

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38421-3-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

**BRIAN J. BLACKMON,
APPELLANT,**

AND

**TIFFANY D. BLACKMON,
RESPONDENT.**

BRIEF OF RESPONDENT

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I. INTRODUCTION

The appellant has not met his burden to establish that the trial court erred in granting the respondent's Petition for an Order of Protection under chapter 26.50 RCW, the Domestic Violence Prevention Act (DVPA). The trial court exercised proper discretion when it denied the appellant's request for a jury, when it excluded one of his witnesses, and when it used preponderance of the evidence as the standard of proof.

To promote clarity, this brief generally refers to the parties by their first names, Brian and Tiffany. No disrespect to either party is intended.

II. ASSIGNMENTS OF ERROR

Appellant, Brian Blackmon, assigns four errors: 1) his jury request was denied; 2) the finder of fact was not neutral; 3) testimony of Lori Harrison was not allowed; and 4) entry of the Order for Protection. This Brief addresses the first, third, and fourth assignments of error.¹

Brian acknowledges that his argument regarding the second assigned error is dependent upon the court granting his Motion to Take Judicial Notice of facts he alleges suggest bias of the trial court judge, Judge Paula Casey. Appellant's Brief (hereafter "AB"), p. 17. The court

denied that motion, and the record contains no evidence of Judge Casey's alleged lack of neutrality. Accordingly, this brief does not address this assignment of error.

III. STATEMENT OF THE CASE

Tiffany filed her protection order petition on June 16, 2008. CP 3-

13. In her petition, Tiffany alleged:

“I am in fear for my life with him and in fear for my sons [sic] life. I saw the chance to get out safely and took it. He refuses to leave the house and the only way to be safe is to take [the child] and I to a safe place till [sic] he leaves. He has physically harmed myself and my son in the past and this is the cause for my fear.” CP 6.

Tiffany attached a four-page listing of incidents that contributed to her fears. CP 7-10. These included several incidents of “spanking” their son in anger hard enough to leave bruises on the child's legs, back, butt, and arms; repeatedly saying he can not wait until the child is old enough to challenge him and “beat his a**.” (CP 10); attempting to get Tiffany committed and telling her it wouldn't take much to prove her unstable, threatening commitment every time she gets upset and telling her to commit suicide when she is already feeling horrible (CP 7); punching

¹ In terms of the fourth assignment of error, this brief responds only to the issue as raised in Appellant's Brief: “whether the hearing of a petition under 26.50 RCW is quasi-criminal in nature such that the clear and convincing standard of proof applies.” AB 1.

steering wheels and walls, throwing game remotes and hitting screens in front of Tiffany and their child (CP 7); and threatening that if Tiffany did not answer phone calls from him, he would cut off her access to his life insurance and paycheck (CP 9).

In response to the petition form's question regarding the respondent's use of firearms, Tiffany replied, "The gun is used as a [sic] object [to] threaten and intimidate." CP 11. The incidents on the list attached to Tiffany's petition include Brian cleaning and taking his gun apart in front of Tiffany and leaving it on the floor beside him (CP10) and threatening that the gun was in the home, loaded, and only he would know where it was (CP 7). The court entered a Temporary Order for Protection and Notice of Hearing, setting the hearing for June 27, 2008. CP 14.

The hearing was re-set seven times, with the court extending temporary protection until the matter was finally heard on September 9th, nearly three months after the original petition.² CP 17-22, 25, and 35-37. After a statement on September 8th by Brian's attorney, Mr. Preble, "that

² On June 27th, both parties signed a court order extending the protection order and setting a hearing for July 11th. CP 17. On July 11th, Tiffany's attorney signed an order extending the protection order and setting a hearing for July 25th. CP 18. Neither Brian nor his attorney appeared at the July 11th hearing. CP 20. On July 25th, both parties signed an order extending the protection order and setting a hearing for August 8th. CP 21. On August 22nd, both parties signed an order extending the protection order and setting a hearing for September 5th. CP 35. On September 5th, both parties signed an order extending the protection order and finally setting the hearing for September 9th. CP 37.

he might be requesting a jury trial,” the court directed Mr. Preble to prepare a brief regarding his request. CP 52.

At the full-day hearing on September 9th, the court heard motions, opening statements from both parties, and testimony from four witnesses (two from each party). CP 53-55. The court heard a motion and closing arguments and issued its rulings on September 12th. CP 56.

Brian’s attorney, Gary Preble, improperly references a letter from Tiffany’s trial court attorney regarding a continuance. AB 3. This letter is not part of the record on appeal. It is referenced only in a Declaration written by Brian supporting his Motion to Reopen Trial for Additional Testimony. CP 39-40. Brian offers no probative or admissible evidence establishing an agreement on Tiffany’s part to a continuance of the hearing beyond September 9, 2008. In fact, Tiffany’s attorney specifically stated that she wanted to go forward with the trial on September 9th. CP 53, Partial Verbatim Report of September 9, 2008 Proceedings 7-9.

Mr. Preble did not file and serve Brian’s demand for a jury until he handed it to Judge Casey *the morning of trial*, September 9, 2008. CP 48. Judge Casey denied his jury request because there is no constitutional right to a jury under RCW 26.50 proceedings, he filed his request late, and RCW 26.50 proceedings are equitable. Partial Verbatim Report of September 9, 2008 Proceedings at 4-5.

The parties returned to court on September 12th for closing argument and rulings. Partial Transcript of September 12, 2008 Court Proceedings. Judge Casey first ruled on a motion Mr. Preble had filed the prior day to allow the testimony of Lori Harrison. *Id.* Judge Casey determined that Ms. Harrison performed a parenting assessment of Brian, never spoke with Tiffany, and did not have facts with respect to the incidents discussed in the protection order action. *Id.* at 1. Judge Casey denied the motion on the basis that Ms. Harrison's testimony would be irrelevant. *Id.* at 2.

IV. ARGUMENT

A. The trial court did not abuse its discretion when it denied Brian's request for a jury trial.

An appellate court reviews a trial court's decision as to whether to grant a request for a jury trial for abuse of discretion. *Auburn Mechanical v. Lydig Constr.*, 89 Wn. App. 893, 951 P.2d 311 (1998). The trial court did not abuse its discretion when it denied Brian's request for a jury trial. Actions under the DVPA are equitable in nature and do not afford a right to trial by jury. Even if Brian had been entitled to a jury, he waived any such right by failing to follow the required procedure.

Even Blackstone recognized that the right to a jury does not extend to every action. *See, e.g.*, the first several lines at AB 9, quoting Blackstone's Commentaries.³ Even if it were desirable to offer the right to a jury in every case, the additional time and expense make a blanket jury entitlement untenable.

Brian did not have the right to a jury in this case because actions under the DVPA are equitable, not legal. A finding by the court that an action is equitable necessarily leads to a denial of trial by jury. *Auburn Mechanical v. Lydig Constr.*, 89 Wn. App. 893, 897, 951 P.2d 311 (1998). Even in cases with both legal and equitable issues, a trial court has wide discretion to determine the primary nature of the case in ruling on a request for trial by jury. *Id.* at 898. The trial court's exercise of discretion in granting or denying a jury trial demand should not be disturbed on appeal absent clear abuse. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 718, 846 P.2d 550 (1993). Brian has not met his burden of establishing that the trial court abused its discretion in denying his request for a jury trial.

³ "On the other hand, if the power of the judicature were placed in the capricious hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our court. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, . . . should be deposited in the breasts of the judges . . ." 3 Blackstone's Commentaries, 380 (Tucker Edition [1803], Volume IV)

Sound policy reasons require DVPO actions to be as streamlined as due process permits.⁴ The DVPA fulfills due process requirements by giving respondents notice and an opportunity to be heard. RCW 26.50.050, .060(5). Brian was personally served with the Petition for Domestic Violence Protection Order, per Sheriff's Return filed on June 23, 2008. He had three months to respond to the petition and prepare for a hearing. The matter was given a full and fair hearing before Judge Casey on September 9, 2008.

Further, even if Brian had been entitled to a jury, he waived any such right by failing to request a jury in accordance with applicable rules. Such failure constitutes a waiver of a trial by jury. CR 38. Brian never filed a written jury demand; his only request was to the court the morning of the September 9th hearing. Partial Verbatim Report of September 9, 2008 Proceedings, pp. 3-4.

