NEW JERSEY DOMESTIC VIOLENCE LAW: THE BROKEN "NEED ANALYSIS"

Jason Scott Kanterman & Jesse Kyle Posey***

"[This] demonstrates all of the challenges that our trial courts confront daily as they seek to be faithful to the Legislature's intent as expressed in the [Prevention of Domestic Violence] Act . . . ."[1]

INTRODUCTION

New Jersey domestic violence practice is full of complexities. As the New Jersey Supreme Court noted in *J.D. v. M.D.F.*, these complexities have placed great burdens on the New Jersey Superior Court, Family Part judges.[2] One of these many burdens comes in the form of asking judges to parse through what is often complicated, poorly presented, and emotionally-charged information in a short amount of time. The time-sensitive nature of these proceedings rarely allows judges the time to fully consider the nuances of a case prior to rendering a decision. As we are all aware, complex decisions made in haste are sometimes, if not often, deficient.

New Jersey courts have provided a structure for deciding when Final Restraining Orders ("FROs") should be entered.[3] Part of this instruction, and often the most outcome-determinative portion, has been dubbed the *need analysis*.[4] While the New Jersey Supreme Court in

---

* Jason Scott Kanterman is a 3L at Rutgers Law School and is the Business Editor for the *Rutgers University Law Review*, Camden. This Article benefited greatly from the input of Professor Victoria L. Chase and the support of the Rutgers Domestic Violence Clinic.

** Jesse Kyle Posey is a 3L at Rutgers Law School and is an Articles Editor for the *Rutgers University Law Review*, Camden. Special thanks to Jaclyn M. Palmerson for her editorial advice.

1. J.D. v. M.D.F., 25 A.3d 1045, 1055 (N.J. 2011).

2. *See id.* ("The record . . . demonstrates all of the challenges that our trial courts confront daily as they seek to be faithful to the Legislature's intent as expressed in the Act, while being vigilant lest they become pawns in an ongoing struggle between the parties seeking an advantage in another forum.").

3. *See* Silver v. Silver, 903 A.2d 446, 455–56 (N.J. Super. Ct. App. Div. 2006).

4. *See J.D. v. M.D.F.*, 25 A.3d at 1062–63; *Silver*, 903 A.2d at 455–56; *see also* Ruth Anne Robbins & Brian J. Foley, *A Cautionary Tale Showing the Need for a Civil Right to*

J.D. v. M.D.F. attempted to provide guidance on how to conduct the need analysis,[5] it appears that more clarity is needed as to what is expected of trial courts in conducting their analyses. This Article seeks to highlight a major deficiency in the need analysis inquiry—specifically, a vague instruction by the New Jersey Supreme Court which has led to an inconsistent application of the law by trial courts—in hopes of calling attention to an area of law which is in desperate need for clarity or revision.

THE LAW

Under the Prevention of Domestic Violence Act ("P.D.V.A.")[6] courts are required to make two distinct determinations before granting an FRO. First, a court must find that the plaintiff is a protected person under the P.D.V.A., which is defined to 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";
- "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"; and
- "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship."[7]

Second, a court must find that "the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in *N.J.S.A.* 2C:25-19a has occurred."[8] In addition to the two legislatively mandated considerations discussed above, the appel-

---

Counsel in Domestic Violence Cases, RUTGERS J.L. & PUB. POL'Y REGION IN REV. BLOG (Oct. 15, 2015), http://rutgerspolicyjournal.org/cautionary-tale-showing-need-civil-right-counsel-domestic-violence-cases#_ftn16 ("One element judges must consider in deciding whether to enter a restraining order is the 'need analysis.' This element isn't contained in the language of the Act but is the result of judicial interpretation.").

5. *See J.D. v. M.D.F.*, 25 A.3d at 1059–63.
6. N.J. STAT. ANN. §§ 2C:25-17 to -35 (West 2015).
7. *Id.* § 2C:25-19(d).
8. *Silver*, 903 A.2d at 455 (citing § 2C:25-29(a)).

late division and supreme court have added a third requirement to the analysis: if a trial court finds that a predicate act occurred, it must then determine "whether a restraining order is necessary . . . to protect the victim."[9] The problem, however, is that there is little explanation or guidance on how courts are to determine *whether a restraining order is necessary to protect the plaintiff*. This lack of guidance has resulted in inconsistent judicial decision-making and, subsequently, harm to parties.[10] The little guidance that *is* provided to the courts is found in *J.D. v. M.D.F.*, in which the New Jersey Supreme Court held:

> Although this . . . determination—whether a domestic violence restraining order should be issued—is most often perfunctory and self-evident, *the guiding standard is whether a restraining order is necessary, upon an evaluation of the [factors] set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse*.[11]

Turning to the factors discussed in *J.D. v. M.D.F.*, section 2C:25-29(a) states: "[C]ourt[s] *shall* consider *but not be limited to* [considering] the following factors" in conducting the analysis:

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.[12]

---

9. *Id.* at 456; *accord J.D. v. M.D.F.*, 25 A.3d at 1055 (citing *Silver*, 903 A.2d at 456).

