



Effective Examinations of the Parties in Domestic Violence Cases

By Daniel Burton



An attorney at Lawrence Law, **DANIEL A. BURTON** devotes his entire practice to matrimonial and family law matters in New Jersey. He represents clients in all aspects of matrimonial and family law, including all stages of divorce litigation, civil union and domestic partnership litigation, divorce mediation and arbitration, custody and parenting time issues, alimony and child support, pre-nuptial agreements, separation and matrimonial settlement agreements, post-judgment litigation, and domestic violence matters.

Domestic violence is a pervasive problem throughout the United States and New Jersey is no exception to this fact. In New Jersey, the Prevention of Domestic Violence Act¹ (“the Act”) was enacted to serve as a shield for domestic violence victims. Unfortunately, all too often there are times where litigants will attempt to use the Act as a “sword,” whether to gain an advantage in custody and parenting time litigation, gain sole access to a marital home/residence, or some other improper purpose. In those cases in which a victim pursues a restraining order for the laudable purposes of the Act, an attorney’s representation of a litigant through the domestic violence matter can be some of the most beneficial work we do as family law practitioners. The protections provided by the domestic violence statute to a victim and the ramifications of that statute to a defendant are both necessary and significant to prevent domestic violence. Accordingly, effective representation of counsel, which undoubtedly includes effective examinations of both parties, is vital to each and every domestic violence litigant.

Domestic violence is a term that has been defined in New Jersey as follows: the

occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor:

1. Homicide
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
13. Criminal trespass
14. Harassment
15. Stalking
15. Criminal coercion
16. Robbery
17. Contempt of a domestic violence order
18. Any other crime involving risk of death or serious bodily injury to a person protected under the Prevention of Domestic Violence Act of 1991.
19. Cyber-harassment

A victim of domestic violence is defined,² in New Jersey as follows:

A person protected under this act and shall include any person who is 18 years of age or older or who is an emancipated minor and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present household member or was at any time a household member. "Victim of domestic violence" also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant. "Victim of domestic violence" also includes any person who has been subjected to domestic violence by a per-

son with whom the victim has had a dating relationship.

Under *Silver*,³ a two-prong analysis was set forth for the courts in New Jersey to follow when determining whether to convert a temporary restraining order (TRO) into a final restraining order (FRO). The first inquiry is whether the plaintiff/victim has proven beyond a preponderance of the evidence that a predicate act of domestic violence has occurred. The second inquiry, if the court finds that the first inquiry has been met, is whether a restraining order is necessary, upon evaluation of the factors set forth in the statute,⁴ to protect the victim from an immediate danger or to prevent further abuse. These two prongs should guide the direct examination of the victim.

Effective Examination of the Parties by Plaintiff's Counsel

Direct examination of the plaintiff/victim by counsel needs to provide a compelling narrative that weaves into the fabric of the story all relevant pieces of evidence. Oftentimes, relevant evidence will include text messages or other like communications between the parties, video or audio recordings of the incident, or photographs depicting the incident's aftermath (specifically in terms of injuries sustained or property broken/destroyed). It is the plaintiff/victim that has the burden to prove, by a preponderance of the evidence, that a predicate occurred and that a restraining order is necessary. This is a much lesser standard of proof than the beyond a reasonable doubt standard used in the criminal division. It is much easier to meet the preponderance of the evidence standard required when there is tangible evidence of the incident beyond just the plaintiff's testimony. This standard should always be at the forefront when examining the plaintiff/victim during direct examination.

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As set forth in the Model Civil Jury Charges:⁵

The term 'preponderance of the evidence' means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. If the evidence on a particular issue is equally balanced, that issue has not been proven by the preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

In order to commit harassment, the actor must act with purpose to harass another. Often, the simplest way to defend against the claim of harassment is to provide the court with an ulterior motive behind the defendant's words/actions. In other words, provide an explanation as to why the defendant said what was said or did what was done and how the intent of the defendant was not to harass the plaintiff/victim.

Prior to the hearing, counsel for the plaintiff/victim should ensure that the TRO complaint contains all relevant allegations as to the predicate act and the prior history between the parties. If there is additional information that needs to be added to the TRO complaint, the plaintiff/victim will need to amend the complaint in order to put the defendant on notice as to any and all allegations that they will be required to defend against at the time of trial. The plaintiff/victim will not be allowed to testify to or about allegations not contained therein as they are limited to the "four corners" of the complaint.

