

To: New Jersey Law Revision Commission
From: Lauren Haberstroh, Legislative Law Clerk
Re: Final Protective Order Factors in N.J.S. 2C:14-16
Date: July 06, 2021

MEMORANDUM

Project Summary

In *C.R. v. M.T.*,¹ the Appellate Division considered whether the Sexual Assault Survivor Protection Act (SAPSA)² required that the plaintiff prove that she was involuntarily intoxicated to satisfy the “nonconsensual sexual contact” requirement of N.J.S. 2C:14-16 subsection a.(1). The Appellate Division concluded that, in order to prove mental incapacity caused by intoxication, an alleged victim must show by a preponderance of the evidence that her faculties were prostrated.³

During oral argument on this case before the New Jersey Supreme Court, Justice Albin questioned the factors that a court was required to consider when issuing a final protective order pursuant to N.J.S. 2C:14-16a.⁴

N.J.S. 2C:14-16 subsection a. sets forth two factors that a court is required to consider during a hearing on a final protective order: “the occurrence of one or more acts of nonconsensual sexual contact, sexual penetration, or lewdness against the alleged victim; and the possibility of future risk to the well-being of the alleged victim.”⁵ It is not clear whether the statute requires a court to consider both factors, or only one. Also, while the statute explicitly provides that the court is not limited to the enumerated factors, it is not clear what other factors a court may consider before issuing a final protective order.

Statute Considered

N.J.S. 2C:14-16 subsection a., which concerns the issuance of final protective orders, provides in pertinent part that:

a. A hearing shall be held in the Superior Court within 10 days of the filing of an application pursuant to section 3 of P.L.2015, c. 147 (C.2C:14-15) in the county where the temporary protective order was ordered, unless good cause is shown for the hearing to be held elsewhere.... At the hearing, the standard for proving the

¹ *C.R. v. M.T.*, 461 N.J. Super. 341 (App. Div. 2019).

² N.J.S. 2C:14-13 to -21.

³ *C.R.*, 461 N.J. Super. at 353.

⁴ Oral Argument at 35:51, *C.R. v. M.T.*, 461 N.J. Super. 341 (App. Div. 2019), https://www.njcourts.gov/videos/2020/11%20Nov%202020/30%20Nov%202020/a_58_19.mp3.

⁵ N.J.S. 2C:14-16a(1)-(2).

allegations made in the application for a protective order shall be a preponderance of the evidence. The court shall consider *but not be limited to* the following factors:

- (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.⁶

Background

The central issue of *C.R. v. M.T.* was whether or not the plaintiff consented to her sexual encounter with the defendant. The plaintiff brought action under SAPSA to prevent defendant from contacting her. Though neither party denied that sexual contact occurred, their accounts differed regarding whether plaintiff consented to sexual contact.⁷ The trial court found both versions of the events to be “equally plausible” and that the plaintiff did not prove that her version was “more likely true” than the defendant’s.⁸

The plaintiff appealed the trial court’s decision, and the Appellate Division determined that the plaintiff could prevail if it were found that she was “incapable of consenting” during sexual contact.⁹ The Court looked to N.J.S. 2C:14-2 subsection a.(7), which states that, among other things, a sexual assault victim is one “whom the actor knew or should have known. . . was mentally incapacitated.”¹⁰ The Court considered whether the statutory definition of “mental incapacitation” required the victim prove that she was involuntarily intoxicated, noting that the statute could be interpreted to suggest this.¹¹ The Appellate Division discussed the punctuation used in the definition of “mental incapacitation” and the doctrine of the last antecedent. It determined that to prove mental incapacity caused by intoxication, alleged victims must show by a preponderance of the evidence that their faculties were prostrated.¹²

Although not the central issue in the case, during oral argument before the New Jersey Supreme Court, Justice Albin expressed concern about the factors to be considered when reviewing a final protective order pursuant to N.J.S. 2C:14-16a.¹³ He stated that the phrase “shall not be limited to” was a “very strange way of setting forth elements, because it [suggests] that

⁶ N.J.S. 2C:14-16a. (*emphasis added*).

⁷ *C.R.*, 461 N.J. Super. at 345.

⁸ *Id.* at 346.

⁹ *Id.* at 347.

¹⁰ *Id.*

¹¹ This was pertinent because the plaintiff voluntarily consumed alcohol before the sexual contact in question. *Id.*, citing N.J.S. 2C:14-1(i).

¹² *C.R.*, 461 N.J. Super. At 353.

¹³ Oral Argument, *supra* note 4 at 36:03.

there are unenumerated elements of this [statute].”¹⁴ Justice Albin questioned what elements the Court was explicitly required to consider before it entered a final protective order.¹⁵

The counsel for the amicus curiae party Legal Services of New Jersey (“Legal Services”) agreed that N.J.S. 2C:14-16 was ambiguous, noting the “unusual” use of the word “factor” instead of “prong” in section a.¹⁶ Legal Services’ counsel stated that, in her experience, the word “factor” tended to indicate several elements that could not independently be relied on when making a decision, but that subsection (2) of N.J.S. 2C:14-16 was commonly treated as a “necessary prong” of the statute in practice.¹⁷

Justice Albin also noted that subsection e. of N.J.S. 2C:14-16 only requires a finding or admission of the behavior described in subsection a.(1), but not the possibility of future risk to the alleged victim as described in subsection a.(2).¹⁸ Legal Services’ counsel explained her interpretation of the statute as requiring both subsections a.(1) and (2) to be met, but acknowledged that the language and structure of later provisions was ambiguous and may not have been written with this intention.¹⁹

When discussing the potential differences between “risk to safety” and “risk to well-being,” Justice Albin questioned whether subsection a.(2) was required for the issuance of a final protective order, noting that the “possibility” of future risk was an “easy bar for the plaintiff to surmount in almost any case.”²⁰ Legal Services’ counsel stated that the Legislature’s use of the word “factors” in N.J.S. 2C:14-16a. may suggest that perhaps the Legislature intended for judges to take a “holistic look” at the victim’s circumstances instead of adhering to a strict list of elements.²¹

Conclusion

Staff seeks authorization to conduct additional research and outreach to determine whether modifying the language of N.J.S. 2C:14-16a. would clarify it, eliminate potential ambiguity, and better represent the intent of the Legislature.

¹⁴ *Id.*

¹⁵ *Id.* at 36:30.

¹⁶ Oral Argument, *supra* note 4 at 36:40.

¹⁷ *Id.*

¹⁸ *Id.* at 36:18.

¹⁹ *Id.* at 37:20.

²⁰ *Id.* at 41:53.

²¹ *Id.* at 44:21.