, as it did for Ms. Novak in the present case, and could chill a plaintiff from pursuing a restraining order knowing she might face, alone, a difficult cross-examination by counsel for the defendant. Further, the nuances of hearsay testimony, of leading questioning, of mental health evidence, and of cross-examination are skills that are unique to the trained advocate. The consequences for both parties are too steep, the legal test too complicated, and the interests at stake too important to inject the proceedings with the inherent imbalance of only having one party entitled to counsel. If this Court were to find that only defendants are entitled to counsel, that result would be counter to the policy of maximum protection from abuse that the legislature correctly declared as the goal of the Act.

IV. Providing counsel to domestic violence litigants is economically and practically feasible.

This Court has noted that the practical considerations of a right to counsel are relevant to the analysis. Rodriguez, 58 N.J. at 288. It is only reasonable for this Court to be concerned about the feasibility of a right to counsel in FRO

hearings. There are several models that this Court could consider as a supplement to the already-established public defender program for domestic violence contempt hearings. However, whatever funding mechanism is utilized, it is important to note that an infrastructure currently exists within New Jersey to support the provision of legal services.⁶ The infrastructure includes county-based legal services throughout the state, two of its law schools, and other public interest organizations targeting domestic violence as a priority need in their population.

First, the Act provides for a specified surcharge designed to fund domestic violence programs. N.J.S.A. 2C:25-29.4. That assessment could become part of a right to counsel competitive grant program connected to those now-existing resources. Each county already has a lead domestic violence agency, which employs a domestic violence legal advocate--non-lawyers who help the litigants navigate courthouse procedures. One could easily imagine that these lead domestic violence agencies, in addition to regional legal services and public interest organizations, would be interested in applying for funding to represent plaintiffs, alongside the public defender representation of defendants.

⁶ This funding could function alongside the Victim Assistance Grant and Violence Against Women Act funding.

Alternatively, this Court could look to the low-cost referral fee program that is in use by the Public Defender's Office as well as the Office of the Law Guardian and the Office of Parental Representation. Those organizations have developed the system for those times when the organization is conflicted out of a representation, and it operates by paying an attorney a fairly low flat rate for each case that is assigned to outside counsel.

There were 14,328 FRO hearings in 2010 across the twenty-one counties of New Jersey.⁷ While that number may seem large on its face, breaking it down by county helps show the actual resources that might be involved. In certain counties, such as Sussex and Hunterdon, those figures translate to approximately five FRO hearings per week, and approximately twenty-three FRO hearings per week in the counties with the highest case loads, i.e. Camden and Essex counties.⁸

In practice, most counties devote only one courtroom to FRO hearings on those days when the FRO cases are scheduled. In many counties, FRO hearings are scheduled as blocks--such as one full

⁷ Numbers calculated per the 2010 Report on the Prevention of Domestic Violence Act prepared by the Family Practice Division, Administrative Office of the Courts at 15-16, by adding the number of cases in which FRO relief was denied with the number of cases in which FRO relief was granted.

⁸ Numbers calculated per the 2010 Report on the Prevention of Domestic Violence Act prepared by the Family Practice Division, Administrative Office of the Courts at 18-20, by adding the number of cases in which FRO relief was denied with the number of case in which FRO relief was granted. The counties selected were those with the lowest and highest case loads.

day of domestic violence FRO hearings, or two mornings per week. Conceivably, the case load could be managed in the same way as case loads are handled in some municipalities: two court-appointed attorneys in the courtroom on hearing days. Even if two full-time attorneys were needed in each of the twenty-one counties, the need for full-time attorneys needed to staff a right to counsel would look something like forty-two attorneys. It should be noted that there are also at least two counties that already share one judge riding circuit, i.e., Salem and Cumberland, thus suggesting that a right to counsel also could be accommodated in an economically feasible manner.

V. Simple justice dictates assignment of counsel in the domestic violence context.

There can be little dispute that an FRO hearing presents complex issues and trial procedures beyond the comprehension of an unrepresented party. The complexity of an FRO hearing demands the right to counsel for the proper carriage of justice. In Rodriguez, this Court acknowledged “[t]he importance of counsel in an accusatorial system,” underscoring that in a case with “any complexities[,] the untrained defendant is in no position to defend himself,” and that, “lack of legal representation may place him at a disadvantage.” Rodriguez, 58 N.J. at 295 (extending the right to counsel in municipal proceedings). Moreover, as a matter of “simple justice,” this Court emphasized

judicial discretion to assign free counsel “whenever justice so requires,” discretion that “may be exercised liberally.” Ibid. Indeed, whenever the “attendant circumstances indicate that the indigent” litigant will be in need of the assistance of assigned counsel, “[the litigant] should of course have it.” Ibid.; see also D.L., 51 N.J. Super. at 89 (quoting Crist, 128 N.J. Super. at 410), aff’d, 135 N.J. Super. 573 (App. Div. 1975)) (noting the need for counsel where the evidence may be “difficult to grasp and consequently difficult to refute for an uneducated and unsophisticated layman”).

The substantive and procedural nuances of domestic violence proceedings, prompted this Court, along with the New Jersey’s Attorney General’s Office, to promulgate a publicly-available 294-page Domestic Violence Procedures Manual to educate the legal population and courts specially and only with respect to domestic violence proceedings. See Domestic Violence Procedures Manual (October 2008), available at <http://www.judiciary.state.nj.us/family/dvprcman.pdf>. Indeed, this Court has only promulgated such a comprehensive substantive and procedural guide in the domestic violence context. In light of this Court’s own manual--designed for the legal community--it seems axiomatic that a domestic violence litigant cannot, nor should be expected, to fully understand the FRO proceedings.

Accordingly, the effects flowing from a domestic violence proceeding, which include, inter alia, an inability to digest the severity of the proceeding, loss of livelihood, loss of weapons, registration as an offender, loss of ability to access one's own home, and monetary sanctions, all collectively threaten consequences of magnitude, giving rise to a right to counsel under New Jersey law.

Conclusion

For the foregoing reasons, amicus urges this Court to provide a right to counsel to litigants in domestic violence proceedings in recognition of the various consequences of magnitude facing both parties.

Respectfully submitted,

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