SUPERIOR COURT OF NEW JERSEY

JUN 19 2008

HUDSON VICINAGE

CHAMBERS OF
FRANCIS B. SCHULTZ
JUDGE

Hudson County Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE APROVAL
OF THE COMMITTEE ON OPINIONS

June 18, 2008

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Letter Opinion
Schultz, J.S.C.

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Re: Crespo v. Crespo
Docket # FV-09-2682-04

Dear Counsel:

Please allow this letter to serve as the findings of the Court in the above-captioned matter.

Defendant Anibal Crespo by way of motion seeks to set aside a Final Restraining Order entered on April 22, 2004 by Judge Mantineo on the grounds that the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, is violative of the New Jersey and United States Constitutions. Since Defendant is still subject to the provisions of the Act, which he claims to be

unconstitutional, this Court finds that he has standing even at this time to challenge its constitutionality. Weaver v. Palmer Bros. Co., 270 U.S. 402, 410, 46 S. Ct. 320, 321, 70 L. Ed. 654, 656 (1926). The motion relied on the documents on file and the transcript of the prior hearing and the movant proffered no additional testimony before this court. The following facts are gleaned from the record.

Vivian Crespo and Anibal Crespo were married in 1984 and divorced in 2001. Ms. Crespo and Mr. Crespo continued to reside in the same two-family house on separate floors. Ms. Crespo lived on the first floor with the children and Mr. Crespo lived on the second floor with his parents.

On March 16, 2004, Mr. Crespo and Ms. Crespo became involved in a dispute. Ms. Crespo claimed that Mr. Crespo smacked her in the face after she asked for her child support money and pulled on her arms, causing bruising. Mr. Crespo, however, claims that Ms. Crespo attacked him while he was sitting in his car, which led him to close the car window to protect himself.

On March 16, 2004, Ms. Crespo filed a complaint and obtained a Temporary Restraining Order against Mr. Crespo. The complaint alleged that Mr. Crespo "smacked her in the face after she asked for her child support money...and pulled the plaintiff's arms causing bruising." Complaint at 1, Crespo v. Crespo, FV-09-2682-04 (March 16, 2004). The complaint also stated that Mr. Crespo threatened Ms. Crespo with a handgun approximately nine years prior to the subject incident, but it was not reported to the police. In addition, Ms. Crespo described numerous incidents of previous domestic violence over the past fifteen years, but reports were never filed. The Temporary Restraining Order prohibited Mr. Crespo from entering Ms. Crespo's place of employment and residence; from having any oral, written, personal, electronic, or other form of contact with Ms. Crespo; and possessing any firearm. The Temporary Restraining Order also granted temporary custody of the parties' two children to Ms. Crespo, and Mr. Crespo was prohibited from having any parenting time or visitation with the children. That same day, at approximately 1:40 p.m., Mr. Crespo was served with a copy of the complaint and Temporary Restraining Order. Mr. Crespo was given notice that a hearing on Ms. Crespo's application for a Final Restraining Order was scheduled for March 25, 2004 at 8:30 a.m.

On March 25, 2004, Judge Mantineo adjourned the hearing date for the Final Restraining Order to April 8, 2004. Judge Mantineo granted Mr. Crespo visitation and parenting time with the children (every other weekend, Saturday from 10:00 a.m. through Sunday 6:00 p.m. and Wednesdays from 7:00 p.m. through 9:00 p.m. for dinner). Ms. Crespo was ordered to provide Mr. Crespo with an updated schedule of the children's sports activities. The court order also continued the prohibition on Mr. Crespo's possession of firearms. It should be noted that Mr. Crespo was represented by counsel at the hearing (Mira L. Mullin, Esq.).

On April 8, 2004 and April 21, 2004, Judge Mantineo conducted a hearing on Ms. Crespo's application for the Final Restraining Order. At the hearing, it was concluded that an

order was necessary for Ms. Crespo's protection and, on April 22, 2004, a Final Restraining Order was entered against Mr. Crespo. The Final Restraining Order prohibited Mr. Crespo from returning to Ms. Crespo's residence, where Mr. Crespo lived. Judge Mantineo permitted Mr. Crespo to visit his children and pick them up at the curb rather than enter Ms. Crespo's home.

Mr. Crespo appealed the Final Restraining Order to the Appellate Division, which affirmed Judge Mantineo in an opinion dated June 6, 2005. In his appeal, Mr. Crespo argued that the Final Restraining Order should be vacated because there was insufficient evidence to find abuse. Mr. Crespo also argued that Judge Mantineo was biased because she and Ms. Crespo attended the same church. Mr. Crespo further claimed that he received ineffective assistance of counsel because his attorney did not move to recuse Judge Mantineo and did not more aggressively put forth what Mr. Crespo believed was exculpatory evidence. The Appellate Division found that there was ample credible evidence, including photographs, that showed Ms. Crespo's injuries caused by Mr. Crespo to support the issuance of the Final Restraining Order.

On March 24, 2006, Mr. Crespo filed a motion to vacate the Final Restraining Order. Judge Mantineo denied the motion for the following reasons: (1) it was untimely and (2) Mr. Crespo did not seek leave to appeal to the Supreme Court of New Jersey the Appellate Division decision of June 6, 2005. Judge Mantineo denied without prejudice the portion of Mr. Crespo's motion challenging the constitutionality of the Prevention of Domestic Violence Act because Mr. Crespo did not serve the New Jersey Attorney General's Office.

On June 15, 2007, Mr. Crespo re-filed a motion to vacate the Final Restraining Order (the one before this Court), which was properly served on the Attorney General. Defendant argues that the Final Restraining Order should be vacated because it is void as the Prevention of Domestic Violence Act is unconstitutional. First, Defendant claims that the Prevention of Domestic Violence Act converts a criminal prosecution into a civil proceeding and, thus, deprives parties of their right to a trial by jury. Second, Defendant argues that the Prevention of Domestic Violence Act denies due process of law to defendants by failing to provide sufficient notice, no right to a deposition, no right to counsel, no discovery, no jury trial, and a low evidentiary standard of review.

On September 18, 2007, Ms. Crespo's attorney forwarded a letter to the Court stating that she had not yet received the Attorney General's response to Mr. Crespo's motion but stated that she opposed vacating the Final Restraining Order and joined in the Attorney General's anticipated opposition regarding the constitutionality of the Prevention of Domestic Violence Act.

On November 29, 2007, the Attorney General filed a motion to intervene pursuant to R. 4:28-4(d) and opposition to Mr. Crespo's motion to vacate the Final Restraining Order. The Attorney General argues that the Prevention of Domestic Violence Act is constitutional because the New Jersey courts have previously held that the statute strikes the proper balance between protecting victims from abuse and preserving the constitutional rights of the accused. The

Attorney General asserts that the Act is necessary to protect victims of domestic violence who were historically underserved by law enforcement and the courts and, thus, striking down the statute would seriously threaten the public interest.