1. **Brian did not have a right to a trial by jury because actions under Chapter 26.50 RCW are equitable nature.**

The first step in determining whether a party has a right to a jury trial is to look at the right as it existed at the time Washington's

⁴ For example, standard Rules of Evidence need not be applied in protection order proceedings. ER1101 (c)(4). Normal court fees and costs are not permitted, and the

constitution was adopted in 1889. AB 11, citing *Auburn Mechanical v. Lydig Constr.*, 89 Wn. App. 893, 897, 951 P.2d 311 (1998). Most important, as Brian correctly asserts, an action for a domestic violence protection order did not exist at the time Washington's constitution was ratified. AB 11. Brian attempts to analogize the protection order statute to a criminal assault statute when he states, "But assault actions did exist at that time as actions at law, and a 26.50 petition therefore would have some elements of an action at law." AB 11.

This argument is invalid. The fact that assault actions existed when our constitution was ratified in no way establishes that DVPA petitions have some elements of an action at law or are accorded a jury right. The DVPA (a civil act) explicitly differentiates the behavior invoking its protection from the criminal action of assault. Under the DVPA, "Domestic violence" means:

- (a) Physical harm, bodily injury, assault, or *the infliction of fear of imminent physical harm, bodily injury or assault*, between family or household members;
 - (b) sexual assault of one family or household member by another; or
 - (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.
- RCW 26.50.010(1) (emphasis added)

system is designed to be accessible to pro se petitioners. RCW 26.50.030 - .040.

This broader definition recognizes that a petitioner can establish domestic violence without any physical contact occurring. Establishing assault *per se* meets the definition of domestic violence, but it is not required. A DVPA petition, even if based primarily on an assault, is an equitable action. Unlike criminal assault actions, the purpose of an action under the DVPA is protective, not punitive. The aim of DVPA actions is to prevent future harm as opposed to punishing past behavior.

Brian erroneously claims that he is entitled to a jury trial because the DVPO requires his participation in evaluation and treatment, restricts contact with his child, excludes him from residing in the marital home, and restricts his right to possess a firearm or ammunition. AB 5-6. His reasoning is not supported by the law of this state.

The relief afforded in a protection order is temporary in nature. Custody determinations in these orders are subject to subsequent orders in family law cases and are limited in duration. The protection order does not award rights to property; it only allocates the temporary use of property. RCW 26.50.200. The protection order's restrictions on firearms are dictated by federal law. 18 U.S.C. §922(g)(9). An action to temporarily restrict or affect these rights under the DVPA does not entitle Brian to a jury. *See also Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006)

for a discussion of how the temporary nature of DVPA actions impacts due process considerations.

The same issues (property, residential time with children, restraints, and required treatment) are routinely addressed in other legal actions that do not afford a right to a jury trial. Neither a proceeding for dissolution of marriage under chapter 26.09 RCW nor a parentage proceeding under chapter 26.26 RCW affords a right to trial by jury. RCW 26.09.010(1) explicitly dispenses with trial by jury in dissolution proceedings, which allow for restrictions on a parent's time with his children (RCW 26.09.191), restraints from contacting the other party and/or minor children (RCW 26.09.050 and .060), evaluation and treatment requirements (RCW 26.09.191(2)(m)), professionally supervised time with a parent (RCW 26.09.013(5) and 26.09.191), permanent disposition of property and debts (RCW 26.09.080), payment of spousal and child support (RCW 26.09.100 *et seq.*), and the right to possess firearms (RCW 26.09.050 and .060). Indeed, both parentage and dissolution proceedings result in permanent orders and often supersede prior DVPO provisions.

A parentage action does not have a right to jury⁵ even though the analogous action available when Washington's constitution was ratified (the Bastardy Act) **did** entail a jury right as part of the State's penal code, as did chapter 26.24 RCW (the Filiation Act) which was the predecessor to chapter 26.26 RCW (the Washington Uniform Parentage Act).

Even civil contempt actions seeking jail time under chapter 26.09 RCW are not within the realm of actions entitling a party to a jury. In *In re Marriage of Haugh*, 58 Wn. App. 1, 790 P.2d 1266 (1990), the court found that the appellant was not entitled to a jury trial in contempt proceedings brought due to his "willful obstruction" of his former wife's visitation rights. *Id.* at 5. The court differentiated civil contempt proceedings, which are coercive in nature, from criminal contempt, which is punitive in nature. The contempt order required Mr. Haugh to spend ten days in jail, but suspended the sentence on condition that he comply with the previously ordered visitation schedule. *Id.* The court held that the appellant was not entitled to a jury because, "the purpose of the sanction is to coerce compliance with a lawful court order." *Id.*

Similarly, the relief provided under the DVPA is not punitive in nature, but serves to ensure the safety of the petitioner, minor children, and the public by coercing compliance with a lawful court order. The

⁵ "The court, without a jury, shall adjudicate parentage of a child." RCW 26.26.605

restrictions in a DVPO, such as right to possess firearms, the right to interact with the petitioner, and the right to reside in a shared residence, are directly related to ensuring the respondent's compliance. Actions under the DVPA are cases in equity, with equitable relief.

Judge Casey's ruling indicates her agreement with this reasoning:

"... it's my understanding that where they are actions in equity, where the relief is equitable, there is no right to a jury trial. . . . You rely only on the constitution, and I do not believe there is a constitutional right to a jury trial in an RCW 26.50 proceeding." Partial Verbatim Report of September 9, 2008 Proceedings, pp. 4-5.

Like proceedings to determine and enforce issues related to dissolution of marriage and parentage, actions under the DVPA are equitable in nature and do not entail the right to trial by jury.

2. Even if actions under the DVPA were partially legal, the trial court did not abuse its discretion in denying the request for a jury because the action is primarily equitable.

Even in actions where both legal and equitable relief is sought, trial courts have broad discretion in determining whether to grant a jury trial. *Auburn Mechanical v. Lydig Constr.*, 89 Wn. App. 893, 898, 951 P.2d 311 (1998). Brian has not met his burden of clearly demonstrating that Judge

Casey abused her discretion in denying his request for a jury because the primary nature of the case is equitable.

3. **Adding a jury right in cases under the DVPA would violate the Act's intent and public policy.**

Due process is a flexible concept; the particular situation determines its exact contours. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893 (1976). But “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187 (1965)). The DVPA fulfills due process requirements by giving respondents notice and an opportunity to be heard. RCW 26.50.050. No order for protection shall grant relief except upon notice to the respondent and hearing. RCW 26.50.060(5).

The extent of both notice and the opportunity to be heard are tempered by the strong public policy favoring protecting victims from abuse. Victims receive protection when the process is accessible. Legislative comments to RCW 26.50.050 include the statement that, “recent tragic events have demonstrated the need to find ways to make legal protections for domestic violence victims more accessible.” Laws of 2008 c 287 § 1. This concept is discussed at some length in Pro Tem

Justice Quinn-Brintnall's concurrence in *Gourley v. Gourley*, 158 Wn.2d 460, 475, 145 P.3d 1185 (2006).

To assess the appropriate level of due process that is constitutionally required, it is first necessary to consider the nature of a protection order hearing. We must consider not only the respondent's interests in protection order proceedings, but the petitioner's and government's interests as well. *Mathews*, 424 U.S. at 335, 96 S.Ct. 893. . . . *The State has a compelling interest in protecting the victims of domestic violence and abuse. See Schall v. Martin*, 467 U.S. 253, 264, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Petitioners are generally pro se, in need of immediate help, and unable to endure a lengthy trial-like proceeding. Those who initiate protection order proceedings are likely to experience a deterioration in their relationship with the person from whom they seek protection. In light of these issues and many others, *the government has a compelling interest in protection order proceedings that are flexible and accessible*, ensuring that petitioners are not discouraged from seeking such orders. *Gourley* at 475-476 (emphasis added)

As in *Gourley*, the appellant in this case was subject to a one-year protection order and had the opportunity to address residential time and other provisions in the pending dissolution action. CP 44-47. The *Gourley* court felt that Mr. Gourley had sufficient due process safeguards. In the instant case, the trial court afforded the parties the opportunity for a full evidentiary hearing. Brian had sufficient due process safeguards.