10. For a discussion of the possible harm to parties, see generally Jason Scott Kanterman, *A Proposed Solution to the "Right to Counsel" in New Jersey Domestic Violence Litigation*, RUTGERS J.L. & PUB. POL'Y REGION IN REV. BLOG (Oct. 27, 2015), http://www.rutgerspolicyjournal.org/proposed-solution-%E2%80%9Cright-counsel%E2%80%9D-new-jersey-domestic-violence-litigation.

11. *J.D. v. M.D.F.*, 25 A.3d at 1055 (emphasis added) (quoting *Silver*, 903 A.2d at 456).

12. § 2C:25-29(a) (emphasis added).

The language of section 2C:25-29(a), coupled with the direction offered in *J.D. v. M.D.F.* and *Silver v. Silver*, clearly indicates that trial courts *shall*, in determining whether an FRO is necessary to protect the plaintiff, consider[13] and analyze[14] the six factors listed above. Failure to analyze "whether a domestic violence restraining order should be issued[,] . . . the guiding standard [of this determination being] whether a restraining order is necessary, upon an evaluation of the [factors] set forth in *N.J.S.A.* 2C:25-29a(1) to -29a(6)," renders a trial court's decision incomplete.[15] More specifically, where a court fails to conduct the necessary analysis, an opinion "lacks the required consideration of whether entry of restraints is 'necessary' to protect plaintiff from harm."[16] The New Jersey Supreme Court further explained that this "inquiry serves to ensure that the protective purposes of the Act are served."[17] While "there will be cases in which the risk of harm is so great that the inquiry can be perfunctory, in others . . . it is not. In those cases, overlooking that important step in the analysis poses the risk of unfairness and error."[18] The problem, however, is that courts share little, if any, common understanding of how to apply the supreme court's instruction. Frankly, the factors are vague. It remains largely unclear exactly what analysis is necessary to satisfy the inquiry. As a practical result of this deficiency, litigants are being exposed to unnecessary uncertainty regarding the standards used in deciding cases; put differently, because courts fail to uniformly analyze the factors set forth in *J.D. v. M.D.F.*, judicial discretion plays too large a role in case disposition, unfairly prejudicing litigants throughout the state.

Other than the basic structure outlined above, no further guidance has been provided on how to conduct the need analysis.[19] What is clear,

---

13. *See J.D. v. M.D.F.*, 25 A.3d at 1063 (reversing and remanding because "the trial court did not sufficiently articulate findings and conclusions consistent with the statutory standards [of the second inquiry]"); *see also* K.Z. v. M.F., No. FV-02-2097-11, 2012 WL 762148, at *4 (N.J. Super. Ct. App. Div. Mar. 12, 2012) (reversing and remanding and "direct[ing] the [trial court] to consider plaintiff's allegations, as well as the considerations set forth in *N.J.S.A.* 2C:25-29a(1) to -29a(6)").

14. *See J.D. v. M.D.F.*, 25 A.3d at 1062 (holding that where a "record does not include an *analysis* of 'the . . . inquiry,' . . . [it] lacks the required consideration of whether entry of restraints is 'necessary' to protect plaintiff from harm" (emphasis added) (first quoting *Silver*, 903 A.2d at 455–56; and then quoting § 2C:25-29)).

15. *Id.* at 1055.

16. *Id.* at 1055, 1062 (first quoting *Silver*, 903 A.2d at 456; and then quoting § 2C:25-29).

17. *Id.* at 1062.

18. *Id.* at 1062–63.

19. To underscore the lack of guidance on this issue, a simple Lexis Advance search for cases citing *J.D. v. M.D.F.* for the guidance it provides on the need analysis yields only

however, is that an inquiry and subsequent analysis of whether a plaintiff needs protection is required. It is also clear that this determination is to be conducted by evaluating the factors set forth in section 2C:25-29(a).