On January 25, 2008, Defendant filed a reply to the Attorney General's opposition to his motion to vacate the Final Restraining Order, reiterating his previous arguments asserted in his original motion to vacate the Final Restraining Order. Defendant did not submit any opposition to the Attorney General's application to intervene. On January 30, 2008, a hearing was held in which it was decided that the Attorney General should be permitted to intervene in this matter.

On March 4, 2008, both parties submitted additional briefs to further address the issues of separation of powers, standard of proof, and the right to a trial by jury. In his supplemental brief, Defendant argues: (1) statistics suggest that Final Restraining Orders are granted more often than the circumstances warrant; (2) due process requires that the finding of whether a defendant committed an act of domestic violence be decided by a jury; (3) the DVA provides for remedies that exceed the Chancery Court's equity power and impermissibly enlarges the Chancery Court's jurisdiction; and (4) the mere preponderance standard established by the DVA is impermissible pursuant to Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Conversely, the Attorney General asserts: (1) the DVA complies with the separation of powers doctrine because the DVA creates a civil cause of action defining the rights and duties of claimants and defendants where domestic violence has occurred, which is within the province of the Legislature; (2) the preponderance of the evidence standard is constitutional because the Addington factors are inapplicable as the DVA creates a private cause of action between private individuals where the State is not a party; (3) even if Addington applies to this case, the DVA is presumptively valid and the Addington factors demonstrate that the DVA provides sufficient due process protections; and (4) the right to trial by jury is not constitutionally necessary because such a right is not absolute and would only delay the fact-finding process, which would function as a detriment to the efficacy of the DVA's protective value.

On March 28, 2008, a hearing with oral argument was held and the court reserved decision.

Defendant raises several arguments to challenge the constitutionality of the DVA, each of which will be addressed in turn.

Defendant claims the DVA is unconstitutional because it impermissibly confers upon the Chancery Division jurisdiction over matters which convert a prosecution for crimes related to domestic violence into civil proceedings.

A pivotal issue in this case is whether jurisdiction for a domestic violence cause of action lies in the Chancery Court. Therefore, an analysis of whether the DVA improperly expands the Chancery Division's equity jurisdiction under the Constitution of New Jersey of 1947 must begin with a discussion of the nature of the Chancery Division's jurisdiction. Like many states, New

Jersey's court system was based on English common law and equity principles. In accordance with this scheme, New Jersey established separate courts of law and chancery. Claims for money damages were litigated in the Law Court and claims for equitable relief were heard in the Chancery Court. Due to various jurisdictional problems and delays under this system, the New Jersey Constitution of 1947 eliminated the separation of law and equity by merging them in a unified Superior Court. Article VI, Section III, Paragraph 4 of the New Jersey Constitution of 1947 provides:

> Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined. [N.J. Const. art. VI, § 3, ¶ 4.]

Pursuant to this constitutional provision, the Law and Chancery Divisions enjoy concurrent jurisdiction to render both legal and equitable relief. The main objective behind the changes to the New Jersey Constitution was to create a uniform judicial system as well as simplification and flexibility in the work of the courts. Winberry v. Salisbury, 5 N.J. 240, 245-46 (1950). In addition, it is well-settled that where equity has rightfully assumed jurisdiction over a cause of action for any purpose, it may retain the cause for all purposes and proceed to a final determination of the entire controversy. Mantell v. International Plastic Harmonica Corp., 141 N.J. Eq. 379, 393 (E. & A. 1947). Accordingly, courts of equity now ordinarily dispose of all issues in a matter once equity has properly obtained jurisdiction. Steiner v. Stein, 2 N.J. 367, 374 (1949). The rationale behind the rule that an equitable feature draws the cause of action completely within the jurisdiction of a court of equity is to avoid a multiplicity of suits. Ibid. Despite the merger of law and equity, the Chancery Division continues to possess jurisdiction over primarily equitable cases. Furthermore, pursuant to its rulemaking powers, the New Jersey Supreme Court has promulgated rules that still maintain the distinction between law and chancery. Therefore, although not formally, there still exists the lingering sense of the old judicial system based on the equity versus law dichotomy.

In the instant case, Defendant asserts that the DVA improperly expands the Chancery Division's jurisdiction by allowing a court of equity to conduct summary hearings of essentially criminal cases based on the preponderance of the evidence civil standard of proof. Defendant explains that the DVA attempts to add to the equitable powers possessed by the Chancery Court, namely, the power to deal with a certain class of criminal cases by the writ of injunction and the summary process of contempt. In doing so, Defendant asserts, the Chancery Division is transformed into an alternative to the criminal courts. In support of his argument, Defendant primarily relies on Hedden v. Hand, 90 N.J.Eq. 583 (E. & A. 1919), in which the New Jersey Court of Errors and Appeals found that a nuisance statute authorizing abatement of houses of assignation and prostitution by chancery's injunctive process contravened Article VI, Section I and Article X, Section I of the New Jersey Constitution of 1844, which assigned jurisdiction in

criminal cases to other tribunals, and Article I, Paragraphs 7 and 9, which provided that no person shall be held answerable for a criminal offense unless on the presentment or indictment of a grand jury and securing the right of trial by jury. Ibid. It was held that the Chancery Division is only concerned with "matters of civil right resting in equity or where the remedy at law is inadequate." Id. at 593. The court further concluded that it was beyond the power of the Legislature to authorize a court of equity to abate a public nuisance of a purely criminal nature because that function resided exclusively in the criminal courts at common law. Id. at 594. The court subsequently held that the effect of the nuisance statute was unconstitutional because it deprived a defendant of his or her constitutional right to have an indictment entered against him by a grand jury and a trial by jury. Id. at 596. The Attorney General claims that Defendant's reliance on Hedden is misplaced and the argument that the DVA is unconstitutional on jurisdictional grounds should be rejected because it is directly contrary to the New Jersey Constitution of 1947 as the courts of equity enjoy concurrent jurisdiction with the courts of law over criminal offenses such as those cited in the DVA.