Brian's appeal is not the first time this Court has considered the adequacy of due process under the DVPA. In *State v. Karas*, 108 Wn. App. 692, 32 P.3d 1016 (2001), this Court held as follows:

Determining what process is due in a given situation generally requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved. *Mathews*, 424 U.S. at 335, 96 S.Ct. 893; *Spence v. Kaminski*, 103 Wn. App. 325, 335, 12 P.3d 1030 (2000). A protection order may implicate several private interests including exclusion from a dwelling and the interest in one's children. *See also Baker v. Baker*, 494 N.W.2d 282, 287 (Minn.1992); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 230 n. 8 (Mo.1982).

Here, *the Act's provisions satisfy the two fundamental requirements of due process-notice and a meaningful opportunity to be heard by a neutral decisionmaker*. The procedural safeguards include: (1) a petition to the court setting forth facts under oath; (2) notice to the respondent; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) the opportunity to file a motion to modify a protection order; (5) a requirement that a judicial officer issue any order; and (6) the right to appeal. *See, e.g., Spence*, 103 Wn. App. at 334, 12 P.3d 1030 (noting in dicta that the “process for issuing a permanent protection order provides adequate notice and ability to be heard”).

. . . Considering the minor curtailment of Karas's liberty imposed by the protection order and the significant public and governmental interest in reducing the potential for irreparable injury, *the Act's provision of notice and a hearing before a neutral magistrate satisfies the inherently flexible demands of procedural due process*.

Karas at 699 – 700. (emphasis added)

The DVPA meets due process requirements without a jury trial. Indeed, the Washington State Supreme Court has found that the DVPA meets due process requirements even without a formal evidentiary trial involving the right to live testimony and cross examination. *Gourley* at

467 - 470. Adding a right to a jury would make the process more difficult, expensive, and time-consuming, a consequence that would clearly violate the strong public policy to keep these actions accessible to survivors of domestic violence.

4. **Brian waived any right to a jury trial because he failed to comply with CR 38.**

Even in cases where the right to a jury is clear, a party waives that right if he fails to adhere to the relevant rules. At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a written demand, by filing the demand with the clerk, and by paying the jury fee required by law. CR 38(b). The failure of a party to serve a demand as required, to file it as required, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver of trial by jury. CR 38(d).

The Protection Order Petition was filed on June 16, 2008. CP 3-13. Brian's attorney, Gary Preble, appeared in the case on June 26th. Between June 27 and September 5, 2008, the trial court reissued Temporary Protection Orders *seven times* until the matter could finally be heard in September. CP 17-22, 25, and 35-37. Mr. Preble did not file and serve

Brian's demand for jury until he handed it to Judge Casey *the morning of trial*, September 9, 2008. CP 48. The only action he took prior to trial was at a preliminary hearing on September 8th, when Mr. Preble, "indicated to the court he would be requesting a jury trial". AB 2, CP 52. The court directed Mr. Preble to prepare a brief regarding his request for a jury trial. CP 52.

The court's request for briefing does not waive the requirements of CR 38. Judge Casey's denial of Brian's request for trial by jury is based in part upon the late nature of his request, notably, "The domestic violence law has been around for a long time. This case has been pending for some time. You certainly had the right to present your briefing earlier so that there could be a chance for response." Partial Verbatim Report of September 9, 2008 Proceedings, p. 5.

Brian never paid the required jury fee. Because Brian failed to file or serve a written jury demand as required by CR 38 and failed to pay the required jury fee, he waived any right he would have had to a jury. In any case, as argued above, the court would have had to deny even a proper jury demand since there is no jury right in actions under the DVPA.

B. Judge Casey did not abuse her discretion in denying Brian's motion to reopen the record for testimony of the parenting evaluator, Lori Harrison.

An appellate court reviews a decision of a trial court regarding denial of a request for witness testimony for abuse of discretion. *Sofie v. Fibreboard Corp*, 112 Wn.2d 636, 771 P.2d 711 (1989). The trial court did not abuse its discretion when it denied Brian's request for testimony from Lori Harrison, a purported parenting evaluator. The court heard ample evidence from both parties and their witnesses. The court properly determined that Ms. Harrison had no personal knowledge regarding facts that would establish whether Tiffany met the statutory standard for a protection order. This witness spoke only with Brian and received all "factual" information only as hearsay from him.

Matters of witness exclusion are committed to the trial court's discretion, and the appellate court will not reverse the trial court's rulings absent a clear abuse of discretion. *Id.* at 667. A judge abuses her discretion when no reasonable judge would have reached same conclusion. *Id.*

In response to Brian's motion to allow evidence from Ms. Harrison, the Court asked Brian's Counsel, Mr. Preble, if Ms. Harrison had facts with respect to the incidents discussed at the DVPO hearing. Mr. Preble replied, "She does not. . . . she's done an assessment with him which includes a domestic violence component." Partial Transcript of

September 12, 2008 Court Proceeding, p. 1. Judge Casey ruled as follows:

A domestic violence assessment is not relevant to a fact finding trial on requesting a protection order. It is the facts of these parties [sic] incident that is the basis for a courts [sic] decision. Also I have not reviewed the attached evaluation from Ms. Harrison and we know that to make a domestic violence evaluation for any purpose there must be collateral contacts with the complaining party. . . . a domestic violence evaluation would not be relevant to the fact finding.

Partial Transcript of September 12, 2008 Court Proceeding, p. 2.

Brian's arguments that he had inadequate time to present evidence or secure this witness are not persuasive. Cases under the DVPA are special proceedings, and even the normal 14-day timeline has been deemed adequate by courts for presenting evidence to contest a DVPO. *State v. Karas*, 108 Wn. App. 692, 699, 32 P.3d 1016 (2001). Mr. Blackmon had nearly three months after the DVPA petition was filed to prepare for the hearing and secure witnesses.

The court heard four witnesses in a full-day evidentiary hearing. Ms. Harrison, the parenting evaluator, never spoke with Tiffany and had no personal knowledge of the facts at issue in the protection order hearing. Judge Casey's ruling to exclude Ms. Harrison's declaration and testimony was proper. Brian has not met his burden of clearly establishing that no reasonable judge would have reached the same conclusion as Judge Casey.

C. The appropriate standard of proof in actions under the DVPA is preponderance of the evidence.

Brian argues that the standard of proof in protection order actions should be elevated from “preponderance of the evidence” to “clear and convincing”. He fails to make an argument as to why a civil protection order should be treated as a “quasi-criminal” action other than to state that it is so. Brian does not meet his burden of demonstrating that the trial court erred in using the preponderance of evidence standard.

The Division One Court of Appeals recently recognized preponderance as the appropriate standard of proof in dissolution proceedings involving placement of a child. “The least stringent evidentiary standard is appropriate there because chapter 26.09 RCW is designed to facilitate a placement choice between equals—the natural parents.” *In re Custody of CCM*, 149 Wn. App. 184, 204, 202 P.3d 971 (2009).

Although not binding, a recent case out of New Jersey, *Crespo v. Crespo*, 408 N.J.Super. 25, 972 A.2d 1169 (June 18, 2009) is of interest. The appellant in *Crespo* challenged a restraining order under the state’s Prevention of Domestic Violence Act based in part on a claim that the Act’s preponderance standard of proof violated due process. The

Appellate court disagreed, providing a helpful analysis of the standard under the *Mathews v. Eldridge* factors.

In applying the principles enunciated in *Mathews*, we again conclude that the preponderance standard, as applied in domestic violence matters, conforms with the requirements of due process. Domestic violence actions, by their very nature, naturally pit the first and third *Mathews* factors, that is, victims' interests in being protected from domestic violence against defendants' liberty interests in being free to say what they wish and go where they please.

Crespo at 1175. (emphasis added)

In New Jersey, as in Washington, both the legislature and the judiciary have long recognized the important societal interest in protecting victims of domestic violence.

In light of these unmistakable expressions of public policy, we recognize that the strong societal interest in protecting persons victimized by domestic violence greatly favors utilization of the preponderance standard.

Id. at 1176-1177. (emphasis added)

The *Crespo* decision is attached to this brief in its entirety because the appellant's claims and arguments in that case are remarkably similar to the claims of Mr. Blackman in this appeal. Like the appellant in *Crespo*, Brian has not met his burden of establishing error in the trial court's application of the preponderance standard.

