



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final Report Relating to the Definition of “Victim of Domestic Violence” in N.J.S. 2C:25-19d**

**December 17, 2015**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted. Please consult the New Jersey statutes in order to determine the law of the State.

Please send comments concerning this report or direct any related inquiries, to:

Jayne J. Johnson, Esq., Counsel  
New Jersey Law Revision Commission  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07102  
973-648-4575  
(Fax) 973-648-3123  
Email: [jjj@njlrc.org](mailto:jjj@njlrc.org)  
Web site: <http://www.njlrc.org>

## **Executive Summary**

This Final Report concludes the project to clarify the definition of “victim of domestic violence” under N.J.S. 2C:25-19d and recommends that no action should be taken at this time, due to the recent enactment of the Sexual Assault Survivor Protection Act of 2015 (SASPA).

In January 2014, the Commission authorized a project to clarify the definition of “victim of domestic violence,” as provided in N.J.S. 2C:25-19d. The project considered revising the threshold definition to reflect the broad judicial interpretation of the relationship that must exist between the victim and the offender under the New Jersey Prevention of Domestic Violence Act (PDVA).

During the course of the project, highly publicized incidents of domestic violence and sexual assault were covered by the local and national media, prompting increased scrutiny of the existing New Jersey statutes in this area of the law. Subsequently, several State Legislators proposed measures intended to ensure the safety and well-being of individuals who are threatened by or encounter sexual violence. The prompt action of the New Jersey Legislature led to the passage of the SASPA, which was signed into law by the Governor on November 9, 2015. The SASPA authorizes emergency, ex parte, protective orders to safeguard individuals who are not covered under the PDVA, but are victims of nonconsensual sexual contact, sexual assault, or lewdness.

This Final Report concludes the work of the Commission on this project and provides that no recommendation for statutory revision will be proposed at this time, in light of the enactment of the SASPA, which addresses the issues the Commission’s project was expected to cover.

## **Introduction**

The Tentative Report released by the Commission in June 2014 proposed revisions to the definition of “victim of domestic violence” under the New Jersey Prevention of Domestic Violence Act (PDVA) to reflect the broad interpretation of the key terms articulated in the case law. N.J.S. 2C:25-19d provides the following definition:

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

“Victim of domestic violence” also includes any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having

a child in common, if one of the parties is pregnant. “Victim of domestic violence” also includes any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship.<sup>1</sup>

The PDVA was enacted in 1991 to protect victims of domestic violence.<sup>2</sup> The Legislature recognized that victims of domestic violence experienced “substantial difficulty” in gaining access to protection from the judicial process, due to the inability of the system “to generate a prompt response” in exigent circumstances.<sup>3</sup>

The Legislature later amended the PDVA in 1994, and most recently during the current legislative session.<sup>4</sup> Provisions of the PDVA were updated as a part of P.L.2015, c.98 which took effect on August 10, 2015.<sup>5</sup> The statute upgrades the offense of “assault against a victim of domestic violence,” under certain circumstances, to a third degree offense. The statute also removes the presumption of non-imprisonment for the first offense of a crime of the third degree provided under N.J.S. 2C:44-1.<sup>6</sup>

The statute provides a presumption against admission into a program of supervisory treatment (PTI) for an individual charged with a crime or offense involving domestic violence.<sup>7</sup> The statute also states that “additional weight should be given by the prosecutor and the court to the position of a domestic violence victim on the proposed admission of a defendant” for participation in PTI.<sup>8</sup> The statute also adds the following two aggravating factors for the court to consider when imposing a sentence pursuant to N.J.S. 2C:44-1: (1) whether the offense involved an act of domestic violence committed in the presence of a child under 16 years of age; (2) whether the offense involved an act of domestic violence; and (3) whether the defendant committed at least one act of domestic violence on more than one occasion.<sup>9</sup>

The amendment to the PDVA adds the following to the list of predicate offenses enumerated under N.J.S. 2C:25-19: (1) criminal coercion; (2) robbery; (3) contempt of a domestic violence order, where the contempt would constitute a crime or disorderly persons offense; and (4) any other crime involving a risk of death or serious bodily injury to a domestic violence victim.<sup>10</sup>

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<sup>1</sup> N.J. STAT. ANN. § c. (2015).

<sup>2</sup> N.J. STAT. ANN. §§ 2C:25-17 to -35 (2015).