Preliminarily, it is important to acknowledge that the Appellate Division in Cesare v. Cesare, 302 N.J. Super. 57, 66-67 (App. Div. 1997), briefly addressed the jurisdictional problems posed by the apparent anomaly of the DVA, which treats domestic violence complaints signed by alleged victims (as opposed to law enforcement officers), and claiming criminal acts, as something other than a criminal offense with potential serious penal consequences and directs the use of a civil standard of proof. The court further commented that the DVA is codified in the Penal Code and requires what might otherwise be criminal acts to be treated as a civil cause of action and under the preponderance of the evidence standard of proof standard for civil cases rather than beyond a reasonable doubt as in criminal cases. Id. at 67. To subject a defendant to the civil and criminal remedies provided by the DVA, a plaintiff must first prove that the defendant committed an act of domestic violence, as defined by the statute. Pursuant to N.J.S.A. 2C:25-19, domestic violence means the occurrence of one or more of the following acts: (1) homicide; (2) assault; (3) terroristic threats; (4) kidnapping; (5) criminal restraint; (6) false imprisonment; (7) sexual assault; (8) criminal sexual contact; (9) lewdness; (10) criminal mischief; (11) burglary; (12) criminal trespass; (13) harassment; and (14) stalking. N.J.S.A. 2C: 25-19. Each of these acts references the appropriate criminal statute. Accordingly, to be found to have committed an act of domestic violence, a party must have committed what is in effect a crime under the Penal Code. The legislative findings set out in N.J.S.A. 2C:25-18 also state that "domestic violence is a serious *crime* against society..." N.J.S.A. 2C:25-18. (emphasis added). However, the protections afforded a criminal defendant, including the right to a jury trial and the defense of double jeopardy, are noticeably absent in domestic violence proceedings. Cesare, supra, 302 N.J.Super. at 67. The court in Cesare observed that the statutory scheme creates these inconsistencies based on who signs the complaint. Ibid. The DVA requires a law enforcement officer to file a *criminal* complaint, whereas if an alleged victim files a domestic violence complaint based on the same incident of domestic violence, it is treated as if it is not a crime but as a *civil* cause of action. Nonetheless, the court decided the matter before it on other grounds and left for another case a closer examination of the constitutional issues implicated by the DVA. Ibid. This is that case.

First, it is not entirely accurate to say that a domestic violence proceeding is a prosecution for a crime converted into a civil proceeding. The injunctive power given by the DVA is a civil remedy for the enforcement of the prevention of domestic violence in the common interest, but it is not the means of punishing criminal offenses in derogation of constitutional rights. The DVA is not assuming jurisdiction over criminal offenses for their prosecution and punishment in the enforcement of the laws denouncing crime and penal transgressions. In many cases, it is evident that a particular act may simultaneously constitute both a crime and a civil wrong. For instance, a nuisance can be indictable as a criminal offense and compensable as a private wrong if there is a special injury to the individual plaintiff, or a defendant may be charged criminally for assault and sued civilly for injuries arising from the same act. However, these cases, with their different remedies, may proceed concurrently or successively. Similarly, the Legislature has explicitly acknowledged the applicability of criminal statutes to acts of domestic violence. See N.J.S.A. 2C:25-18. The DVA also states that the victim may simultaneously pursue a criminal case and a civil action arising out of the same domestic violence incident. N.J.S.A. 2C:25-28. Additionally, the entry of a domestic violence order does not preclude a later conviction and sentence for the crime that forms the basis of the order. State v. Reyes, 172 N.J. 154, 168 (2002). These distinctions underscore the conclusion that criminal and civil statutes concerning domestic violence create separate rights and remedies. Ibid. The DVA's civil remedies are not meant to punish the defendant for the commission of a crime or crimes which constitute an act of domestic violence. In fact, the statute has been declared by the courts to be remedial in nature, not punitive. Cesare v. Cesare, 154 N.J. 394, 400 (1998). As the New Jersey Supreme Court held in Doe v. Poritz, 142 N.J. 1, 43 (1995), even if the provided relief of a statute has a deterrent impact and adversely affects, potentially severely, some of those subject to its provisions, the law does not become punitive unless there is an intent to punish. The stated intent of the DVA is to *protect* victims through preventive and curative measures such as restraining orders, monetary compensation for losses suffered as a direct result of the act of domestic violence, and professional domestic violence counseling for the alleged abuser. See N.J.S.A. 2C:25-29. To that extent, equity aids in preventing crime. It is not the intent of the DVA that constitutional provisions be evaded by substituting a civil for a criminal procedure or a single judge for a jury. In this way, the DVA's remedial process of injunction is invoked to effectuate the principle behind the protection of domestic violence victims, not to enforce the criminal law's penalties for the crime of domestic violence. Therefore, in New Jersey under the DVA, criminal and civil actions arising out of an act of domestic violence are treated as two distinct matters with the criminal case initiated by law enforcement officers involving *punishment* for the commission of a crime which also constitutes an act of domestic violence on behalf of the public interest and the civil case initiated by the alleged victim involving *remedying* the private harm between the parties.

Defendant's argument is similar to that made by the appellant in State ex rel. State Board of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504 (E. & A. 1935), that is, in reliance on Hedden, the Chancery Court lacks subject matter jurisdiction to enforce penal laws by injunction, which violates the constitutional guarantee to a trial by jury in all criminal

prosecutions. Significantly, the law has changed considerably since Hedden was decided in 1919. The amendments to the New Jersey Constitution in 1947 have an important impact on the analysis and outcome of the constitutionality of the DVA on the issue of jurisdiction. While at the time of the Hedden decision there was a stark distinction between courts of law and equity, today that divide is not quite so clear because of the merger of law and equity under the Constitution of 1947. Although it is questionable whether the court in Hedden truly meant that its principles would not apply if the courts of law and equity were merged, current case law dictates otherwise. After a brief discussion of the New Jersey Supreme Court's holding in Hedden, the court in Newark Milk Co. stated that the principle that the authority to grant injunctive relief for a cause of action (i.e., nuisance) which at common law resided solely in courts of criminal jurisdiction "should not be extended beyond its sound constitutional basis." Id. at 512. In Newark Milk Co., the Legislature enacted a statute authorizing the State Milk Control Board to file an action in Chancery for injunctive relief to restrain habitual violations of the Milk Control Act, which required the importation of milk of wholesome quality. Ibid. The Court of Errors and Appeals of New Jersey found that the statute was constitutional because remedy by injunction served as "an added means to make effective the orders promulgated to accomplish the legislative purpose" and, traditional equitable principles permitted injunctive relief to prevent a multiplicity of actions at law and irreparable injury would result, although there may be a legal remedy available. Id. at 514.

Equitable principles seem to command that injunctive relief is available in domestic violence matters. The general principle is well-settled that equity will not enjoin the commission of a crime. 27A Am. Jur. 2d Equity § 69 (2007). However, case law indicates that the injunctive process can lawfully be made available to enforce and effectuate legislative policy if it is found necessary to command obedience to the orders and regulations and is in harmony with the character of the court upon whom jurisdiction is conferred. Newark Milk Co., supra, 118 N.J. Eq. at 514. Even in Hedden, the court stated that the Legislature may "lawfully confer on the court of chancery the injunction power in a new class of cases to which such remedy is appropriate or to extend the jurisdiction of the court to a class of cases which by their nature may come properly within the sphere and application of equitable principles." Hedden, supra, 90 N.J.Eq. at 594-95. The principles of equitable jurisdiction include: (1) inadequacy of the remedy at law; (2) irreparable injury; and (3) multiplicity of actions at law. Newark Milk Co., supra, 118 N.J.Eq. at 514. Typically, the jurisdiction of equity is tested by the facts existing at the inception of the suit.