V. CONCLUSION

The trial court properly exercised its discretion when it denied Brian's request for a jury because actions under the DVPA are equitable in nature and because Brian did not follow the required procedure for a jury request.

The trial court properly exercised its discretion when it excluded Ms. Harrison's declaration and testimony because both were irrelevant.

The trial court correctly applied the appropriate standard of proof for actions under the DVPA, which is preponderance of the evidence.

Brian has failed to meet his burden on appeal to show that the trial court clearly abused its discretion -- that no reasonable judge would have ruled the same way -- on any one of these issues. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of July, 2009.

Attorney for Respondent, Tiffany Blackmon:


NORTHWEST JUSTICE PROJECT
Meagan J. MacKenzie, WSBA No. 21876

PROOF OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appearance was delivered via Legal Messenger to Gary A. Preble, Attorney for Brian Blackmon, Preble Law Firm, 2120 State Ave NE, Ste. 101, Olympia WA 98506 on July 30, 2009.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington on July 30, 2009.


Meagan J. MacKenzie
NORTHWEST JUSTICE PROJECT

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APPENDIX A

C

Superior Court of New Jersey,
 Appellate Division.
 Vivian **CRESPO**, Plaintiff,
 v.
 Anibal **CRESPO**, Defendant-Respondent.
 Vivian **Crespo**, Plaintiff,
 v.
 Anibal **Crespo**, Defendant-Appellant.
 Submitted May 13, 2009.
 Decided June 18, 2009.

Background: Two years after entry of a final restraining order (FRO) against him, defendant, plaintiff's former husband, moved for relief from the FRO, challenging constitutionality of Prevention of Domestic Violence Act. The Superior Court, Chancery Division, Hudson County, found Act unconstitutional and vacated FRO. Plaintiff appealed.

Holdings: The Superior Court, Appellate Division, Fisher, J.A.D., held that:

- (1) procedural provisions of Prevention of Domestic Violence Act do not improperly usurp the Supreme Court's exclusive constitutional authority over the practices and procedures utilized in the courts;
- (2) application of a preponderance standard to find domestic violence does not violate due process;
- (3) Act's prohibition on the possession of firearms by a person found to have committed domestic violence did not violate defendant's Second Amendment right to keep and bear arms;
- (4) Act's requirement that a final hearing be held within ten days of the filing of the complaint did not violate due process;
- (5) defendant failed to establish due process violation in the absence of discovery, where he never sought leave to conduct discovery; and
- (6) defendant was not entitled to trial by jury.

Reversed and remanded.

West Headnotes

[1] Constitutional Law 92  2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and Procedure in General. Most Cited Cases
 In determining whether to tolerate intrusions on its exclusive power to define court procedures, the Supreme Court first determines whether the Judiciary has fully exercised its power with respect to the matter at issue; if not, then the Court considers whether the statute serves a legitimate legislative goal, and, concomitantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain. N.J.S.A. Const. Art. 6, § 2, par. 3.

[2] Constitutional Law 92  2350

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2350 k. In General. Most Cited Cases
 Supreme Court may accommodate legislation that touches upon an integral area of judicial power, but only if the statute has not in any way interfered with the Court's constitutional obligation to insure a proper administration of the court system. N.J.S.A. Const. Art. 6, § 2, par. 3.

[3] Bail 49  51

49 Bail
49II In Criminal Prosecutions
49k50 Amount of Bail
49k51 k. In General. Most Cited Cases

Constitutional Law 92  2357

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions

92XX(B)2 Encroachment on Judiciary
92k2357 k. Remedies and Procedure in
General. Most Cited Cases

Constitutional Law 92 ⚔ 2370

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2369 Criminal Law
92k2370 k. In General. Most Cited
Cases

Protection of Endangered Persons 315P ⚔ 31

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(A) In General
315Pk31 k. Constitutional and Statutory
Provisions. Most Cited Cases

Protection of Endangered Persons 315P ⚔ 52

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(C) Proceedings
315Pk51 Plenary Proceedings in General
315Pk52 k. In General. Most Cited
Cases

Protection of Endangered Persons 315P ⚔ 70

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(D) Protection Orders in General
315Pk70 k. Judgment or Order in General.
Most Cited Cases
Procedural provisions of Prevention of Domestic
Violence Act, including those provisions directing
the setting and reducing of bail, the manner in which
a court order shall be recorded, who must receive the
order and the requirements imposed upon a party
seeking relief from an order, the particular part of the
superior court to hear such cases, and the period
within which a final hearing must occur, do not im-
properly usurp the Supreme Court's exclusive consti-
tutional authority over the practices and procedures

utilized in the courts. N.J.S.A. 2C:25-26, 2C:25-27,
2C:25-28a, 2C:25-29a.

14] Constitutional Law 92 ⚔ 2350

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2350 k. In General. Most Cited
Cases

Protection of Endangered Persons 315P ⚔ 62

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(C) Proceedings
315Pk58 Evidence
315Pk62 k. Weight and Sufficiency.
Most Cited Cases
Application of a preponderance standard instead of a
clear-and-convincing standard to find domestic vio-
lence under Prevention of Domestic Violence Act
does not violate due process. U.S.C.A. Const.Amend.
14; N.J.S.A. Const. Art. 1, par. 1; N.J.S.A. 2C:25-17
et seq.

15] Evidence 157 ⚔ 596(1)

157 Evidence
157XIV Weight and Sufficiency
157k596 Degree of Proof in General
157k596(1) k. In General. Most Cited
Cases

“Clear and convincing evidence” is that which is so
clear, direct and weighty and convincing as to enable
the factfinder to come to a clear conviction, without
hesitancy, of the precise facts in issue.

16] Evidence 157 ⚔ 596(1)

157 Evidence
157XIV Weight and Sufficiency
157k596 Degree of Proof in General
157k596(1) k. In General. Most Cited
Cases
The “clear-and-convincing standard” requires that
factfinder possess a firm belief or conviction as to the

truth of the allegations sought to be established.

[7] Protection of Endangered Persons 315P
78

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(D) Protection Orders in General
315Pk72 Nature and Scope of Relief
315Pk78 k. Other Particular Orders or Relief. Most Cited Cases

Weapons 406 3

406 Weapons
406k3 k. Constitutional, Statutory, and Local Regulations. Most Cited Cases
Prevention of Domestic Violence Act's prohibition on the possession of firearms by a person found to have committed domestic violence is a valid, appropriate and sensible limitation on an individual's Second Amendment right to keep and bear arms. U.S.C.A. Const.Amend. 2; N.J.S.A. 2C:25-28j, 2C:25-29b.

[8] Weapons 406 1

406 Weapons
406k1 k. Right to Bear Arms. Most Cited Cases
The Second Amendment is not a limitation on the power of states. U.S.C.A. Const.Amend. 2.

[9] Weapons 406 1

406 Weapons
406k1 k. Right to Bear Arms. Most Cited Cases
The individual rights guaranteed by the Second Amendment are not absolute or unlimited. U.S.C.A. Const.Amend. 2.

[10] Constitutional Law 92 4488

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications

92k4488 k. Orders for Protection. Most Cited Cases

Protection of Endangered Persons 315P 57

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(C) Proceedings
315Pk51 Plenary Proceedings in General
315Pk57 k. Hearing and Determination. Most Cited Cases

Prevention of Domestic Violence Act's requirement that a final hearing be held within ten days of the filing of the complaint did not deprive defendant of due process; defendant was provided with more than sufficient time to respond to the complaint, and defendant failed to suggest that he either requested or was denied an adjournment or that he was unable to adequately defend against the complaint as a result of the time between the commencement of the action and the start of the final hearing. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:25-29a.

[11] Protection of Endangered Persons 315P
52

315P Protection of Endangered Persons
315PII Security or Order for Peace or Protection
315PII(C) Proceedings
315Pk51 Plenary Proceedings in General
315Pk52 k. In General. Most Cited Cases

In compelling circumstances, where a party's ability to adequately present evidence during a domestic violence action may be significantly impaired, a trial judge may, in the exercise of sound discretion, permit limited discovery in order to prevent an injustice. R. 5:5-1(d).