<sup>3</sup> SB 2230, 204th Leg. (1991) (Bill Statement).

<sup>4</sup> N.J. STAT. ANN. §§ 2C:25-19 to -35.

<sup>5</sup> P.L.2015, c. 98, eff. Aug. 10, 2015.

<sup>6</sup> N.J. STAT. ANN. § 2C:12-1(b)(12) (2015).

<sup>7</sup> N.J. STAT. ANN. § 2C: 2C:43-12(2)(b) (2015).

<sup>8</sup> N.J. STAT. ANN. § 2C: 2C:43-12.

<sup>9</sup> N.J. STAT. ANN. §§ 2C:44-1(a)(14), (15) (2015).

<sup>10</sup> N.J. STAT. ANN. § 2C:25-19a (2015).

The Legislature, however, did not amend the statutory definitions provided under the PDVA. The terms within N.J.S. 2C:25-19d, particularly, “present or former household member” and “dating relationship” remain intact.

The broad interpretation of these terms is reflected in recent case law. In *S.P. v. Newark Police Dept.*, for example, the Appellate Division considered whether individuals residing on the same floor of a boarding house were considered “household members” under the PDVA.<sup>11</sup> The plaintiff alleged that a fellow boarding house resident made several unsolicited sexual advances toward her one evening, and the following morning sexually assaulted her as she exited the bathroom shared by the residents.<sup>12</sup>

The court in *S.P.* considered the reasoning of *Hamilton v. Ali*, which employed the following factors to determine whether individuals were “household members” under the PDVA:

1. Constancy of the relationship.
2. Over-night stays at each other's residence.
3. Personalty items such as jewelry, clothing and personal grooming effects stored at each other's residences.
4. Shared property arrangements, such as automobile usage, access to each other's bank accounts and one mailing address for billing or other legal purposes.
5. Familiarity with each other's siblings and parents socially.<sup>13</sup>

The court in *S.P.* determined that while many of these factors did not apply to individuals living in a boarding house, guidance could be found in cases with interactions similar to that of residents in a rooming house.<sup>14</sup> The court found that the “recurring circumstances” in most of the cases is “a determination that the ‘qualities and characteristics of the relationship places the plaintiff in a more susceptible position for abusive and controlling behavior.’ ”<sup>15</sup> The court concluded that in *S.P.*, like other cases, where the past or present living arrangement of individuals who were “unrelated, not

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<sup>11</sup> *S.P. v. Newark Police Dept.*, 428 N.J. Super. 210, 214-15 (App. Div. 2012)( providing that the plaintiff filed suit against the Newark Police Dept. for failing to remove the fellow resident after she placed a call to the department the prior evening in accordance with the PDVA. The Appellate Division, while finding that as cohabitants of a boarding house the case falls within the ambit of the PDVA, held that the Tort Claims Act barred suit under the circumstances. The court held that “the ensuing decisions of a responding officer to a call such as that from S.P., as detailed, in part, in N.J.S.A. 2C:25-21 and -23, requires a significant thoughtful analysis and exercise of personal deliberations regarding a variety of factors such that discretionary immunity should attach under the TCA”).

<sup>12</sup> *Id.* at 215.

<sup>13</sup> *Hamilton v. Ali*, 350 N.J. Super. 479, 489 (Ch. Div. 2001) (citing with approval in *S.Z. v. M.C.*, 417 N.J. Super. 622 (App. Div. 2011)).

<sup>14</sup> *S.P.*, 428 N.J. Super. at 225-26.

<sup>15</sup> *Id.*

personally or romantically involved, but resid[e] in the same home,” which satisfies the “family-like setting,” implied in the “household member” requirement of the PDVA.<sup>16</sup>

The court ruled that while “all boarders in a rooming house” are not to be considered household members, “the particular factual circumstances” of the *S.P.* case “gave rise to a finding that” the plaintiff and the fellow boarding house resident “were members of the same household,” in accord with the intent of the PDVA and “the broad and flexible interpretation of ‘household member’ articulated in the case law.”<sup>17</sup>

The Appellate Division later relied on the following factors, adopted in *Coleman v. Roman*, to determine whether parties were “former household members” under the PDVA:

1. The nature and duration of the prior relationship;
2. Whether the past domestic relationship provides a special opportunity for abuse and controlling behavior;
3. The passage of time since the end of the relationship;
4. The extent and nature of any intervening contacts;
5. The nature of the precipitating incident; and
6. The likelihood of ongoing contact or relationship.<sup>18</sup>