In the case at bar, the above-mentioned factors favor the application of equitable jurisdiction. First, the remedy at law for acts of domestic violence is inadequate because there are no corresponding criminal penalties that provide sufficient relief to protect victims of domestic violence from further domestic abuse. The Legislature stated in its finding and declaration set out in N.J.S.A. 2C:25-18 that:

> *[E]ven though many of the existing criminal statutes are applicable to acts of domestic violence*, previous societal attitudes concerning

> domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. [N.J.S.A. 2C:25-18.] (emphasis added).

As previously mentioned, the criminal statutes for acts which constitute acts of domestic violence as indicated in the DVA include: (1) homicide; (2) assault; (3) terroristic threats; (4) kidnapping; (5) criminal restraint; (6) false imprisonment; (7) sexual assault; (8) criminal sexual contact; (9) lewdness; (10) criminal mischief; (11) burglary; (12) criminal trespass; (13) harassment; and (14) stalking. N.J.S.A. 2C: 25-19. The penalties following conviction in the Law Division for such crimes may consist of imprisonment and, more frequently, probation, depending on the nature of the crime and the prior record of the defendant. The defendant may also be released on bail prior to trial or receive parole after serving a portion of his or her sentence. None of these criminal penalties are permanent and do not ensure that the defendant will not harm the victim once released, which is the precise objective of the DVA. Therefore, the remedies at law for crimes denominated as acts of domestic violence do not achieve the same goal as the injunctive relief afforded the victim under the DVA and, in fact, can work to undermine its purpose.

Second, victims of domestic violence would suffer irreparable injury if injunctive relief were not provided. The Legislature's fundamental goal under the DVA is to protect victims of domestic violence against further abuse. N.J.S.A. 2C:25-18. As recognized by the New Jersey courts as well as the New Jersey Legislature, domestic violence is "a serious crime against society..." and "the health and welfare of some of the State's most vulnerable citizens, the elderly and disabled, are at risk because of incidents of reported and unreported domestic violence, abuse, and neglect..." Ibid. There is a plethora of statistics and research depicting the widespread nature and devastating effects of domestic violence which threaten the safety of thousands of citizens throughout the State of New Jersey. See Brennan v. Orban, 145 N.J. 282 (1996). There is no more fundamental basis upon which the Legislature can act than to protect the health and welfare of the general public as part of its police power. Newark Milk Co., supra, 118 N.J. Eq. at 515. Like the service of contaminated food commodities at issue in Newark Milk Co., the health or very existence of citizens is menaced by domestic abuse. Accordingly, the protection of victims of domestic violence from bodily harm is of paramount concern as it affects the health and welfare of the people of this State and commands adequate legislative action. Absent preventive relief, a victim of domestic violence can be, and often is, subjected to continual abuse, which can lead to additional and aggravated injuries as well as death.

Third, injunctive relief would thwart a multiplicity of actions at law because it would eliminate the need for multiple criminal actions for individual incidents of domestic violence. As the court in Newark Milk Co. explained, the prevention of a multiplicity of actions at law is "one of the special grounds of equitable jurisdiction, and for that purpose the remedy by injunction is freely used...although there may be a legal remedy." Id. at 514. Domestic violence is described as a "*pattern* of abusive and controlling behavior injurious to its victims." Peranio

v. Peranio, 280 N.J. Super. 47, 52 (App. Div. 1995). (emphasis added). Given that domestic violence often takes the form of repeated occurrences, injunctive relief would, at the very least, attempt to prevent the commission of additional domestic abuse, thus reducing the concern for multiple actions at law.

Aside from the foregoing analysis of equitable jurisdiction, this Court is bound by current case law. In accordance with that law, the jurisdictional infirmity found in Hedden, supra, 90 N.J.Eq. 583, is not present here because under the Constitution of 1947 law and equity functions have merged in the Superior Court by a provision that vests in that tribunal original general jurisdiction throughout the State in all causes. N.J. Const. art. VI, § 3, ¶ 2, 4; art. XI, § 4, ¶ 3. See also Mayor and Council of the Borough of Alpine v. Brewster, 7 N.J. 42, 51 (1951).

Finally, on a brief policy note, what would be the practical result of striking down the DVA on jurisdictional grounds such that domestic violence matters must be heard in the Law Division? Although this should not be the deciding factor, it is a serious consideration. First and foremost, jury trials would cause undue delay in providing necessary relief to the plaintiff, especially since one of the primary reasons the DVA was enacted was due to "the [law enforcement and judicial system's] inability to generate a prompt response in an emergency situation." N.J.S.A. 2C:25-18. Furthermore, if the reason for placing domestic violence actions in the Family Division is that these matters deal with family-like situations and such courts have the expertise to handle them, then transferring domestic violence matters to the Law Division would undermine that purpose.

Defendant claims that his freedom of speech is violated by the DVA. A defendant's right to speak freely with his wife and children is not protected under the First Amendment to the United States Constitution. Although a Final Restraining Order limits contact between a defendant's wife and children, the right of free speech is not absolute at all times and under all circumstances. There are classes of speech, the prevention of which do not raise any constitutional problems, including lewd and obscene language, profane language, libel, and "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942). Particularly relevant in the domestic violence context, "fighting words" are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Ibid. It is well-settled that such speech is not an "essential part of any exposition of ideas, and are of such slight social value...that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Ibid. Therefore, the First Amendment will not protect abusive and injurious speech, which is prevalent in situations involving domestic violence.

The right to possess one's residence is not violated by the DVA. Although the removal of a defendant from his or residence implicates a deprivation of a protected right, the Appellate Division held in Grant v. Wright, 222 N.J. Super. 191 (App. Div. 1988), that the court has the authority to grant exclusive possession to the plaintiff of the residence to the exclusion of the defendant when the residence or the household is jointly owned or leased by the parties upon a

finding that the plaintiff is in danger of domestic violence. In its analysis of this issue, the court emphasized the legislative history of the DVA, the seriousness of the problem of family violence, and the legislatively defined need for extraordinary process. Id. at 199. Accordingly, this Court's decision to remove Defendant from the marital home did not violate his right to possess his residence as that right can yield within the bounds of the New Jersey Constitution to protect the safety and well-being of the plaintiff.