[12] Pretrial Procedure 307A 21

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak21 k. Actions and Proceedings in Which Remedy Is Available. Most Cited Cases
Judges are not required to be oblivious to a party's claim for discovery in compelling circumstances in

summary actions, even though the court rules do not expressly authorize relief. R. 5:5-1(d).

[13] Constitutional Law 92 4488

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)25 Other Particular Issues and Applications

92k4488 k. Orders for Protection. Most Cited Cases

Protection of Endangered Persons 315P 52

315P Protection of Endangered Persons

315PII Security or Order for Peace or Protection

315PII(C) Proceedings

315Pk51 Plenary Proceedings in General

315Pk52 k. In General. Most Cited

Cases

Defendant failed to establish violation of due process based on the absence of discovery in action under Prevention of Domestic Violence Act, where defendant failed to demonstrate that he sought leave to conduct any discovery proceedings. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:25-17 et seq.; R. 5:5-1(d).

[14] Protection of Endangered Persons 315P 122

315P Protection of Endangered Persons

315PII Security or Order for Peace or Protection

315PII(G) Appeal and Review

315Pk122 k. Right of Review, Parties, and Estoppel. Most Cited Cases

Appellate court would not consider defendant's claim that a right to counsel attaches, as a matter of due process, in actions under Prevention of Domestic Violence Act, where record did not reflect that defendant ever sought appointment of counsel prior to or during the adjudication of the domestic violence matter. U.S.C.A. Const.Amend. 14; N.J.S.A. 2C:25-17 et seq.

[15] Jury 230 19.10(1)

230 Jury

230II Right to Trial by Jury

230k19.10 Domestic Relations Cases

230k19.10(1) k. In General. Most Cited Cases

Defendant was not entitled to trial by jury in action under Prevention of Domestic Violence Act, where Act did not grant such a right, and action based on an allegation of domestic violence and principally seeking injunctive relief was akin to an action in equity, which generally did not carry the right to jury trial at common law. N.J.S.A. 2C:25-17 et seq.

[16] Jury 230 12(1.1)

230 Jury

230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(1.1) k. Common Law or Statutory Actions, in General. Most Cited Cases

The right to a jury trial is constitutionally required only if expressly permitted by the Legislature or if the right existed at common law when the constitution was adopted.

[17] Jury 230 19.10(1)

230 Jury

230II Right to Trial by Jury

230k19.10 Domestic Relations Cases

230k19.10(1) k. In General. Most Cited Cases

Cases
When the alleged victim of domestic violence seeks a restraining order as the principal claim for relief in action under Prevention of Domestic Violence Act, the right to trial by jury does not attach, even if other ancillary relief, such as damages, is also sought. N.J.S.A. 2C:25-17 et seq.

*1171 Anne Milgram, Attorney General, attorney for intervenor State of New Jersey, appellant in A-0202-08T2 and respondent in A-0203-08T2 (Nancy Kaplen, Assistant Attorney General, of counsel; V. Nicole Langfitt, Deputy Attorney General, on the brief).

O'Donnell, McCord & DeMarzo, attorneys for Anibal

Crespo, respondent in A-0202-08T2 and appellant in A-0203-08T2 (David N. Heleniak, of counsel and on the brief).

Gibbons, P.C., attorneys for amicus curiae New Jersey Coalition for Battered Women (Lawrence S. Lustberg and Avidan Y. Cover, on the brief).

Andrew L. Schlafly, attorney for amicus curiae Eagle Forum Education & Legal Defense Fund.

Before Judges FISHER, C.L. MINIMAN and BAXTER.

The opinion of the court was delivered by FISHER, J.A.D.

***30** Two years after entry of a final restraining order (FRO) against him, defendant moved for relief from the FRO, claiming the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35, was unconstitutional for a host of reasons. The trial judge determined that the Act's "practice and procedure" components violate the separation of powers doctrine and that the Act's preponderance standard of proof violates due process principles. We disagree and reverse.

***1172 *31 I**

The parties were married in 1984 and divorced in 2001. Despite the divorce, they continued to inhabit the same two-family house; defendant lived on the second floor with his parents while plaintiff lived with their three children on the first floor.

In 2004, after a dispute over child support, plaintiff filed a domestic violence complaint alleging present and past verbal and physical abuse. An ex parte temporary restraining order (TRO), which restricted defendant from communicating with or contacting plaintiff, was immediately entered. Defendant was served with the complaint and TRO, and, after a two-day trial, which consisted of the testimony of only the parties, the judge entered a FRO in plaintiff's favor. Defendant appealed and we affirmed by way of an unpublished opinion. *Crespo v. Crespo*, No. A-5102-03T5 (App. Div. June 6, 2005).

On June 15, 2007, defendant moved before a different judge to vacate the FRO, asserting the Act's unconstitutionality.^{FN1} Defendant argued that the Act essentially converted what ought to be a criminal prosecution into a civil proceeding, thus depriving the parties of their right to a jury trial. Additionally, defendant argued that the Act denied him due process by failing to provide sufficient notice prior to the final hearing, by applying a preponderance standard instead of a clear-and-convincing standard, and by failing to permit discovery or a right to counsel. By way of his written opinion of June 18, 2008, the judge found the Act unconstitutional and vacated the FRO.^{FN2}

^{FN1}. Defendant moved to vacate a year earlier. That motion was denied because of, among other things, defendant's failure to properly serve the Attorney General in light of his constitutional attack on the Act, as required by *Rule* 4:28-4(d).

^{FN2}. Despite the two-year delay following entry of the FRO in defendant's attack on the Act's constitutionality, we conclude that defendant's arguments may still be considered at this late date because he remains subject to the FRO.

***32** We granted the motions filed by the State and defendant for leave to appeal, and we now reject the trial judge's determination that the Act is unconstitutional either because of its incorporation of procedural components or because it imposes only a preponderance standard. In addition, we reject defendant's additional constitutional arguments, which the trial judge also found wanting.

II

In defining the powers of the Judiciary, our State Constitution declares that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." *N.J. Const.* art. VI, § 2, ¶ 3. Soon after the adoption of the 1947 Constitution, in *Winberry v. Salisbury*, 5 N.J. 240, 255, 74 A.2d

406, cert. denied, 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950), the Court defined the scope of its rule-making power and held that its practices and procedures may not be overridden by conflicting legislation. Nevertheless, the Court's response has not been to strike down all legislative procedures. The Court instead has recognized that the separation of powers doctrine "was never intended to create ... utterly exclusive spheres of competence." In re Salaries for Probation Officers, 58 N.J. 422, 425, 278 A.2d 417 (1971). As described by Justice Handler in his opinion for the Court in Knight v. City of Margate, 86 N.J. 374, 388, 431 A.2d 833 (1981):

The constitutional doctrine of the separation of powers denotes not only independence but also interdependence *1173 among the branches of government. Indeed, the division of governmental powers implants a symbiotic relationship between the separate governmental parts so that the governmental organism will not only survive but will flourish.

[1][2] As a result, the question is not whether the Legislature has created procedures to be applied in our courts but whether those procedures contradict or inhibit the functioning of the courts. In determining whether to tolerate intrusions on its exclusive power to define court procedures, the Court has employed a two-pronged test. See Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 163, 836 A.2d 779 (2003) (Zazzali, J., *33 concurring). In such circumstances, the Court first determines whether the Judiciary "has fully exercised its power with respect to the matter at issue"; if not, then the Court considers "whether the statute serves a legitimate legislative goal, and, 'concomitantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain.'" Ibid. (quoting Knight, supra, 86 N.J. at 389-91, 431 A.2d 833). As a result, the Court may "accommodate legislation that touches upon an integral area of judicial power," N.J. State Bar Ass'n v. State, 387 N.J.Super. 24, 49, 902 A.2d 944 (App.Div.), certif. denied, 188 N.J. 491, 909 A.2d 726 (2006), but only if the statute has "not in any way interfered with [the] Court's constitutional obligation [to] insure a proper administration of the court system," Passaic County Prob. Officers' Ass'n v. County of Passaic, 73 N.J. 247, 255, 374 A.2d 449 (1977).