Once counsel for the plaintiff/victim has covered all aspects of the TRO com-

plaint, successfully explaining to the court both steps of *Silver*⁶ beyond the preponderance of the evidence, focus should shift to the cross examination of the defendant. This assumes that the defendant actually testifies, as there may be a basis for the defendant not testifying, especially if there is an ongoing criminal matter stemming from the same incident. During cross-examination of the defendant, the focus should be on bolstering the testimony from the plaintiff/victim by attacking the defendant's credibility, getting concessions from the defendant, and otherwise showing the various contradictions that may exist in the defendant's version of the story.

Effective Examination of the Parties by Defendant's Counsel

There are four primary areas of defense against the entry of a FRO:

1. Attacking the alleged predicate act (1st step of *Silver*);⁷
2. Attacking the alleged need for a FRO (2nd step of *Silver*);⁸
3. Using the argument of domestic contempt; and
4. Using the argument of divorce/litigation planning.

The Predicate Act

The most common predicate act in TRO complaints is harassment. The legal definition⁹ for harassment is:

A person, with purpose to harass another:

1. Communicates with that person either anonymously, at extremely inconvenient hours, or in offensively coarse language;
2. Strikes, kicks, shoves, or offensively touches that person; or
3. Engages in any other course of alarming conduct or repeatedly committed acts with purpose to alarm or seriously annoy that person.

In order to commit harassment, the actor must act with *purpose* to harass another. Often, the simplest way to defend against the claim of harassment is to provide the court with an ulterior motive behind the defendant's words/actions. In other words, provide an explanation as to why the defendant said what was said or did what was done and how the intent of the defendant was *not to harass* the plaintiff/victim. Direct examination of the defendant should set forth the basis for this type of defense by explaining what the purpose or intent of the defendant actually was. Similarly, cross-examination of the plaintiff/victim should attempt to "poke holes" in whatever the allegation of the predicate act may be. As an example, if the plaintiff/victim is relying on the portion of the harassment statute regarding offensively coarse language as the basis for establishing the predicate act of harassment, then examples should be given where plaintiff/victim uses similar language when communicating with the defendant.

Necessity of Final Restraining Order

In addition to the predicate act, the plaintiff/victim must also prove: (1) that they are fearful of the defendant; and (2) that there exists opportunity for domestic violence to continue/occur again without the entry of the FRO. An effective cross-examination can counter the fear argument by establishing a willingness by the plaintiff/victim to continue communicating with the defendant, failing to remove themselves from the defendant's presence by remaining there willingly, or otherwise showing a lack of fear on the part of the plaintiff/victim. For example, if the plaintiff/victim provides a video/audio recording, attempts should be made to show that the recording proves that they were never fearful of the defendant because they remained calm, refused to leave, escalated the situation, or otherwise failed to demonstrate that the defendant's words or actions

had any impact upon them. If the plaintiff/victim presents themselves as fearful of the defendant because the defendant is the owner of firearms, a good counter during cross examination would be the presentation of evidence that establishes that the plaintiff/victim spent significant time with the defendant after the alleged domestic violence, had previously gone hunting with the defendant or spent time at the shooting range with the defendant or knew of the presence of those firearms in the residence for a considerable amount of time prior to the incident in question.

Domestic Contretemps

Domestic contretemps is a legal term used to describe ordinary arguments that occur between spouses or domestic partners that fall short of being considered domestic violence. This is oftentimes a successful defense to the claim of domestic violence, as the plaintiff/victim is simply trying to mislabel an otherwise routine argument between spouses as domestic violence. The courts must strive to remain vigilant in separating domestic contretemps from domestic violence as the lines can sometimes blur, but the outcomes for each should remain distinguished. During examination of the parties, this defense can be highlighted effectively by showing that there was nothing extraordinary about the argument that took place between the parties.

Divorce Planning

The Act¹⁰ can oftentimes be misused, despite its intended purpose, by litigants that are currently engaged or about to be engaged in divorce litigation. In other words, it is commonplace for a litigant to use the Act¹¹ as a sword to inflict harm against the other party rather than its intended purpose of being a shield to protect against harm from the other party. Accordingly, it is common to see litigants file for TROs against their spouse/partner, in order to gain an

advantage in parallel divorce or custody proceedings. This is especially true at the onset of litigation because it is often seen by a litigant as a way to (a) temporarily/permanently remove their spouse/partner from the former marital home, (b) temporarily remove their spouse/partner from custody and parenting time of their child(ren), and/or (c) create an unfair first impression of their spouse/partner before the court. Important things to consider include, but are not limited to, (1) the timing of filing of the divorce complaint, (2) the timing of filing of any TRO/amended TRO complaints, (3) the timing of the retention of counsel, (4) words/actions of the plaintiff/victim, and (5) language in the plaintiff/victim's pleadings.

