

## Commentary

# Ease Political Pressure on Judges in N.J. Domestic Violence Cases

## Turn final restraining order hearings into jury trials

By David N. Heleniak

Under New Jersey's Prevention of Domestic Violence Act, a family court judge holds a final restraining order hearing within 10 days of entering a temporary restraining order. But political pressures often color judges' decisions on whether a defendant has engaged in domestic abuse. And defendants have no right to a jury trial. For this reason, the act is unconstitutional.

An April 24, 1995, *New Jersey Law Journal* article ("Judicial Training: 'Your Job Is To Be a Wall,'" ), outlined instructions to newly appointed municipal judges at a training session on TROs:

- "[D]on't get callous about the fact that these people are pestering you again. You know, grant the restraining order. It'll be the one time that you don't grant the restraining order that you'll be tomorrow's headlines."

- "[I]f anybody ever came back at you and said, 'Well, gee, that's a real reach in terms of probable cause,' you have a legislatively mandated response which is, 'I erred on the side

*Heleniak is an associate with O'Donnell, McCord & DeMarzo in Morristown, where he primarily handles personal injury matters. This article is adapted from the author's article in the Spring 2005 issue of the Rutgers Law Review, Vol. 57 No. 3, "The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act."*

of caution for the victim."

- "Quite frankly, the standard really is by a preponderance of credible evidence. That's what the law is. But what he's saying to ya, 'Don't make that mistake at three o'clock in the morning.' You may be a little tired. Err on the side of being cautious."

- "The law is, this is the standard, but that's not quite frankly what perhaps [is] the right thing to do."

- "The bottom line is we're trying to protect the victim. We don't want the victim hurt. We don't want the victim killed. So

yes, you don't want your name in the paper, but you'd feel worse than that if the victim was dead."

- "If you got any hint whatsoever there's a problem, sign the TRO. Don't take the chance."

- "Let the Family Division sort it out."

When it comes time for the family court to "sort it out," however, the judge at the FRO hearing is plagued by the same concerns that weighed on the municipal judge deciding whether to enter the TRO.

From the perspective of job security,

a judge has much to lose and little to gain from ruling in favor of the defendant. If he rules in favor of the defendant, and the defendant hurts the plaintiff, the judge might be sharply criticized for failing to prevent the harm. If he rules against the defendant, and the defendant is really innocent, so what? His life might be ruined for something he didn't do, but who cares? There will be no headlines, no angry activists protesting on the courthouse steps.

Only a jury, composed of one-time actors in the justice system immune from political pressures, can protect a defendant from judicial concerns over job security. And only by amending the Prevention of Domestic Violence Act, to spread the responsibility for guessing whether something bad will happen if the TRO is lifted, can the New Jersey Legislature hope to provide a defendant with an objective factfinder as opposed to one who errs on the side of caution.

I urge our Legislature to revisit the Prevention of Domestic Violence Act to ensure that fairness and due process are afforded to all parties. Furthermore, I urge all defendants facing or appealing an FRO hearing to challenge the constitutionality of the act, if financially feasible. ■