[3] We recognize, as did the trial judge, that the Act prescribes various procedures. Among other things, the Act provides direction for: the setting and reducing of bail, N.J.S.A. 2C:25-26; the manner in which a court order shall be recorded, who must receive the order and the requirements imposed upon a party seeking relief from an order, N.J.S.A. 2C:25-27; the particular part of the superior court to hear such cases, N.J.S.A. 2C:25-28a; and the period within which a final hearing must occur, N.J.S.A. 2C:25-29a.

These and other procedural components in the Act have not gone unnoticed by our Supreme Court since the Act's adoption nearly twenty years ago. But the Court's response was not to conclude that these practices and procedures have interfered with the proper administration of justice or otherwise violated the separation of powers doctrine. To the contrary, the Court incorporated the Act's procedural components by adopting Rule 5:7A,^{FN3} *34 as well as through the issuance of the State's Domestic Violence Procedures Manual.^{FN4} Rather than viewing the Act's procedural components as usurping its exclusive constitutional authority over the practices and procedures utilized in the courts, the Supreme Court has embraced and enhanced the Act's procedural components by adopting Rule 5:7A and by participating with the Attorney General in the creation of a Domestic Violence Manual that also incorporates the procedures contained in the Act. Accordingly, we find the argument that the various procedural aspects of the Act violate N.J. Const. art. VI, § 2, ¶ 3, to be utterly without merit.

^{FN3}. The Act's procedural provisions are cited throughout Rule 5:7A. As Judge Pressler has correctly observed, Rule 5:7A "implements" the procedural components of the Act. Pressler, Current N.J. Court Rules, comment 1 on R. 5:7A (2009).

^{FN4}. See <http://www.judiciary.state.nj.us/family/dvprcman.pdf> (last visited June 8, 2009). The Manual's stated purpose was to provide "procedural guidance for law enforcement officials, judges and judiciary staff in implementing the Prevention of Domestic Violence Act."

*1174 III

A

[4] The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” *U.S. Const.* amend. XIV, ¶ 1. Although Article I, Paragraph 1 of the New Jersey Constitution does not expressly refer to the right to due process of law, the Court has interpreted this part of our state constitution as “protect [ing] against injustice and, to that extent, protect[ing] ‘values like those encompassed by the principle[] of due process.’” *Doe v. Poritz*, 142 N.J. 1, 99, 662 A.2d 367 (1995) (quoting *Greenberg v. Kimmelman*, 99 N.J. 552, 568, 494 A.2d 294 (1985)); see also *Jamgochian v. N.J. State Parole Bd.*, 196 N.J. 222, 239, 952 A.2d 1060 (2008); *Lewis v. Harris*, 188 N.J. 415, 442, 908 A.2d 196 (2006); *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 472, 842 A.2d 125 (2004); *Sojourner A. v. N.J. Dept. of Human Servs.*, 177 N.J. 318, 332, 828 A.2d 306 (2003). Defendant argues that the Act’s preponderance standard,^{FN5} *35 in light of the consequences of a finding of domestic violence, violates these due process principles by placing an unduly light burden of persuasion on the alleged victims of domestic violence.

FN5. *N.J.S.A. 2C:25-29a* directs that at the final hearing “the standard for proving the allegations in the complaint shall be by a preponderance of the evidence.”

Due process principles often require consideration of the sufficiency of the burden of persuasion in appropriate cases. For example, our Supreme Court has examined the standard of proof necessary to revoke a doctor’s license to practice through the application of due process principles. *In re Polk*, 90 N.J. 550, 560-69, 449 A.2d 7 (1982). The Supreme Court of the United States has also examined the constitutional sufficiency of burdens of persuasion in: deportation cases, *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285-85, 87 S.Ct. 483, 487-88, 17 L.Ed.2d 362, 368-69 (1966); denaturalization proceedings, *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120, 123 (1960); civil commitment proceedings, *Addington v. Texas*, 441 U.S. 418, 432-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d

323, 335 (1979); and parental termination proceedings, *Santosky v. Kramer*, 455 U.S. 745, 768-70, 102 S.Ct. 1388, 1402-03, 71 L.Ed.2d 599, 616-17 (1982).

In considering whether the adoption of a particular burden of persuasion adheres to state constitutional due process principles, our Supreme Court has followed the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976). See *Polk, supra*, 90 N.J. at 562, 449 A.2d 7. Recognizing that due process is “flexible and calls for such procedural protections as the particular situation demands,” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972), the Mathews Court created a test, which requires consideration of three factors:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[*Mathews, supra*, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.]

*36 In applying this test, the trial judge concluded that the Act is unconstitutional because it permits findings of domestic violence through the application of a preponderance*1175 standard instead of the clear-and-convincing standard.

B

It is surprising that the trial judge would conclude that the Act was unconstitutional in this regard because he recognized that we had previously held to the contrary in *Roe v. Roe*, 253 N.J.Super. 418, 427, 601 A.2d 1201 (App.Div.1992). However, in sidestepping this binding precedent, the trial judge concluded that our failure to expressly mention *Mathews* in *Roe* suggested that the constitutionality of the Act’s standard of proof remained open to debate. The judge further distinguished *Roe* because there we consid-

ered an argument that the Act was constitutionally inadequate by failing to incorporate a reasonable-doubt standard whereas here defendant argues that the Act should have incorporated a clear-and-convincing standard.

It is certainly true that *Roe* considered an argument that the Act was constitutionally required to impose a reasonable-doubt standard. *Id.* at 427, 601 A.2d 1201. However, we find irrelevant this distinction because in *Roe* we held that the preponderance standard, which is attacked here, met constitutional muster. *Id.* at 428, 601 A.2d 1201. In addition, although we did not cite *Mathews* in *Roe*, we have no doubt that the due process principles described in *Mathews* were considered and applied on that occasion.

Indeed, the opinion in *Roe* is infused with a consideration of the *Mathews* factors, even though *Mathews* was not expressly mentioned. As Judge King then said for the court, the preponderance standard “better serves the purpose of the Act in protecting victims of domestic violence” because allegations of domestic violence are often “difficult to prove due to the[ir] private nature,” and there are “usually few, if any, eyewitnesses to marital discord or domestic violence.” *37 *Roe, supra*, 253 N.J.Super. at 428, 601 A.2d 1201. As a result, we recognized in *Roe* that the vindication of the Act’s important goals often depends upon the ability of a victim to obtain relief in situations where proof is scarce, parties’ contentions are in sharp contrast, and a judge may often be relegated to deciding the case based solely on credibility findings. Thus, although not referring to *Mathews* by name, it is nevertheless clear that *Roe* considered “the nature of the private interest affected,” “the risk of error in the ultimate determination created” by the use of the preponderance standard, and “the countervailing governmental interest to be furthered.” *Polk, supra*, 90 N.J. at 562, 449 A.2d 7; see also *Mathews, supra*, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.

Because *Roe* bound the trial judge and required that he reject defendant’s arguments regarding the constitutional sufficiency of the preponderance standard in actions brought pursuant to the Act, the Attorney General is correct that the judge erred in refusing to follow *Roe*. The judge was privileged to disagree with

Roe but he was not free to disobey. *Reinauer Realty Corp. v. Borough of Paramus*, 34 N.J. 406, 415, 169 A.2d 814 (1961); *Petrusky v. Maxfli Dunlop Sports Corp.*, 342 N.J.Super. 77, 81, 775 A.2d 723 (App.Div.), certif. denied, 170 N.J. 388, 788 A.2d 772 (2001).

C

However, we need not limit our holding to a consideration of whether the trial judge should have been bound by *Roe*. Instead, we consider the merits of the argument and, in so doing, reiterate with confidence our adherence to *Roe*’s holding. In applying the principles enunciated in *Mathews*, we again conclude that the preponderance standard, as applied in domestic violence matters, conforms with the requirements of due process.

*1176 Domestic violence actions, by their very nature, naturally pit the first and third *Mathews* factors, that is, victims’ interests in being protected from domestic violence against defendants’ liberty interests in being free to say what they wish and go where they please. *38 The Legislature obviously viewed the victims’ interests as highly important and of far greater weight than defendants’ interests, when it declared in the Act that

domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. *It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.*

[N.J.S.A. 2C:25-18 (emphasis added).]

