

**To: New Jersey Law Revision Commission**

**From: Jennifer Weitz**

**Re: Evidentiary Standard for a Final Restraining Order Under SASPA**

**Date: September 9, 2019**

## **MEMORANDUM**

### **Executive Summary**

In *B.C. v. V.C.*, 2017 WL 2705443 (App. Div. 2017) the Appellate Division considered whether the Sexual Assault Survivor Protection Act of 2015 (SASPA), applied retroactively, in order to form the basis for a protective order.<sup>1</sup> The Court found “there is no clear expression of legislative intent that SASPA was to be applied retroactively...[,]” and in the absence of any indication that the statute is curative, or that either party expected retroactive application, the complaint was dismissed.<sup>2</sup> Because the statute did not apply retroactively, the Court declined to address the constitutional question raised by the trial court.<sup>3</sup>

The Commission authorized research and outreach regarding this area of the law in July 2018.

Staff is seeking guidance from the Commission regarding whether the Commission would like to see Staff move forward in this area, or conclude this project.

### **Background**

Plaintiff B.C. sought a final restraining order against V.C., the father of her two daughters, pursuant to SASPA, which provides a legal remedy for anyone alleging to be a victim of nonconsensual sexual contact, or any attempt at such conduct, and who is not eligible for a restraining order as a victim of domestic violence.<sup>4</sup> B.C. filed separate complaints on behalf of each child in May 2016 alleging sexual abuse from 2013 through March 2015.<sup>5</sup> The Family Part court entered a temporary restraining order that barred defendant V.C. from any contact with his children.<sup>6</sup> However, at the hearing for final restraining orders under N.J.S. 2C:14-16, the Court dismissed the SASPA complaints, finding the statute unconstitutional as applied to defendant.<sup>7</sup>

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<sup>1</sup> *B.C. v. V.C.*, 2017 WL 2705443 (App. Div. 2017).

<sup>2</sup> *Id.* at \*4

<sup>3</sup> *Id.*

<sup>4</sup> Statement to A.4078, *P.L.* 2015, c. 147

<sup>5</sup> 2017 WL 2705443 at \*1

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

The Court held that the preponderance of evidence standard required under SASPA was insufficient to protect V.C.'s parental rights, and that a SASPA restraining order barring contact between a parent and child instead required proof by clear and convincing evidence.<sup>8</sup> The Court dismissed the SASPA complaints, and Plaintiff B.C. appealed.<sup>9</sup>

The Appellate Division noted that SASPA was not in effect when the alleged conduct occurred. SASPA was enacted in 2015, but became effective on May 9, 2016, two days before the plaintiff filed her complaints.<sup>10</sup> The complaints did not allege any sexual assault on or after May 9; rather, the complaint alleged that defendant last sexually assaulted his daughters in March 2015.<sup>11</sup> Thus, the Court had to decide if SASPA applied retroactively.

The Court held that SASPA did not apply retroactively.<sup>12</sup> The Court noted that legislation generally applies prospectively, and there was no legislative intent otherwise.<sup>13</sup> SASPA also is not curative, as it was a newly enacted law that did not carry out or explain an existing law.<sup>14</sup> There also was no expectation among either party to allow for retroactive application.<sup>15</sup> In the absence of any basis upon which to apply SASPA retroactively, the Appellate Division accordingly declined to address the constitutional challenge to the statute.<sup>16</sup>

### **Sexual Assault Survivor Protection Act of 2015, N.J.S. 2C:14-13 to -23**

The Sexual Assault Survivor Protection Act of 2015 authorizes the court to issue protective orders for victims of certain nonconsensual sexual conduct.<sup>17</sup> Introduced in January 2015 with multiple sponsors and co-sponsors, it was passed unanimously by both the Assembly and Senate, and approved in November 2015 as *P.L. 2015, c. 147*. Under SASPA, any person alleging to be a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, 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 for a temporary protective order.<sup>18</sup> A parent or guardian may file the application on behalf of an alleged victim who is younger than 18 years old.<sup>19</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*3

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*4

<sup>16</sup> *Id.*

<sup>17</sup> Introduction to A4078, *P.L. 2015, c. 147*

<sup>18</sup> Statement to A4078, *P.L. 2015, c. 147*

<sup>19</sup> *Id.*

A temporary protective order may be entered by the Superior Court upon good cause shown.<sup>20</sup> At a hearing, the standard for proving the allegations made in the application is a preponderance of the evidence.<sup>21</sup> Following the issuance of a temporary protective order, a subsequent hearing on whether to issue a final protective order would take place in the county where the temporary protective order was issued.<sup>22</sup> The issuance of a final protective order would be based on a preponderance of the evidence.<sup>23</sup>

SASPA took effect 180 days after enactment; thus, it was not law when plaintiff B.C. filed her complaint. The Appellate Court therefore declined to address the constitutional question discussed in the Family Part decision.

Subsequently, in 2016, this particular provision of SASPA was amended.<sup>24</sup> The amendments specifically removed the availability of protective orders for situations involving allegations of misconduct committed by a parent or guardian against a minor, or anyone having care, custody, and control of the minor, when the misconduct is alleged by another parent or guardian.<sup>25</sup> Instead, such incidents are now reported to the Division of Child Protection and Permanency in the Department of Children and Families, which will investigate and, when appropriate, petition the Superior Court for a protective order.<sup>26</sup>

The amendments eliminated section four of SASPA, which had allowed it to apply to any act or attempted act of nonconsensual sexual contact committed prior to, on, or after the act's effective date.<sup>27</sup> Thus, there was no longer unlimited retroactivity, and therefore no way for SASPA to apply to plaintiff's claim.

Since *B.C. v. V.C.* was decided, two other cases have been heard by the Appellate Division regarding protective orders under SASPA.<sup>28</sup> In the earlier of the two, in 2018, the Court again found that SASPA did not apply retroactively, and thus the defendant's 2005 sexual assault could not form the basis for a SASPA protective order.<sup>29</sup> Additionally, although the Court found credible the claim that plaintiff felt threatened by her encounter with the defendant, there was no evidence that the defendant made or attempted physical contact with plaintiff.<sup>30</sup>

More recently, in February 2019, the Appellate Division upheld the entry of a final protective order issued under SASPA, but vacated the fee award granted by the trial court.<sup>31</sup> The

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<sup>20</sup> Statement to A4078, *P.L.* 2015, *c.* 147, First Reprint

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *P.L.* 2016, *c.* 93, § 1

<sup>25</sup> Statement to S.2601, *P.L.* 2016, *c.* 93

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *R.L.U. v. J.P.*, 457 N.J. Super. 129 (App. Div. 2018); *M.M. v. M.P.*, 2019 WL 852182 (App. Div. 2019)

<sup>29</sup> 457 N.J. Super. at 133

<sup>30</sup> *Id.* at 136

<sup>31</sup> 2019 WL 852182 at \*1

unpublished opinion cited the preponderance of the evidence standard which governs a temporary protective order, but otherwise did not discuss it. Thus, to date the Appellate Division has yet to rule squarely on this issue.

### **Outreach to Date**

The Commission received feedback from the Department of Children and Families, and specifically from the Division on Women, which opposes any change to the statute. According to DCF, any allegations made in an application for a protective order are thoroughly investigated by the Department and, as a result, a more demanding evidentiary standard is unnecessary. Further, DCF characterized *B.C. v. V.C.* as an outlier regarding its opinion on protective orders involving parents.

The Hudson County Prosecutor's Office, while declining to comment, noted that in general, protective orders of this sort are granted according to a preponderance of the evidence standard.