The DVA does not interfere with a defendant's Second Amendment right to bear arms. Significantly, New Jersey does not recognize an individual right to bear arms under the Second Amendment. Burton v. Sills, 53 N.J. 86, 97-101 (1968). Despite Defendant's intelligent discussion of the historical background of the Second Amendment recognizing the split among the jurisdictions on the correct interpretation of that right, this Court is bound by the current state of the law in *New Jersey*. Therefore, the DVA's provisions regarding weapons do not infringe upon the Second Amendment right to bear arms in this State.

Furthermore, Defendant argues that the DVA fails to provide adequate due process protections given the nature of the individual rights at stake. Specifically, Defendant claims that there are several due process deficiencies with the DVA: (1) lack of notice; (2) no right to appointed counsel; (3) improper standard of proof; and (4) no trial by jury.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Although Article I, Paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, it "protects against injustice and, to that extent, protects values like those encompassed by the principles of due process." H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003). In H.E.S., the Supreme Court of New Jersey explained that, at a minimum, due process requires that a party in a judicial hearing receive notice defining the issues and an adequate opportunity to prepare and respond. Id. at 322. Due process is a flexible concept that depends on the particular circumstances. Id. at 321.

Defendant claims that there is a constitutional right to appointed counsel. Due process does not require the right to counsel for a defendant in domestic violence proceedings. New Jersey law indicates that a defendant is entitled to counsel if the proceeding is essentially criminal in nature and, therefore, is guaranteed protections similar to a criminal defendant. See Pasqua v. Council, 186 N.J. 127, 140 (2006) (holding that defendants in contempt proceedings under R. 1:10-2, which are essentially criminal in nature because they are instituted for the purpose of punishing a defendant for failure to comply with a court order, have a right to counsel, as opposed to defendants in child support enforcement proceedings who do not have a right to counsel since such proceedings are civil in nature); Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971). The Sixth Amendment to the United States Constitution, however, does not provide for counsel in a non-criminal setting. In addition, there is no authority in this State in a civil proceeding for a right to counsel. Rodriguez, supra, 58 N.J. at 294. Civil proceedings in which

New Jersey has required court-appointed counsel to indigent defendants include involuntary civil commitment proceedings, Pasqua, 186 N.J. at 148, and termination of parental rights actions under N.J.S.A. 30:4C-11 to -24, Id. at 142. As previously discussed, domestic violence actions under the DVA are civil proceedings designed to protect victims from further abuse. Consequently, defendants in domestic violence actions do not have a constitutional right to court-appointed counsel.

Defendant alleges he should be entitled to a jury trial. Defendant does not make any legal arguments as to why a defendant has a right to a jury trial in domestic violence actions but rather focuses solely on the problem of alleged bias in the judicial system. Specifically, Defendant argues that a domestic violence hearing is unconstitutional because it "requires judges to make relevancy determinations on the basis of hunches, gut feelings, intuition, and preconceived assumptions." Brief of Defendant at 47, Crespo, FV-09-2682-04. Defendant also claims that a jury trial is necessary due to unconscious, institutionalized bias within the judiciary. Id. at 51. Yet, the problem of potential bias in making a judicial determination is not a legal basis for which a defendant has a constitutional right to a jury trial.

The right to a trial by jury in domestic violence actions raises an interesting question nonetheless, which this Court will briefly discuss. The DVA itself does not confer on a defendant a right to trial by jury. However, Article 1, Paragraph 9 of the New Jersey Constitution guarantees the right to a jury trial in state court only to the extent that the right existed at common law at the time the New Jersey Constitution was adopted. Shaner v. Horizon Bancorp., 116 N.J. 433, 447 (1989); In re LiVolsi, 85 N.J. 576, 587 (1981). It is unknown whether the historical focus of that right is the 1947 Constitution, LiVolsi, supra, 85 N.J. at 587; the 1844 Constitution, Steiner v. Stein, 2 N.J. 367, 378-79 (1949), or the 1776 Constitution, Montclair v. Stanoyevich, 6 N.J. 479, 485 (1951). Notwithstanding the uncertainty about which version of the New Jersey Constitution defines the right to trial by jury, the definition has always focused on the traditional distinction between law and equity. Shaner, supra, 116 N.J. 433; LiVolsi, supra, 85 N.J. at 587-88; Steiner, supra, 2 N.J. at 379. Traditionally, the right to a jury trial attaches in legal actions, not equitable cases. Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J.Super. 572, 581 (Ch. 1972). In actions seeking equitable relief, as opposed to money damages, litigants generally do not enjoy a right to trial by jury. LiVolsi, supra, 85 N.J. at 587. To determine whether a case is primarily legal or equitable, New Jersey courts look at the historical basis for the cause of action and focus on the requested relief. Weinisch v. Sawyer, 123 N.J. 333, 343 (1991). For instance, in Shaner, supra, 116 N.J. at 450-53, the Court denied the plaintiff a jury trial in an action brought under the Law Against Discrimination (LAD) because, although the plaintiff sought money damages, the available relief under the LAD is predominantly equitable in nature (i.e., remedies that prevent and discourage the recurrence of discrimination). The Court explained that the remedy is the most persuasive factor in determining whether the cause of action has been historically primarily equitable or legal in nature, even though the nature of the underlying controversy is also helpful to consider. Ibid.

The DVA has been held to be equitable in nature. Reyes, supra, 172 N.J. at 160. In New Jersey, there was nothing similar to injunctive relief forbidding future domestic abuse and mandating that a person stay away from a complainant existing at common law. In proceedings brought under the DVA, money damages may be one of the forms of relief available to the plaintiff, but not the only remedy. The court may award the plaintiff monetary compensation for loss of earnings or other support, including child or spousal support, out-of-pocket expenses of injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling, moving or other travel expenses, reasonable attorney's fees, court costs, and compensation for pain and suffering. N.J.S.A. 2C:25-29(b)(4). Punitive damages may also be awarded in addition to compensatory damages. Ibid. Additionally, the court may require the defendant to continue to make rent or mortgage payments on the residence occupied by the victim. N.J.S.A. 2C:25-29(b)(8). However, the primary relief sought by the plaintiff in a domestic violence action is an injunction seeking to limit contact between the plaintiff and the defendant, which is equitable in nature. Similar to the remedy of preventing further discrimination available in LAD cases, the main thrust of the DVA is to protect the victim by providing remedies that prevent further domestic abuse. Therefore, a defendant does not have a constitutional right to a jury trial in domestic violence actions.

The next issue is whether the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, contains elements of "practice and procedure" reserved only for the Supreme Court and is, therefore, a violation of the Separation of Powers Clause found in Article 3, Paragraph 1 of the New Jersey Constitution of 1947.

