

Garden State CLE presents:



**Five Steps to Winning Advocacy
in Domestic Violence Cases**

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Lesson Plan

Step by Step Trial Procedures

STEP ONE

In personam and subject matter jurisdiction. The first step in prosecuting a domestic violence case is for the plaintiff to establish that he/she qualifies as a victim under the PDVA.

1) Victim Defined – Age Dependent:

Victim of domestic violence” means a person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member.

Being a household member requires more than a casual dating relationship but less than the parties residing together. Some of the relevant criteria include:

- 1) Constancy of the relationship.
- 2) Over-night stays at each other's residence.
- 3) Personal items such as jewelry, clothing and personal grooming effects stored at each other's residences.
- 4) Shared property arrangements, such as automobile usage, access to each other's bank accounts and one mailing address for billing or other legal purposes.
- 5) Familiarity with each other's siblings and parents socially in dining and/or entertainment activities together, and/or attendance together at extended family functions such as weddings. Desiato vs. Abbott, 261 N.J.Super 30, 34(Ch.Div.1992).

2) Former Household Members Defined:

Coleman vs. Romano, 388 N.J.Super 342, 351-52(Ch.Div.2006), sets forth a six-factor test to determine whether jurisdiction exists based on the

parties' status as “former household members,” focusing on “whether the parties have been so entangled, emotionally or physically—or they will be in the future—that the court should invoke the Act to protect the plaintiff and prevent further violence.”

The six factors identified in Coleman are:

- 1) the nature and duration of the prior relationship;
- 2) whether the past domestic relationship provides a special opportunity for abuse and controlling behavior;
- 3) the passage of time since the end of the relationship;
- 4) the extent and nature of any intervening contacts;
- 5) the nature of the precipitating incident; and
- 6) the likelihood of ongoing contact or relationship.

See also South vs. North, 304 N.J.Super 104(Ch.Div.1997) (Living in the same apartment complex)

3) Victim Defined – Age Not an Element:

“Victim of domestic violence” also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. “Victim of domestic violence” also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.

4) Dating Relationship Defined:

Typically, courts will look to 6 objective factors in deciding if a dating relationship exists. (See Andrews vs. Rutherford, 363 N.J.Super 252, 260(Ch.Div.2003)).

These include:

- 1) Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization?

- 2) How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
- 3) What were the nature and frequency of the parties' interactions?
- 4) What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
- 5) Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?³
- 6) Are there any other reasons unique to the case that support or detract from a finding that a “dating relationship” exists?

Note, one interesting case involving all these issues was M.A. vs. E.A., 388 N.J.Super 612(App.Div.2006). This sad case resulted in the enactment of the Sexual Assault Survivors Protection Act, N.J.S.A. 2C:14-13 thru 21. (Any person alleging to be a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, and who is not eligible for a restraining order as a “victim of domestic violence” as defined by [the PDVA], may ... file an application with the Superior Court ... alleging the commission of such conduct or attempted conduct and seeking a temporary protective order.)

STEP TWO

Predicate offenses – Once the status of the victim has been established as a matter of fact, the plaintiff must then demonstrate that the defendant perpetrated an act of domestic violence. These acts constitute predicate offenses.

They are defined under N.J.S.A. 2C:25-19 as follows:

1) Domestic violence” means the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor:

- 1) Homicide N.J.S.A. 2C:11-1 et seq.
- 2) Assault N.J.S.A. 2C:12-1 (d/p)
- 3) Terroristic threats N.J.S.A. 2C:12-3
- 4) Kidnapping N.J.S.A. 2C:13-1
- 5) Criminal restraint N.J.S.A. 2C:13-2
- 6) False imprisonment N.J.S.A. 2C:13-3 (d/p)
- 7) Sexual assault N.J.S.A. 2C:14-2
- 8) Criminal sexual contact N.J.S.A. 2C:14-3
- 9) Lewdness N.J.S.A. 2C:14-4 (d/p)
- 10) Criminal mischief N.J.S.A. 2C:17-3 (d/p for \$500 or less)
- 11) Burglary N.J.S.A. 2C:18-2
- 12) Criminal trespass N.J.S.A. 2C:18-3 (d/p or petty d/p)
- 13) Harassment N.J.S.A. 2C:33-4 (petty d/p)
- 14) Stalking P.L.1992, c. 209 (C.2C:12-10)
- 15) Criminal coercion N.J.S.A. 2C:13-5

16) Robbery N.J.S.A. 2C:15-1

17) Contempt of a domestic violence order pursuant to subsection b. of N.J.S.A. 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)

2) "Emancipated Minor" means a person who is under 18 years of age but who has been married, has entered military service, has a child or is pregnant or has been previously declared by a court or an administrative agency to be emancipated.