The Supreme Court has also recognized the important

societal interest in protecting victims of domestic violence:

Domestic violence is a serious problem in our society. Each year, three to four million women from all socio-economic classes, races, and religions, are battered by husbands, partners, and boyfriends. The Act and its legislative history confirm that New Jersey has a strong policy against domestic violence. Although New Jersey is in the forefront of states that have sought to curb domestic violence, New Jersey police reported 77,680 incidents of domestic violence in 2000 alone.

[*State v. Reyes*, 172 N.J. 154, 163, 796 A.2d 879 (2002) (internal quotations and citations omitted).]

In light of these unmistakable expressions of public policy, we recognize that the strong societal interest in protecting persons victimized by domestic violence greatly favors utilization of the preponderance standard. In so holding, we are by no means dismissive of the limitations imposed on defendants in such matters. In cases where the parties resided in the same household when the action was commenced, the restraint on defendant imposes a substantial burden—it bars the defendant from his or her home. However, in cases where the parties were not members of the same household, the relief normally granted poses little more than a minor inconvenience; in those many cases the defendant is merely barred from the victim's residence and place of employment, not his own. In either circumstance, we conclude that the limits imposed upon a defendant's private interests carry far less weight in the *Mathews* analysis than does the governmental³⁹ interest in eliminating domestic violence and in affording immediate and effective protection to victims of domestic violence.

In considering the second *Mathews* factor, we are not persuaded that the preponderance standard may tend to lead to erroneous adjudications or erode public confidence in the ability of our courts to produce fair and accurate determinations in such matters. In this regard we continue to recognize the truth of what we said in *Roe*: “[t]here are usually few, if any, eyewitnesses to marital discord or domestic violence.” 253 N.J.Super. at 428, 601 A.2d 1201. Most of the events complained of in such matters happen behind closed doors or during private communications; as a result,

most cases turn only on the trial judge's assessment of the ⁴⁰credibility of only two witnesses—the plaintiff and the defendant.

[5][6] The Legislature certainly understood that a clear-and-convincing standard would saddle victims of domestic violence with a burden that would often foreclose relief in many deserving cases. When the testimony of the plaintiff is pitted against the testimony of the defendant, with no other corroborating testimony or evidence, a plaintiff would likely have difficulty sustaining the sterner standard urged by defendant here. Clear and convincing evidence is that which is “so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.” *Matter of Seaman*, 133 N.J. 67, 74, 627 A.2d 106 (1993) (quoting *In re Boardwalk Regency Casino License Application*, 180 N.J.Super. 324, 339, 434 A.2d 1111 (App.Div.1981), modified, 90 N.J. 361, 447 A.2d 1335 (1982)). The clear-and-convincing standard thereby requires that the judge possess “a firm belief or conviction as to the truth of the allegations sought to be established.” *Matter of Purrazzella*, 134 N.J. 228, 240, 633 A.2d 507 (1993) (quoting *Aiello v. Knoll Golf Club*, 64 N.J.Super. 156, 162, 165 A.2d 531 (App.Div.1960)). Judges—being human—may at times err in assessing which of two contestants has told the truth; we do not, however, view *Mathews* as requiring a burden of persuasion that more effectively eliminates the chance of a mistaken adjudication at the steep price of permitting countless⁴⁰ more meritorious claims to be lost at the hands of the clear-and-convincing standard.^{FN6}

FN6. The great majority of domestic violence matters do not involve specialized knowledge or present “circumstances or issues that are so unusual or difficult, that proof by a lower standard will not serve to generate confidence in the ultimate factual determination.” See *Polk, supra*, 90 N.J. at 568, 449 A.2d 7. By contrast, the imposition of a sterner burden of persuasion has been imposed in circumstances that are “intrinsically complex and not readily amenable to objective assessment,” *ibid.*, such as cases requiring determinations of: mental incompetence, *Addington, supra*, 441 U.S. at 432-

33, 99 S.Ct. at 1812-13, 60 L.Ed.2d at 335; parental unfitness, Santosky, supra, 455 U.S. at 769, 102 S.Ct. at 1403, 71 L.Ed.2d at 616-17; paternity, Sarte v. Pidoto, 129 N.J.Super. 405, 410-12, 324 A.2d 48 (App.Div.1974); and undue influence upon testators, Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 182-83, 432 A.2d 890 (1981).

Because the interests at stake and the factfinding required of our Family Part judges in domestic violence matters is not at all similar to those matters in which courts have compelled application of the clear-and-convincing standard, we conclude-in conformity with our holding in *Roe*-that a standard more demanding than the preponderance standard "would undermine the social purposes of the Act." 253 N.J.Super. at 428, 601 A.2d 1201.

IV

Defendant was unsuccessful in his attempts to convince the trial judge that other aspects of the Act are unconstitutional. Among other things, defendant argues (a) that the Act infringes on his Second Amendment right to bear arms, and, also, that the Act fails to comport with due process principles with regard to (b) discovery, (c) the time to prepare between the filing of the action and the final hearing, (d) the right to counsel, and (e) the right to trial by jury.^{FN7}

FN7. Defendant has also argued that the Act improperly converts what is a criminal prosecution into a civil proceeding, damages his reputation, and interferes with his right to raise his children, to speak freely with his wife and children, and to enjoy the marital home. We find these arguments to have insufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*. We would briefly note that the FRO does not impact defendant's ability to raise his children. Defendant retains his preexisting right to raise his children unabated by the FRO, which merely imposes a visitation schedule-provisions that are always subject to modification upon good cause shown. *See N.J.S.A. 2C:25-29d*. The FRO also has no impact on defendant's right to "enjoy the marital

home"; the parties were divorced and, although we have not been informed of the terms of the judgment of divorce, we assume the parties' marital property was equitably distributed and, as a result, there ceased to be a "marital home."

*1178 *41 A

[7] We reject defendant's argument that by allowing the seizure of a defendant's firearms upon a finding of domestic violence, the Act permits a deprivation of an individual's Second Amendment right to bear arms. Defendant relies upon *District of Columbia v. Heller*, --- U.S. ---, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)-a recent "dramatic upheaval in the law," *id. at* ---, 128 S.Ct. at 2824, 171 L.Ed.2d at 686 (Stevens, J., dissenting)-which pronounced for the first time an individual right to keep and bear arms. We reject defendant's argument.

[8] First, it is important to recognize that the Supreme Court has held that the Second Amendment is "a limitation only upon the power of Congress and the National government, and not upon that of the States." *Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 584, 29 L.Ed. 615, 619 (1886). In revamping the scope of the Second Amendment, the *Heller* majority did not alter the view expressed in *Presser* and other decisions that the Second Amendment poses no limits on the states. *Heller, supra*, --- U.S. at ---, 128 S.Ct. at 2813 n. 23, 171 L.Ed.2d at 674 n. 23. Since *Heller*, two federal courts of appeals have disagreed whether the individual right to keep and bear arms should apply to the states. Compare *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d Cir.2009) (holding that, until overruled, lower courts are bound to adhere to *Presser*), with *Nordyke v. King*, 563 F.3d 439, 457 (9th Cir.2009) (holding that the Fourteenth Amendment incorporates the individual rights now found in the Second Amendment and therefore limits the states and local governments). To the extent necessary *42 to our disposition of defendant's Second Amendment argument, we agree with *Maloney* that the lower courts remain bound by the Supreme Court's earlier binding determinations that the Second Amendment has no application to the states until such time, if ever, the Supreme Court overrules *Presser* and holds to the contrary.

[9] However, even assuming otherwise, *Heller* by no means holds that the individual rights guaranteed by the Second Amendment are absolute or unlimited. --- *U.S.* at ---, 128 *S.Ct.* at 2816, 171 *L.Ed.2d* at 678. To the contrary, the *Heller* majority recognized that it had not pronounced an “exhaustive historical analysis ... of the full scope of the Second Amendment,” and emphasized that the majority opinion should not be taken “to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at ---, 128 *S.Ct.* at 2816-17, 171 *L.Ed.2d* at 678.^{FN8} In light of the majority's express description of the limitations on its holding,^{FN9} we have no cause to assume that *1179 *Heller* in any way interferes with our Legislature's declaration that a person found to have committed an act of domestic violence may be subjected to a weapons seizure. *N.J.S.A.* 2C:25-28j^{FN10}; *43 *N.J.S.A.* 2C:25-29b.^{FN11}

FN8. Our Legislature has vigorously acted to keep “firearms out of the hands of all dangerously unfit persons, noncriminal as well as criminal.” *Burton v. Sills*, 53 *N.J.* 86, 94, 248 *A.2d* 521 (1968), *appeal dismissed*, 394 *U.S.* 812, 89 *S.Ct.* 1486, 22 *L.Ed.2d* 748 (1969). See also *N.J.S.A.* 2C:39-1 to -16. The Act's provisions that permit the seizure of firearms and other weapons from a person found to have committed domestic violence represent a natural progression in furthering the policies of this State regarding gun control.