THE CONFUSION: LACK OF GUIDANCE

The supreme court's instruction to evaluate the factors set forth in section 2C:25-29(a), coupled with the appellate division's remanding of cases which lack this inquiry, signifies that trial courts must discuss and analyze the factors when determining whether an FRO is necessary. This requirement appears clear. The confusion, then, must not be in the initial mandate, but rather with the scope of it—in other words, how thorough the analysis must be to satisfy the required inquiry. The answer is not provided by the statute, as the factors set forth in section 2C:25-29(a) are vague in both construction and in application, and neither the court nor the legislature has provided instruction or clarity as to what is expected of courts in conducting the analysis. Without clarification, it is unreasonable to expect consistency from trial courts.

A simple reading of the factors illustrates the point. The first factor may be the most understandable; it requires courts to review any "previous history of domestic violence between the [parties], including threats, harassment and physical abuse."[20] This factor, if found to be present, likely[21] favors the imposition of an FRO.

The second factor is more complicated because it requires courts to examine "[t]he existence of *immediate danger* to person or property."[22] While, on its face, this requirement appears simple to apply, the actual language suggests a more difficult analysis. For example, how is the

---

eighteen results, all of which are unpublished New Jersey appellate division cases. Shepard's Report of *J.D. v. M.D.F.*, 25 A.3d 1045 (N.J. 2011), LEXIS ADVANCE, https://advance.lexis.com/api/permalink/7773302d-9665-4f79-a238-fac90231f495/?context=1000516 (last visited Mar. 13, 2016). Having reviewed these results, none clarify what is expected of courts in conducting the analysis.

20. § 2C:25-29(a)(1).

21. *See id.* § 2C:25-18 ("It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide."). The term *likely* is deliberately used. That said, case law within New Jersey is wholly void of any direct support for this interpretation. The Authors have reached this conclusion by acknowledging the defined intent of the legislature in enacting the P.D.V.A.—to extend the broadest possible protection to victims of domestic violence—to conclude that a judicial finding of prior domestic violence would militate toward granting the protections of an FRO. While the Authors believe that the assumptions underlying this conclusion are valid and persuasive, it is worth noting that this conclusion rests solely on just that—assumptions.

22. *Id.* § 2C:25-29(a)(2) (emphasis added).

phrase *immediate danger* defined? *Black's Law Dictionary* ("*Black's*") defines the term *immediate* as "[o]ccurring without delay; instant."[23] *Black's* defines the term *danger* as "[p]eril; exposure to harm, loss, pain, or other negative result."[24] Adopting *Black's* definitions, it appears this analysis becomes one of scope and degree. How *instant* must the danger be? How *severe* must the *loss* or *pain* be? It is foreseeable that any victim, or perceived victim, of domestic violence could claim exposure to some negative impact, such as physical or mental pain (or even property damage) that would constitute a *danger*. The malleability of these terms, coupled with the lack of instruction and guidance on how to apply them, is problematic; it leaves significant room for judicial interpretation, and therefore, ample room for a wide array of results emanating from similar factual circumstances. This lack of guidance leads to unpredictability—a problem for all involved in domestic violence litigation.

Similar concerns surround the third factor, which requires courts to consider the parties' "financial circumstances."[25] Again, courts lack instruction on how to apply this factor, which leads to significant inconsistency in application. For example, the type of considerations required by the phrase *financial circumstances* remains unclear. Should courts consider only liquid assets, or should they also assess the presence of investments or property ownership? Must courts only consider the individual financial circumstances of the parties, or should they look to the parties' joint finances? Are debts to be considered? Should courts consider the dependency of others on the parties' finances? What about past, current, and future ability to earn a living? In sum, it is unclear how courts are to conduct this analysis. Additionally, it remains unclear how this consideration factors into the issuance or non-issuance of an FRO. If the parties are wealthy, does that militate for or against issuing protection? If one party is more financially stable than the other, does that affect the outcome? Courts are left without instruction or guidance on how this consideration should impact the outcome of the need analysis. As such, courts are forced to interpret what is expected of them in conducting this inquiry, leading to significant judicial discretion, ultimately resulting in inconsistent outcomes.

The confusion continues with the fourth factor, where courts are asked to consider "[t]he best interests of the victim and any child."[26] This factor is inherently difficult to apply; what is good for one individual's situation may not be good for another. To ask a judge, in a sum-

23. *Immediate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

24. *Danger*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25. § 2C:25-29(a)(3).

26. *Id.* § 2C:25-29(a)(4).

mary type matter (lasting anywhere between three days and two weeks from inception to judgment, with the judge only having limited involvement, usually lasting no more than an hour),[27] to determine what is best for a specific individual, is to place a weighty burden on the court's shoulders. The brevity of the litigation, coupled with the lack of information available to the court, often results in under-informed decisions with regard to what is best for a victim and any children. Because this factor requires judicial interpretation, and because judges are left without any guidance on how to interpret and apply this factor, outcomes are inherently subjective.