To determine whether a dating relationship existed, the following six factors were identified by the court in *S.K. v. J.H.*:

1. Was there a minimal social interpersonal bonding of the parties over and above a mere casual fraternization?
2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
3. What were the nature and frequency of the parties’ interactions?<sup>19</sup>
4. What were the parties’ ongoing expectations with respect to the relationship, either individually or jointly?
5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
6. Are there any other reasons unique to the case that support or detract from a finding that a ‘dating relationship’ exists?<sup>20</sup>

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<sup>16</sup> *Id.* at 226, *see also Hamilton*, 350 N.J. Super. at 486-88.

<sup>17</sup> *Id.* at 213.

<sup>18</sup> *N.G. v. J.P.*, 426 N.J. Super. 398, 410 (App. Div. 2012) (citing *Coleman v. Roman*, 388 N.J. Super. 342, 351-52 (Ch. Div. 2006)).

<sup>19</sup> 426 N.J. Super 230, 234-35 (App. Div. 2012).

<sup>20</sup> *Id.* at 235.

Additional factors reflected in case law include: (1) the time between the alleged domestic violence and the termination of the dating relationship; (2) the act(s) of domestic violence; (3) the amount of intervening contacts since the dating relationship; (4) the nature and duration of the prior relationship; (5) the duration of any hiatus since the end of that relationship, and (6) other related factors.<sup>21</sup>

The Commission proposed revisions to the threshold definition of a “victim of domestic violence” as provided in N.J.S. 2C:25-19d to reflect the broad interpretation of the key terms articulated in the case law. The Commission received comment from attorneys who practice or work in this area of the law. The commenters expressed support for the project because it sought to protect individuals who were not covered by the plain language of the PDVA. The commenters emphasized that law enforcement officers did not have sufficient statutory guidance to determine whether an individual was a “victim of domestic violence,” in accord with the broad judicial interpretation of the definition.

### **Sexual Assault Survivor Protection Act of 2015**

The Legislature took a comprehensive approach to the issues presented by the commenters to the Commission, including cases like that of *S.P.*, who reported several unsolicited sexual advances from a fellow, boarding house resident to law enforcement officers hours before being sexually assaulted, but was unable to obtain a protective order or find another means of recourse to prevent the assault. The Legislature opted not to revise the language of the PDVA, but instead, created a separate provision to allow individuals who do not fall within ambit of the PDVA to obtain an emergency, ex parte, protective order.

The Sexual Assault Survivor Protection Act of 2015 (SASPA), P.L.2015, c.147, passed both house of the Legislature unanimously and was signed into law by the governor on November 9, 2015. The law will take effect six months from the date of signing.<sup>22</sup>

The SASPA provides the following:

- Any person alleging to be a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, and who is not eligible for a restraining order as a “victim of domestic violence” under the domestic violence statutes may file an application with the Superior Court alleging the commission of such conduct or attempted conduct and seeking a temporary protective order.

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<sup>21</sup> See *Tribuzio v. Roder*, 356 N.J. Super. 590, 597 (App. Div. 2003).

<sup>22</sup> AB 4078, 216th Leg. (2015) (Bill Statement).

- A parent or guardian could file the application on behalf of the alleged victim if the alleged victim is less than 18 years of age, or has a developmental disability or has a mental disease or defect that renders the alleged victim temporarily or permanently incapable of understanding the nature of the alleged victim's conduct, including but not limited to, being incapable of providing consent.
- A protective order may be sought, and may be issued by the court, regardless of whether criminal charges based on the incident were filed and regardless of the disposition of any such charges. An application filed in accordance with the provisions of the statute would not prevent the filing of a criminal complaint, or the institution or maintenance of a criminal prosecution based on the same act.
- Under the statute, a judge of the Superior Court may enter an emergency, ex parte order when necessary to protect the safety and well-being of an alleged victim on whose behalf the relief is sought. The court would grant any relief necessary to protect the safety and well-being of the alleged victim.
- The temporary protective order would be issued if the court determines that the applicant is a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct.
- If the court is satisfied that the exigent circumstances that would excuse the alleged victim from having to appear personally, and sufficient grounds for granting the application have been shown, the temporary protective order would be issued, pursuant to court rules, upon sworn testimony or an application of an alleged victim who is not physically present, or by a person authorized to file an application on behalf of an alleged victim.<sup>23</sup>

A temporary protective order may include, but would not be limited to, the following emergency relief:

- Prohibiting the respondent from committing or attempting to commit any future act of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the alleged victim;
- Prohibiting the respondent from entering the residence, property, school, or place of employment of the alleged victim or the alleged victim's family or household members, and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the alleged victim or the alleged victim's family or household members;
- Prohibiting the respondent from having any contact with the alleged victim or others, including an order forbidding the respondent from personally or

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<sup>23</sup> AB 4078, 216th Leg. (2015) (Bill Statement).