FN9. The *Heller* majority also recognized that limitations may continue to be imposed upon particular types of arms. *Id.* at ---, 128 *S.Ct.* at 2817, 171 *L.Ed.2d* at 679.

FN10. *N.J.S.A.* 2C:25-28j authorizes judges to grant emergency, ex parte relief by way of a TRO, which may include a provision “forbidding the defendant from possessing any firearm or other weapon enumerated in [*N.J.S.A.* 2C:39-1r], ordering the search for

and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant and any other appropriate relief.” This provision requires that the judge “state with specificity the reasons for and scope of the search and seizure”; the provision also excludes its application to law enforcement officers “on duty” and members of the Armed Forces of the United States or members of the National Guard “while actually on duty or traveling to or from an authorized place of duty.” *Ibid.*

FN11. *N.J.S.A.* 2C:25-29 permits judges to include provisions in FROs that “bar the defendant from purchasing, owning, possessing or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun ... during the period in which the restraining order is in effect or two years whichever is greater.” It also places the same limitations, as *N.J.S.A.* 2C:25-28j, on the courts' power with regard to law enforcement officers and members of the Armed Forces and the National Guard.

Although the recent pronouncement of a slim majority of the Supreme Court of the United States might in the future restrict the reach of our gun control laws should that Court overrule its longstanding holding in *Presser* that the Second Amendment does not apply to the states, we can find nothing in the *Heller* decision to suggest a limitation on a state's right to bar persons who have been found to have committed acts of domestic violence from possessing firearms. Absent a clear and binding announcement from the Supreme Court of the United States to the contrary, we conclude that the Act's prohibition on the possession of firearms by a person found to have committed domestic violence is a valid, appropriate and sensible limitation on an individual's Second Amendment rights.

B

[10] Defendant also argues that the Act's requirement that a final hearing be held within ten days of the filing of the complaint, *see N.J.S.A. 2C:25-29a*, deprived him of due process. This argument is utterly without merit. Our Supreme Court has already *44 found that the ten-day provision comports with the requirements of due process.

In *H.E.S. v. J.C.S.*, 175 N.J. 309, 323, 815 A.2d 405 (2003), the Court held:

the ten-day provision does not preclude a continuance where fundamental fairness dictates allowing a defendant additional time. Indeed, to the extent that compliance with the ten-day provision precludes meaningful notice and an opportunity to defend, the provision must yield to due process requirements.

[Internal quotations and citations omitted.]

In this case, the complaint was filed on March 16, 2004 and the final hearing did not commence until April 8, 2004, twenty-three days later. The second and last day of the hearing occurred on April 21, 2004, thirty-six days after the action was commenced. Defendant was provided with more than sufficient time to respond to the complaint. Indeed, he has not referred to anything in the record to suggest he either requested or was denied an adjournment or that he was unable to adequately defend against the complaint as a result of the *1180 time between the commencement of the action and the start of the final hearing.

C

[11][12][13] We also reject defendant's argument that he was prejudiced by his inability to depose plaintiff or obtain other discovery. Domestic violence actions are "summary actions," a fact that inherently precludes the right to discovery. *See, e.g., H.E.S., supra*, 175 N.J. at 323, 815 A.2d 405. However, we note that one trial court has determined that, in accordance with *Rule 5:5-1(d)*, a defendant may seek leave to obtain discovery in such a matter upon a showing of good cause. *Depos v. Depos*, 307 N.J.Super. 396, 400, 704 A.2d 1049 (Ch.Div.1997). We agree with

the opinion of Judge Dilts in *Depos* that in compelling*45 circumstances, where a party's ability to adequately present evidence during a domestic violence action may be significantly impaired, a trial judge may, in the exercise of sound discretion, permit limited discovery in order to prevent an injustice. Judges are not required to be oblivious to a party's claim for discovery in compelling circumstances even though the court rules do not expressly authorize relief. *See, e.g., Kellam v. Feliciano*, 376 N.J.Super. 580, 587, 871 A.2d 146 (App.Div.2005).

Here, the record reveals that at no time did defendant seek leave to conduct any discovery proceedings. We, thus, reject defendant's bald contention that he was deprived of due process because of the absence of discovery in this case.

D

[14] Defendant argues that a right to counsel attaches in domestic violence matters.

Due process principles have been found to require the appointment of counsel in civil or quasi-criminal matters when an indigent party faces imprisonment or some "other consequence of magnitude." *See Pasqua v. Council*, 186 N.J. 127, 148, 892 A.2d 663 (2006) (quoting *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295, 277 A.2d 216 (1971)). Whether the imposition of a restraining order of the scope authorized by the Act constitutes a matter of sufficient magnitude to warrant the appointment of counsel has yet to be resolved by our courts.

We find no cause to further consider the right to counsel at the present time. The record does not reflect that defendant ever sought the appointment of counsel prior to or during the adjudication of this domestic violence matter. Accordingly, in the present setting, the issue is purely academic.

E

[15][16] Finally, we reject the argument that defendant was entitled to a trial by jury in this matter. The right to a jury trial in this State is constitutionally required only if expressly permitted by the Legisla-

ture or if the right existed at common law when the constitution was adopted. Ciba-Geigy Corp. v. Liberty Mut. Ins. Co., 149 N.J. 278, 298, 693 A.2d 844 (1997); Shaner v. Horizon Bancorp., 116 N.J. 433, 447, 561 A.2d 1130 (1989). Because*46 the Act does not grant such a right, we consider whether the common law recognized a right to trial by jury in similar cases.

At common law, actions at law generally carried the right to a trial by jury, whereas actions in equity did not. Lyn-Anna Props. v. Harborview Dev. Corp., 145 N.J. 313, 321, 678 A.2d 683 (1996); Shaner, supra, 116 N.J. at 447, 561 A.2d 1130. Accordingly, we consider whether an action based on an allegation of domestic violence and principally seeking injunctive relief is more akin to an action at law or an action in equity.

In ascertaining when a right to trial by jury attaches in this manner, the focus is *1181 not so much on the nature of the claim, but primarily on the relief sought. As our Supreme Court has instructed, “[a]lthough ‘the nature of the underlying controversy’ is useful ‘in determining whether the cause of action has been historically primarily equitable or legal in nature,’ the remedy remains the most persuasive factor.” Weinisch v. Sawyer, 123 N.J. 333, 344, 587 A.2d 615 (1991) (quoting Shaner, supra, 116 N.J. at 450-51, 561 A.2d 1130). The primary relief permitted by the Act, and sought by plaintiff here—an injunction—is an equitable remedy. See, e.g., N.J. State Bar Ass’n v. Northern N.J. Mortg. Assocs., 22 N.J. 184, 194, 123 A.2d 498 (1956).

[17] As a result, we conclude that when the alleged victim of domestic violence seeks a restraining order as the principal claim for relief, the right to trial by jury does not attach. In so holding, we do not mean to suggest any disagreement with the manner in which the Court dealt with the right to trial by jury in tort actions brought by one spouse against another when only damages are sought. See Brennan v. Orban, 145 N.J. 282, 305-06, 678 A.2d 667 (1996) (holding that marital torts seeking damages asserted in the Family Part are not necessarily triable by jury). Nor do we mean to suggest—or decide—that the right to trial by jury would not attach to a domestic violence action that eschewed injunctive relief and sought only dam-

ages. We merely decide what is before us and hold that when the alleged victim of domestic violence, as *47 here, chiefly seeks a restraining order—even if other ancillary relief, such as damages, is also sought—the right to trial by jury does not attach.

V

The order under review, which concluded that the Act is unconstitutional, is reversed and the matter remanded for reinstatement of the FRO.

N.J.Super.A.D.,2009.
Crespo v. Crespo
408 N.J.Super. 25, 972 A.2d 1169

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