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." N.J. Const. art. VI, § 2, ¶ 3. This constitutional provision means that the Supreme Court, by adopting rules, shall govern practice and procedure in the courts and not be subject to overriding legislation. The only exception would be if the practice and procedure equated to substantive law. Winberry, supra, 5 N.J. at 248-55. The decision in Winberry was a topic of discussion for some time thereafter. In his concurring opinion, Justice Case seemed to accuse the majority of interpreting the Constitution so as to reach a desired result. Id. at 267 (Case, J., concurring). He also pointed out that the report of the committee that drafted the judicial article specifically said that the Legislature would have superseding authority over practice and procedure. Id. at 260. The majority dismissed that argument by pointing out that the report was not presented until two days after the article was formally adopted. Id. at 248 (majority opinion).

An article in the Harvard Law Review followed shortly after Winberry accusing the majority of overreaching in its interpretation of the phrase "subject to law." See Benjamin Kaplan & Warren J. Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury, 65 Harv. L. Rev. 234 (1951). On the other hand, the concept that the Supreme Court (*not* the Legislature) should have final say on practice and procedure has impressive roots. An address in 1906 to the American Bar Association by a then little-known Nebraska lawyer named Roscoe Pound started a reform movement to simplify the unwieldy

nature of practice and procedure in the various court systems. On July 1, 1947, Pound, as Dean of Harvard Law School, urged this idea by explaining it in greater detail before the committee working on the judicial article of the New Jersey Constitution. Later, he specifically supported the New Jersey Supreme Court's Winberry decision regarding "practice and procedure" in a law review article. See Roscoe Pound, Procedure Under Rules of Court in New Jersey, 66 Harv. L. Rev., 28, 29 (1952). A much earlier article by Dean John Wigmore bluntly explained why the court and not the Legislature should have final say on practice and procedure. He asserted that the court knows its needs better, is more disinterested, has more competency on these matters, is less likely to be influenced by personal motives, and is not burdened by all the other issues of state government that would preoccupy the Legislature. John H. Wigmore, Editorial Note, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev., 276 (1928). This very article, as well as Dean Pound's position, was mentioned in approving tones in Winberry. Winberry, supra, 5 N.J. at 254-55.

It is the duty of the judiciary (as it is of all three branches of government) to oppose encroachments on its constitutional domain by another branch of government. In re P.L. 2001, Ch. 362, 186 N.J. 368, 378-79 (2006). The Supreme Court has unquestioned ultimate authority regarding administration (as opposed to practice and procedure). In the administration context, any incursion by the Legislature on the Supreme Court's domain may be tolerated depending upon the legitimacy of the governmental purpose and the nature and extent of the encroachment upon judicial prerogatives and interests. Id. at 383-84. After all, as a matter of comity and common sense, legislative enactments which do not directly conflict or interfere with the operation of the judiciary can be respected. Id. at 383. However, any intrusion upon another branch's domain will not be tolerated if it impairs the essential integrity of that branch. Massett Bldg. Co. v. Bennett, 4 N.J. 53, 57 (1950). When such an encroachment occurs, it is the duty of the branch to oppose it. Allan v. Durand, 137 N.J.L. 30, 33 (Sup. Ct. 1948).

In George Siegler Co. v. Norton, 8 N.J. 374 (1952), the Supreme Court was called to rule upon a conflict between a state statute and a rule of procedure. The statute said that at an uncontrolled railroad intersection the judge must let the negligence case go to the jury while the court rules said that if there was clearly contributory negligence present the judge could dismiss the action. Since the court rules were procedural and in conflict with the statute, the court rule had to prevail based on the concept of separation of powers. Id. at 383.

In Outdoor Sports Corp. v. A. F. of L., Local 23132, 6 N.J. 217, 226 (1951), the Supreme Court held that the Anti-Injunction Act, N.J.S.A. 2:29-77.1 et. seq., was essentially procedural and, for that reason, its procedural provisions had to be incorporated by reference into a then court rule, namely, R.3:65-9. In fact, the Court cited Winberry for this proposition. Simply put, there is nothing violative of separation of powers if the statutory provision involving "practice and procedure" is accepted by the Court in the form of a rule which embraces the statute. It is obviously for this very reason that there are so many court rules that are nearly word-for-word identical to state statutes dealing with what appears to be "practice and procedure." Essentially, if the Legislature had a good idea (although it crossed the separation of powers line) and the

Court was willing to embrace it, then it adopted a rule reflecting the statute. There is, of course, the very issue involved in Winberry. In that matter, a state statute allowed for one year to file an appeal while the court rule provided only forty-five days. The court rule ultimately prevailed since it was in conflict with the statute.

In a legal context, "procedure" is defined as "the judicial rule or manner for carrying on a civil lawsuit or criminal proceeding." Black's Law Dictionary, 1221 (7th ed. 1999). The difference between procedure and substantive law is thus not easily defined. In certain situations, a law can be procedural in one context but substantive in another. Busik v. Levine, 63 N.J. 351, 364-65 (1973).

There are several unambiguously procedural elements in the Prevention of Domestic Violence Act. See N.J.S.A. 2C:25-17 to -35. One section details how the judge shall make his or her findings, what the order releasing a defendant shall contain, what shall be considered by the court in setting bail, and what must be done before bail can be reduced. See N.J.S.A. 2C:25-26. In another section, it specifically commands the manner in which the court's order shall be recorded, to whom that order shall be provided, and what shall be required of the defendant before the order can be vacated. See N.J.S.A. 2C:25-27. Other provisions specifically mandate in which Part of which Division of the Superior Court the complaint shall be filed. See N.J.S.A. 2C:25-28(a). This cannot help but bring to mind Justice Vanderbilt's prophetic warning that this exact sort of thing is not consistent with the judicial article of the New Jersey Constitution. Winberry, supra, 5 N.J. at 247. Also, there are specific mandates regarding practice and procedure (and possibly even administration) in N.J.S.A. 2C:25-28(b), (c), (d), (f), (h), (i), (j)[1], and (q). The entirety of N.J.S.A. 2C:25-29(a), especially the "within ten days" requirement for the setting of the final hearing, contains what are unambiguously rules for practice and procedure. N.J.S.A. 2C:25-29(a).