Factors five and six share similar deficiencies. Factor five directs courts to consider the victim's safety "[i]n determining custody and parenting time."[28] The sixth factor requires courts to determine "[t]he existence of a verifiable order of protection from another jurisdiction."[29] While it appears that application of these factors, if substantiated, would militate toward the issuance of protection, it may not always work that way. Specifically, factor five requires courts to assess a victim's safety. What will lead to safety for one individual may cause harm to another; this factor appears inherently reliant on judicial discretion. Such discretion may or may not have been purposeful; either way, the court or legislature should clarify what is expected.

All six factors, taken together, lead to additional concerns. For example, no guidance has been provided on how to collectively weigh these factors—is each to be provided equal weight? If not, which factors are to be weighed more heavily? In preparing to write this Article, the Authors had the pleasure of speaking with several distinguished New Jersey domestic violence practitioners who expressed a belief that courts focus more heavily on the first and second factors, while often only skimming over, or even entirely disregarding, the remaining factors. If either the supreme court or legislature wishes to condone such a practice, they should explicitly say so. However, the language of *J.D. v. M.D.F.*, coupled with the language of the statutory factors, appears to require courts to consider all six factors equally. Either way, clarity is necessary.

---

27. *See id.* § 2C:25-29(a) (requiring a hearing be held within ten days of filing the complaint).

28. *Id.* § 2C:25-29(a)(5).

29. *Id.* § 2C:25-29a(6).

RESULTS OF THE CONFUSION

Due to the lack of guidance on how to apply the six factors, courts often turn to other criteria in determining whether an FRO is necessary.[30] The use of unspecified considerations leads to both inconsistency and confusion. One example of such inconsistency seen throughout the case law is the denial of an FRO simply because the parties have separated.[31] This consideration is logically inconsistent with, and even contradictory to, the legislature's intent to provide the utmost protection for victims of domestic violence.

A. The Legislature Intended to Encompass Victims that Flee

The purpose of a restraining order is to separate the parties.[32] All relief provided by the legislature under section 2C:25-29(b)(1)–(19) anticipates separation of the parties.[33]

Similarly, the legislature provides remedies to protect victims even after they flee. The P.D.V.A. provides that "[i]f 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 victim requires alternative housing."[34]

In addition to the inferential support provided by the remedies, the P.D.V.A. explicitly states that a restraining order may not be denied

---

30. *See* J.D. v. M.D.F., 25 A.3d 1045, 1062–63 (N.J. 2011) (demonstrating that courts may consider factors outside of the six factors enumerated in the P.D.V.A.); *see also* Silver v. Silver, 903 A.2d 446, 456 (N.J. Super. Ct. App. Div. 2006) (considering "a pattern of abusive and controlling behavior" in its analysis (citing Cesare v. Cesare, 713 A.2d 390, 397 (N.J. 1998))).

31. Arguably one reason why trial courts have engaged in such an analysis without intervention or correction by a higher court is because a large majority of FRO hearings result in unwritten, unpublished opinions. In other words, the fact that most decisions are read into the record, as opposed to transcribed and shared with the legal community, may have the effect of limiting review. The Authors, through their time litigating domestic violence cases as part of the Rutgers Domestic Violence Clinic, have observed numerous FRO cases where courts have relied on separation in rendering decisions. Furthermore, the Authors have also confirmed—by speaking with a number of Rutgers Law faculty members—that this outcome is common in domestic violence cases.

32. *See* § 2C:25-29(b).

33. *Id.* For example, section 2C:25-29(b)(2) provides for "[a]n order granting exclusive possession to the plaintiff of the residence or household regardless of whether the residence or household is jointly or solely owned . . . [or] . . . leased by the parties." *Id.* § 2C:25-29(b)(2); *see also id.* § 2C:25-29(b)(6) (prohibiting the defendant from coming to the plaintiff's place of employment or home as well as any other place specified in the restraining order).

34. *Id.* § 2C:25-29(b)(2).

simply because a plaintiff has fled the residence occupied by the attacker.[35] Section 2C:25-28(a) reads:

> A victim may file a complaint alleging the commission of an act of domestic violence with the Family Part of the Chancery Division of the Superior Court in conformity with the Rules of Court. The court *shall not dismiss any complaint* or delay disposition of a case *because the victim has left the residence* to avoid further incidents of domestic violence.[36]

Further indicating the intent of the legislature is the preference to remove the attacker from the home upon issuance of a temporary restraining order.[37] In all, it appears clear that separation is favored, if not required, upon allegations of domestic violence. Therefore, to use the future separation of the parties against a plaintiff at the FRO hearing would, in effect, punish a plaintiff for seeking protection, thereby violating the explicit expectations of the legislature.