STEP THREE

Need for an Order of Protection

Proof of a predicate act of domestic violence does not necessarily mandate the issuance of a final restraining order. The law recognizes that people covered under the PDVA sometimes will engage in heated, emotional arguments, often referred to in the law as “domestic contretemps”. This usually arises in the context of harassment cases. (Peranio vs. Peranio, 280 N.J.Super 47(App.Div.1995) (“I will bury you” not an act of harassment); Kamen vs. Egan, 322 N.J.Super 222(App.Div.1999) (trespassing); J.D. vs. M.D.F., 207 N.J. 458(2011) (flash photography taken outside house not sufficient for order); Peterson vs. Peterson, 374 N.J.Super 116(App.Div.2005) (name calling))

Even though the plaintiff may have satisfied the jurisdictional and predicate offenses elements by a preponderance of the evidence, when determining whether a restraining order should be issued based on an act of harassment, trespass, assault or, for that matter, any of the predicate acts, 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. Essentially, the inquiry is whether a restraining order is necessary to protect the victim from immediate danger or future abuse. In that connection, the court should consider and make specific findings on the previous history of domestic violence, if any, between the plaintiff and defendant, and how that impacts, if at all, on the issue of whether a restraining order should issue. (Silver vs. Silver, 387 N.J.Super 113(App.Div.2006)). 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. (Corrente vs. Corrente, 281 N.J.Super 243, 248(App.Div.1985)).

Thus, according to the Supreme Court as set forth in Cesare vs. Cesare, 154 N.J. 394, 405(1998) demonstrates proofs under the third step, at the hearing the Family Court should consider but not be limited to the following factors:

- 1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- 2) The existence of immediate danger to person or property;

- 3) The financial circumstances of the plaintiff and defendant;
- 4) The best interests of the victim and any child;
- 5) In determining custody and parenting time the protection of the victim's safety; and
- 6) The existence of a verifiable order of protection from another jurisdiction.

An order issued under this act shall only restrain or provide damages payable from a person against whom a complaint has been filed under this act and only after a finding or an admission is made that an act of domestic violence was committed by that person. The issue of whether or not a violation of this act occurred, including an act of contempt under this act, shall not be subject to mediation or negotiation in any form. In addition, where a temporary or final order has been issued pursuant to this act, no party shall be ordered to participate in mediation on the issue of custody or parenting time.

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 a domestic violence adjudication.

STEP FOUR

Relief – N.J.S.A. 2C:25-29

In proceedings in which complaints for restraining orders have been filed, the court shall grant any relief necessary to prevent further abuse.

1) In every case, there is one automatic restraint:

Firearms - By statute, any restraining order issued by the Family Court shall bar the defendant from purchasing, owning, possessing or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3 during the period in which the restraining order is in effect or two years, whichever is greater. The order shall require the immediate surrender of any firearm or other weapon belonging to the defendant. The order shall include notice to the defendant of the penalties for a violation of any provision of the order, including but not limited to the penalties for contempt of court and unlawful possession of a firearm or other weapon pursuant to N.J.S.A. 2C:39-5.

The provisions of this subsection requiring the surrender or removal of a firearm, card, or permit shall not apply to any law enforcement officer while actually on duty, or to any member of the Armed Forces of the United States or member of the National Guard while actually on duty or traveling to or from an authorized place of duty.

2) Discretionary Relief - At the hearing, the judge of the Family Part of the Chancery Division of the Superior Court may issue an order granting any or all of the following relief:

- 1) An order restraining the defendant from subjecting the victim to domestic violence, as defined in this act.

- 2) An order granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned by the parties or jointly or solely leased by the parties. This order shall not in any manner affect title or interest to any real property held by either party or both jointly. If it is not possible for the victim to remain in the residence, the court may order the defendant to pay the victim's rent at a residence other than the one previously shared by the

parties if the defendant is found to have a duty to support the victim and the victim requires alternative housing.