In a non-separation of powers context, the Appellate Division, in an unreported opinion, seemed to feel that N.J.S.A 2C:25 is basically a procedural statute. D.S. v. K.P. No. A-637803T2 (App. Div. July 24, 2007). Given that courts are generally loath to find statutes unconstitutional, the firmness in unconstitutionality must be beyond a reasonable doubt. State v. Trump Hotels and Casino, 160 N.J. 505, 526 (1999). The procedural aspects of the Prevention of Domestic Violence Act are so clearly an intrusion into the integrity of the court's domain that they must be declared unconstitutional. R.5:7A(a) seems to only adopt the *relief* as described in the statute. See R.5:7A(a). For that reason, as well as the fact that the relief seems to be of a *substantive* nature, there is nothing unconstitutional as a violation of separation of powers regarding the relief aspects of the statute. However, the balance of R.5:7A does nothing to give court ratification to the procedural aspects of the statute. For instance, R.5:7A(e) ignores the bail procedures for a criminal complaint of domestic violence established by N.J.S.A. 2C:25-26(d) - (e). Instead, on the issue of bail, when a law enforcement officer has effected an arrest without a

[1] "The judge shall state with specificity the reasons..." N.J.S.A. 2C:25-28(j).

warrant on a criminal complaint brought for a domestic violence incident, R.5:7A(e) refers to another court rule, namely R.3:4-1.

As a final point, it should be noted that the Prevention of Domestic Violence Act conflicts with other pre-existing court rules. For example, the statute calls for a final order in ten days and the imposition of a variety of permanent relief for the financial well-being and protection of the victim and family. See N.J.S.A. 2C:25-29. The statutory procedure is foreign to the court rules. Unlike an *ex parte* injunction, the Temporary Restraining Order issues on a complaint, there is no order to show cause, no opportunity to move to vacate on a two-day notice, and no provision for an *ad interim* restraint pending a hearing. Rather, the Temporary Restraining Order is the *ad interim* restraint. There is no pre-trial preparation. Numerous court rules for procedure already exist which could easily have applied to the substantive aspect of the statute. See R.1:6-2; R.4:52-1 to -7. Thus, the procedural aspects of the DVA are not only beyond the Legislature's province but also directly conflict with established procedures already found within the court rules.

This would not be the first time a legislative attempt to deal with the scourge of domestic violence was found to be violative of a state's constitution. In Bates v. Bates, 303 Ark. 89 (1990), the Supreme Court of Arkansas held that the Legislature's vesting of exclusive jurisdiction for domestic violence matters in the chancery courts exceeded the constitutional authority of the Legislature. Thus, the prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to – 35, is unconstitutional as it violates New Jersey's Constitutional Article on Separation of Powers.

The next issue involves the standard of proof. The standard of proof "shall be by a preponderance of the evidence." N.J.S.A. 2C:25-29(a). The standard of proof is usually considered a procedural matter and, as such, is normally reserved for the courts. In re Will of Smith, 108 N.J. 257, 264 (1987). It has sometimes been debated as to whether the standard of proof is a matter of procedure, evidence, or substantive law. Therefore, this judge can hardly find beyond a reasonable doubt that the standard of proof is a matter of "practice and procedure." Thus, as a matter of separation of powers, the standard of proof cannot be unconstitutional. However, the Due Process Clause of the Fourteenth Amendment to the United States Constitution is implicated in any serious discussion of the standard of proof.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to instruct the fact-finder concerning the degree of confidence our society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. Addington, 441 U.S. at 423, 99 S. Ct. at 1808, 60 L. Ed. 2d at 329. In the matter of Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976), the United States Supreme Court arrived at a balancing test which is relevant and instructive in determining the appropriate standard of proof under the Due Process Clause. In re Polk License Revocation, 90 N.J. 550,

562 (1982). The three factors to consider are: (1) the nature of the private interest affected by the proceeding; (2) the countervailing governmental interest to be furthered by the proceeding; and (3) the risk of error in the ultimate determination created by the use of the particular standard of proof. Ibid.

The Deputy Attorney General at oral argument contended that in civil actions in which the State is not a party the Mathews analysis cannot be applied. This Court's research finds nothing in the Mathews analysis or any of its progeny to suggest that is the case. A State's use of civil labels and good intentions are not determinative when the individual interests at stake in a State's proceedings are both particularly important and more substantial than mere loss of money. Santosky v. Kramer, 455 U.S. 745, 756, 102 S. Ct. 1388, 1396, 71 L. Ed. 2d 599, 608 (1982). Besides, it is evident from the second factor of the Mathews test that the government's interest in the purpose behind the legislation is part of the scrutiny used in determining the proper standard of proof. While the caption of the instant matter does not say "state", the legislative findings and declaration contained in the Act itself as well as the procedures setup for both the police and the courts make it clear that the State is most certainly an interested party in civil domestic violence matters.

This Court is aware of both reported and unreported New Jersey cases holding that the mere preponderance standard is appropriate in domestic violence matters. See D.S. v. K. P., No. A-637803T2 (App. Div. July 24, 2007); Roe v. Roe, 253 N.J. Super. 418 (App. Div. 1992). However, neither of those cases conducted a Mathews analysis to see if the standard of proof passed muster under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This Court is also unaware of any reported decision applying the Mathews analysis to the standard of proof in domestic violence matters. Cases applying the Mathews analysis include Addington, supra, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323, holding that the Texas mere preponderance standard was insufficient under the Fourteenth Amendment for involuntary civil commitment hearings. In the matter of Santosky, supra, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599, the Court held that New York's mere preponderance standard was insufficiently low to allow for the termination of parental rights based on abuse and neglect. The New Jersey Supreme Court in the matter of In re Polk, supra, 90 N.J. 550, held that the Mathews analysis was required to determine if the preponderance standard was constitutionally sufficient in a professional license revocation hearing. In that matter, the Court held that the mere preponderance standard was constitutionally sufficient. However, the Court's analysis of the three factors, particularly the third factor, expanded on the allocation of error considerations mentioned in the United States Supreme Court cases.

One of the most significant impacts on defendants growing out of a Final Restraining Order is the defendants' inability to be with or maintain their relationship with their children. Many Final Restraining Orders contain significant limitations on the defendants' ability to be with their children. It is well-established that a parent's right to the care and companionship of his or her child is so *fundamental* as to be guaranteed protection under the First, Ninth, and Fourteenth Amendments to the United States Constitution. Wilke v. Culp, 196

N.J. Super. 487, 496 (App. Div. 1984). The fundamental right of a parent to be with his or her child is not limited only to termination of parental rights cases such as in Santosky, supra, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599, but also has been recognized in the context of a domestic violence restraining order. See Cosme v. Figueroa, 258 N.J. Super. 333, 341 (Ch. Div. 1992). Once a *fundamental* right is involved, the regulation limiting that right may be justified only by a compelling state interest. Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147, 178 (1972). If the impact upon the defendant results in a stigma or resembles a criminal trial, these factors weigh in favor of a higher standard. Santosky, supra, 455 U.S. at 756-62, 102 S. Ct. at 1396-1399, 71 L. Ed. 2d at 608-12. When more is involved than just money and the result may actually tarnish an individual's reputation, a higher standard is favored. Addington, supra, 441 U.S. at 424-27, 99 S. Ct. at 1808-10, 60 L. Ed. 2d at 329-31. For these reasons, particularly the involvement of a *fundamental* right protected by the United States Constitution, Mathews factor number one weighs considerably in favor of a higher standard of proof than mere preponderance.