- through an agent initiating any communication likely to cause annoyance or alarm including, but not limited to personal, written, or telephone contact, or contact via electronic device, with the alleged victim or the alleged victim's family members, or their employers, employees, or fellow workers, an employee or volunteer of a sexual assault response entity that is providing services to an alleged victim, or others with whom communication would be likely to cause annoyance or alarm to the alleged victim;
- Prohibiting the respondent from stalking or following, or threatening to harm, stalk, or follow, the alleged victim;
  - Prohibiting the respondent from committing or attempting to commit an act of harassment, including an act of cyber-harassment, against the victim; and
  - Any other relief that the court deems appropriate.<sup>24</sup>

The SASPA requires that a hearing is held in the Superior Court within 10 days of the filing of an application for a protective order. At the hearing, the allegation made in the application must be proven by a preponderance of the evidence. The court may consider, but is not limited to, the following: (1) the occurrence of one or more acts of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the alleged victim; and (2) the possibility of future risk to the safety or well-being of the alleged victim. A final protective order may be issued only after a finding or admission that the respondent committed an act of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the alleged victim.<sup>25</sup>

A final protective order may:

- Prohibit the respondent from having contact with the victim; and
- Prohibit the respondent from committing any future act of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the victim.

A final order may also include the following relief:

- Prohibiting the respondent from entering the residence, property, school, or place of employment of the victim or the victim's family or household members, and requiring the respondent to stay away from any specified place that is named in the order and is frequented regularly by the victim or the victim's family or household members;

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<sup>24</sup> AB 4078, 216th Leg. (2015) (Bill Statement).

<sup>25</sup> *Id.*

- Prohibiting the respondent from having any contact with the victim or others, including an order forbidding the respondent from personally or through an agent initiating any communication likely to cause annoyance or alarm including, but not limited to, personal, written, or telephone contact, or contact via electronic device, with the victim or the victim's family members or their employers, employees, or fellow workers; an employee or volunteer of a sexual assault response entity that is providing services to a victim; or others with whom communication would be likely to cause annoyance or alarm to the victim;
- Prohibiting the respondent from stalking or following, or threatening to harm, stalk or follow, the victim;
- Prohibiting the respondent from committing or attempting to commit an act of harassment, including an act of cyber-harassment, against the victim; and any other relief that the court deems appropriate.

A final protective order would be immediately forwarded to the police for immediate service on the respondent in accordance with the Rules of Court.<sup>26</sup>

- Notice of a final protective order would be sent by the clerk of the Superior Court or other person designated by the court to the appropriate county prosecutor, chiefs of police, members of the State Police and any other appropriate law enforcement agency.
- Notice would also be provided to the Division of Child Protection and Permanency in the Department of Children and Families where the victim is less than 18 years of age.

A final protective order will remain in effect until further order of a judge of the Superior Court. Either party may file a petition with the court to dissolve or modify a final protective order.

When considering a petition for dissolution or modification, the court would consider whether a material change in circumstances has occurred since the issuance of the protective order which would make its continued enforcement inequitable, oppressive or unjust, taking into account the current status of the parties, including:

- the desire of the victim for the continuation of the protective order,
- the potential for contact between the parties,
- the history of the respondent's violations of the protective order or criminal convictions, and
- any other factors that the court may find relevant to protecting the safety and well-being of the victim.

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<sup>26</sup> AB 4078, 216th Leg. (2015) (Bill Statement).

The SASPA is a comprehensive Act which seeks to safeguard individuals who are not covered under the PDVA, but are victims of nonconsensual sexual contact, sexual assault, or lewdness. The issues the Commission's project expected to cover are addressed by the provisions of the SASPA.

### **Conclusion**

This Final Report concludes the project to clarify the definition of "victim of domestic violence" under N.J.S. 2C:25-19d and provides that no recommendation for statutory revision will be proposed at this time.