3) An order providing for parenting time. The order shall protect the safety and well-being of the plaintiff and minor children and shall specify the place and frequency of parenting time. Parenting time arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for parenting time may include a designation of a place of parenting time away from the plaintiff, the participation of a third party, or supervised parenting time.

a) The court shall consider a request by a custodial parent who has been subjected to domestic violence by a person with parenting time rights to a child in the parent's custody for an investigation or evaluation by the appropriate agency to assess the risk of harm to the child prior to the entry of a parenting time order. Any denial of such a request must be on the record and shall only be made if the judge finds the request to be arbitrary or capricious.

b) The court shall consider suspension of the parenting time order and hold an emergency hearing upon an application made by the plaintiff certifying under oath that the defendant's access to the child pursuant to the parenting time order has threatened the safety and well-being of the child.

4) An order requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of the act of domestic violence. Compensatory losses shall include, but not be limited to, loss of earnings or other support, including child or spousal support, out-of-pocket losses for injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling for the victim, moving or other travel expenses, reasonable attorney's fees, court costs, and compensation for pain and suffering. Where appropriate, punitive damages may be awarded in addition to compensatory damages.

5) An order requiring the defendant to receive professional domestic violence counseling from either a private source or a source appointed by the court and, in that event, requiring the defendant to provide the court at specified intervals with documentation of attendance at the professional counseling.

6) An order restraining the defendant from entering the residence, property, school, or place of employment of the victim or of other family or household members of the victim and requiring the defendant to stay away from any specified place that is named in the order and is frequented regularly by the victim or other family or household members.

7) An order restraining the defendant from making contact with the plaintiff or others, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm including, but not limited to, personal, written, or telephone contact with the victim or other family members, or their employers, employees, or fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim.

8) An order requiring that the defendant make or continue to make rent or mortgage payments on the residence occupied by the victim if the defendant is found to have a duty to support the victim or other dependent household members; provided that this issue has not been resolved or is not being litigated between the parties in another action.

9) An order granting either party temporary possession of specified personal property, such as an automobile, checkbook, documentation of health insurance, an identification document, a key, and other personal effects.

10) An order awarding emergency monetary relief, including emergency support for minor children, to the victim and other dependents, if any. An ongoing obligation of support shall be determined at a later date pursuant to applicable law.

11) An order awarding temporary custody of a minor child. The court shall presume that the best interests of the child are served by an award of custody to the non-abusive parent.

12) An order requiring that a law enforcement officer accompany either party to the residence or any shared business premises to supervise the removal of personal belongings in order to ensure the personal safety of the plaintiff when a restraining order has been issued. This order shall be restricted in duration.

13) An order granting any other appropriate relief for the plaintiff and dependent children, provided that the plaintiff consents to such relief, including relief requested by the plaintiff at the final hearing, whether or not the plaintiff requested such relief at the time of the granting of the initial emergency order.

14) An order that requires that the defendant report to the intake unit of the Family Part of the Chancery Division of the Superior Court for monitoring of any other provision of the order.

15) An order prohibiting the defendant from stalking or following, or threatening to harm, to stalk or to follow, the complainant or any other person named in the order in a manner that, taken in the context of past actions of the defendant, would put the complainant in reasonable fear that the defendant would cause the death or injury of the complainant or any other person. Behavior prohibited under this act includes, but is not limited to, behavior prohibited under the provisions of P.L.1992, c. 209 (C.2C:12-10).

16) An order requiring the defendant to undergo a psychiatric evaluation.

17) An order directing the possession of any animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household. Where a person has abused or threatened to abuse such animal, there shall be a presumption that possession of the animal shall be awarded to the non-abusive party.

3) Notice to law enforcement - Notice of orders issued pursuant to this section shall be sent by the clerk of the Family Part of the Chancery Division of the Superior Court or other person designated by the court to

the appropriate chiefs of police, members of the State Police and any other appropriate law enforcement agency.

4) Dissolution - 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.

5) DV Registry - Prior to the issuance of any order pursuant to this section, the court shall order that a search be made of the domestic violence central registry. (Note, the entry into the registry is not subject to expungement.)

STEP FIVE

Alternative Relief – Consent order for Civil Restraints advantages & disadvantages – See N.B. vs. S.K., 435 N.J.Super 298(App.Div.2014) (A violation of civil restraints does not constitute an act of domestic violence).