As an example, it may be instrumental to a domestic violence case to establish the timeline of events may look like prior to the issuance of a TRO. For example, if a plaintiff/victim retains counsel, files a complaint for divorce, files a pendente lite application for support and/or custody of the minor children all prior to the issuance of a TRO, there is a strong possibility that the TRO was sought to gain an advantage in that divorce litigation, especially if the allegations allegedly occurred prior to the retention of counsel. In this particular instance, it would be prudent for defense counsel to walk the plaintiff/victim through the timeline to establish the likelihood that they had ulterior motives when filing for the TRO. The domestic violence statute was meant to serve as a shield to protect victims of domestic violence. However, it is often that the statute is used by litigants as a sword to inflict harm upon the defendant and/or gain an unfair advantage in future litigation. ■

Endnotes

1. N.J.S.A. 2C:25-19(a).
2. N.J.S.A. 2C:25-19(d).
3. *Silver v. Silver*, 387 N.J. Super. 112

(App. Div. 2006).

4. N.J.S.A. 2C:25-29(a) states: A hearing shall be held in the Family Part of the Chancery Division of the Superior Court within 10 days of the filing of a complaint pursuant to section 12 of P.L.1991, c.261 (C.2C:25-28) in the county where the ex-parte restraints were ordered, unless good cause is shown for the hearing to be held elsewhere. A copy of the complaint shall be served on the defendant in conformity with the Rules of Court. If a criminal complaint arising out of the same incident which is the subject matter of a complaint brought under P.L.1981, c.426 (C.2C:25-1 et seq.) or P.L.1991, c.261 (C.2C:25-17 et seq.) has been filed, testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant, other than domestic violence contempt matters and where it would otherwise be admissible hearsay under the rules of evidence that govern where a party is unavailable. At the hearing the standard for proving the allegations in the complaint shall be by a preponderance of the evidence. The court shall consider but not be limited to the following factors:
 - (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
 - (2) The existence of immediate danger to person or property;
 - (3) The financial circumstances of the plaintiff and defendant;
 - (4) The best interests of the victim and any child;
 - (5) In determining custody and parenting time the protection of the victim's safety; and

- (6) The existence of a verifiable order of protection from another jurisdiction.
- (7) Any pattern of coercive control against a person that in purpose or effect unreasonably interferes with, threatens, or exploits a person's liberty, freedom, bodily integrity, or human rights with the court specifically considering evidence of the need for protection from immediate danger or the prevention of further abuse. If the court finds that one or more factors of coercive control are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. Coercive control may include, but shall not be limited to:
- (a) isolating the person from friends, relatives, transportation, medical care, or other source of support;
 - (b) depriving the person of basic necessities;
 - (c) monitoring the person's movements,
 - communications, daily behavior, finances, economic resources, or access to services;
 - (d) compelling the person by force, threat, or intimidation, including, but not limited to, threats based on actual or suspected immigration status;
 - (e) threatening to make or making baseless reports to the police, courts, the Division of Child Protection and Permanency (DCPP) within the Department of Children and Families, the Board of Social Services, Immigration and Customs Enforcement (ICE), or other parties;
 - (f) threatening to harm or kill the individual's relative or pet;
 - (g) threatening to deny or interfere with an individual's custody or parenting time, other than through enforcement of a valid custody arrangement or court order pursuant to current law including, but not limited to, an order issued pursuant to Title 9 of the Revised Statutes; or
 - (h) any other factors or circumstances that the court deems relevant or material.
- An order issued under this act shall only restrain or provide damages payable from a person against whom a complaint has been filed under this act and only after a finding or an admission is made that an act of domestic violence was committed by that person. The issue of whether or not a violation of this act occurred, including an act of contempt under this act, shall not be subject to mediation or negotiation in any form. In addition, where a temporary or final order has been issued pursuant to this act, no party shall be ordered to participate in mediation on the issue of custody or parenting time.
5. Model Civil Jury Charges 1.12 General Provisions for Standard Charge H. Preponderance of the Evidence (short version).
 6. *Silver*, 387 N.J. Super. at 112.
 7. *Id.*
 8. *Id.*
 9. N.J.S.A. 2C:33-4.
 10. N.J.S.A. 2C:25-19, et. al.
 11. N.J.S.A. 2C:25-19, et. al.