B. Case Law Demonstrates Fleeing Victims Regularly Receive FROs

Case law demonstrates that courts consistently grant FROs when parties are living apart, even if separation is not recent, providing that jurisdiction has been established.[38] An extreme example of this practice is found in *N.G. v. J.P.*, which concerned siblings that had a history of domestic violence, but who had not resided together for fifty-two years.[39] The appellate division held that the animosity between the parties created a high likelihood of future domestic violence and granted an FRO even though the parties were not currently living together.[40]

Furthermore, courts have found a need for FROs in cases where parties have either had a dating relationship or a child in common and have *never* lived together. In *J.S. v. J.F.*, the defendant compensated

---

35. *Id.* § 2C:25-28(a).

36. *Id.* (emphasis added).

37. *See id.* § 2C:25-28.1 (prohibiting in-house restraining orders in both TROs and FROs); *id.* § 2C:25-28(j) (preventing "defendant from returning to the scene of domestic violence").

38. *See, e.g.*, N.G. v. J.P., 45 A.3d 371, 374, 383 (N.J. Super. Ct. App. Div. 2012); South v. North, 698 A.2d 553, 555, 557, 559 (N.J. Super. Ct. Ch. Div. 1997) (finding need when defendant came to plaintiff's apartment at least three times per week and had unlimited access to plaintiff's residence); *see also* § 2C:25-19(d) (defining a victim of domestic violence to include people in a dating relationship or who have a child in common).

39. 45 A.3d at 374.

40. *Id.* at 382–83.

the plaintiff for spending time with him.[41] The defendant continually sent text messages that threatened harm to the plaintiff and her boyfriend.[42] Despite never living together, the court found need for an FRO.[43]

As indicated by the appellate division's continued imposition of FRO protection in cases where parties have lived apart, the P.D.V.A. should be interpreted liberally to grant protection to the broadest class possible.[44] Whether or not parties are living together, they may encounter each other in the future. Parties may have children together, may share mutual friends, or may even be members of the same family; there are countless situations where parties may have contact despite not living together. Accordingly, in conducting the need analysis, courts should not rely on the parties' separation in denying protection; instead, reliance on the factors articulated by the supreme court provides for a just and reliable result.

CONCLUSION AND RECOMMENDATIONS

Due to the lack of clarity, consistency among decisions is improbable. Clarification is necessary; the New Jersey Supreme Court must dictate what is expected of trial courts throughout the state. Fixing this problem is likely a multistep process.

First, the supreme court or legislature must reaffirm the duty created by *J.D. v. M.D.F.*, which requires trial courts to analyze the factors enumerated in section 2C:25-29(a)(1)–(6) when rendering a need analysis.[45] Next, the court must clarify the meaning of the factors provided in section 2C:25-29(a). Thereafter, the supreme court must advise on how the factors are to be weighed; in other words, the supreme court must dictate whether all factors are of equal importance or if certain factors command greater importance than others. Based upon the language and presentation of the factors, it appears all are to be given equal weight. Either way, clarification is necessary. Finally, the court must

41. 983 A.2d 1151, 1153–54 (N.J. Super. Ct. App. Div. 2009).

42. *Id.* at 1154.

43. *Id.* at 1154–55.

44. *See* § 2C:25-18 (expressing the intent of the legislature to cover victims of domestic violence that occur in "family or family-like setting[s]").

45. *See* 25 A.3d 1045, 1055 (N.J. 2011) (providing that, in determining "whether a domestic violence restraining order should be issued[,] . . . the guiding standard is whether a restraining order is necessary, upon an evaluation of the [factors] set forth in *N.J.S.A.* 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse" (quoting Silver v. Silver, 903 A.2d 446, 456 (N.J. Super. Ct. App. Div. 2006))).

clarify what, if anything, in addition to the factors set forth in section 2C:25-29(a), may be considered when determining the need for an FRO. Doing this will provide trial courts with greater clarity and limit the risk of improper analysis that may be conducted in lieu of the mandatory need analysis.

As a matter of policy and justice, by analyzing all six factors and articulating findings as to each, courts can more completely address the situation presented and more adequately preserve the record for appellate review. Similarly, and maybe most importantly, by conducting an explicit evaluation of the six factors in *all* domestic violence trials, courts can guarantee litigants a fairer, more consistent proceeding.