The second Mathews factor considers the governmental interest to be furthered by the proceeding. New Jersey's interest in preventing domestic violence is extremely strong, as reflected in the legislative findings and declaration contained in the statute itself. See N.J.S.A. 2C:25-18. Thus, factor number two weighs mightily in favor of a lesser standard of proof. However, New Jersey's interest in protecting victims of domestic violence can be no greater than New York's interest in protecting children from abuse and neglect, as was discussed in Santosky, supra, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599. Thus, the analysis proceeds to the third factor.

In In re Polk, supra, 90 N.J. 550, the New Jersey Supreme Court conducted an extensive analysis of the third Mathews factor. The permanency of the loss sustained by the defendant is a factor weighing in favor of a higher standard. Id. at 564. Final Restraining Orders in New Jersey are by their nature permanent as compared to New York's restraining orders, which are normally limited to two years. See N.Y. FAM. CT. ACT § 842 (Consol. 2008). While it is true that many Final Restraining Orders are vacated usually with the acquiescence of the plaintiff, many are not. In In re Polk, one of the factors weighing in favor of a lesser standard was the acknowledgment that "what" has to be proved (i.e., the substantive burden) is so high a standard that a lesser standard of proof (procedurally) is allowable. This is because in medical license revocation matters the conduct has to be so particularly egregious as to constitute gross malpractice. As the Court pointed out, by requiring flagrant misconduct, the Legislature significantly increased the substantive burden which the State must bear, thus allowing the lesser standard of proof. In re Polk, supra, 90 N.J. at 565-66. That Court also noted that in medical license revocations the substantive issues are capable of objective measurement and application. Id. at 567. It can hardly be said that the same is true when acts of domestic violence are alleged. While some domestic violence matters are easy to prove (e.g., objective signs of physical injury), some are extremely difficult. The difficult ones often involve allegations of harassment, terroristic threats, and the judge ultimately acknowledging that this is nothing more than a "he said, she said" matter. Although involving allegations of physical injury, the instant case was

described by the trial judge in this fashion. Transcript of Final Restraining Order Hearing dated April 21, 2004, at 23-24, Crespo, No. FV-09-002682-04. In In re Polk, supra, 90 N.J. 550, 567, the Court also discussed what was apparently the concept of a level playing field. It was noted that Dr. Polk used thirty-four defense witnesses and the Court held that "these procedures give a person whose rights are threatened by the proceedings every realistic opportunity to prepare and meet the charges." Ibid. It is difficult to imagine a defendant in a domestic violence hearing given his or her ten-days notice (subject to reasonable adjournment) being able to bring in thirty-four witnesses nor, as modern day trials go, can it truly be said that a hearing on a Final Restraining Order involves "every realistic opportunity to prepare and meet the charges." Ibid. The quickly calendared and summary nature of domestic violence proceedings seems to suggest something else. While some domestic violence matters, especially those involving objective signs of physical injury, are easy to prove, others involving stalking, harassment, terroristic threats, etc. are not so easy to prove, especially since some involve not only the state of mind of a perpetrator but also that of the victim. The latter cases may fall into the category that are difficult to prove and, thus, would not be properly served by a lower standard when it comes to generating confidence in the ultimate factual determination. Id. at 568. The heightened standard of proof compensates for the difficulty in marshalling cogent evidence to establish or defend against such a claim. Thus, in some situations, the subject matter itself being so intrinsically complex is not readily amenable to objective assessments. Ibid. Simply put, the nature of some domestic violence cases are easy to prove with objective evidence and some are very difficult to prove (or defend) and require the fact-finder to tread very carefully into arcane and often nebulous areas. By imposing the higher standard (clear and convincing), those easy to prove, objective cases would still be easy to prove and the higher standard would not run the risk of exculpating the guilty. However, regarding the more difficult to prove cases, the higher standard would, at the same time, satisfy the New Jersey Supreme Court's concern regarding difficult to prove matters as discussed in In re Polk, without offending the Appellate Division's concern that the criminal standard would make proof all but impossible. Roe, supra, 253 N.J. Super. at 428.

As this judge sees it, the Due Process Clause of the Fourteenth Amendment and the matter of In re Polk, supra, 90 N.J. 550, require that a clear and convincing standard be utilized in domestic violence matters. For that reason, N.J.S.A. 2C:25-29(a) is unconstitutional as it relates to the standard of proof. The thrust of this Court's position should be clear in the event of further review. That a *fundamental* right could be forfeited as a result of a rapidly calendared, summary hearing without discovery where the only protection afforded the defendant is the "mere preponderance standard" clearly offends the Due Process Clause of the Fourteenth Amendment. This judge firmly believes that the Supreme Court's analysis in In re Polk as well as the U.S. Supreme Court decisions mentioned earlier, when applied to the Domestic Violence Act require that the standard of proof be elevated to that of clear and convincing evidence. The hearing before Judge Mantineo did not consider the constitutionally proper procedures provided for Chancery hearings, nor did the court consider the factors to evaluate the appropriate standard of proof.

The Final Restraining Order entered by Judge Mantineo on April 22, 2004, is hereby vacated, however, all of its terms and conditions remain in effect as a temporary restraining order. Defendant is entitled to a new hearing on the Final Restraining Order, at which time the already-existing court rules shall govern the practice and procedure to be used at that hearing. As to the standard of proof, the judge hearing the matter shall decide if pursuant to the Mathews analysis the use of the court rules, as opposed to the procedure utilized in the Act, still require the clear and convincing standard or whether the analysis allows for the mere preponderance standard to be used.

Very truly yours,

Francis B. Schultz

Francis B. Schultz

FBS/kr

FILED

JUN 18 2008

FRANCIS B. SCHULTZ, J.S.C.

VIVIAN CRESPO,

Plaintiff,

V

ANIBAL CRESPO,

Defendant.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION- FAMILY PART
DOCKET # FV-09-2682-04

CIVIL ACTION
ORDER

THIS matter having been opened to the Court by the defendant and the Court having considered the papers submitted and for the reasons set forth in this Court's letter opinion of June 18, 2008, it is on this 18th day of June 2008, **ORDERED** that the Final Restraining Order entered by Judge Mantineo on April 22, 2004, is hereby **VACATED**, however, its terms and conditions remain in effect as a Temporary Restraining Order, and the matter shall be set down for a hearing on a Final Restraining Order at which time the court rules will be used for practice and procedure and the Court shall consider the appropriate standard of proof.

IT IS FURTHER **ORDERED** that a copy of this order be served upon all parties within seven days of the date hereof.

Francis B. Schultz
FRANCIS B. SCHULTZ, J.S.C.