

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re: Self-Representation in Involuntary Commitment and the Termination of Parental Right's Matters as discussed in *In the Matter of the Civil Commitment of D.Y.*, 218 N.J. 359 (2014) and *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. 123 (2018).
Date: March 09, 2020

MEMORANDUM

Executive Summary

In the Matter of the Civil Commitment of D.Y., the New Jersey Supreme Court addressed, for the first time, the issue of whether a convicted sex offender who was competent to stand trial had a constitutional right to self-representation during an involuntary commitment proceeding.¹ Four years later, in *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, the Court was faced with the question of self-representation in the context of the termination of an individual's parental rights.²

An individual facing involuntary commitment, pursuant to the Sexually Violent Predator Act (SVPA), is statutorily prohibited from appearing before the court without counsel.³ A parent in an action concerning the termination of his or her parental rights must be advised of the right to retain and consult with legal counsel.⁴ The principal statutes that set forth the right to legal representation in such matters is silent on the issue of self-representation.⁵ Neither the SVPA nor the parental rights statutes address what procedures a litigant or a courts must follow in when individuals wish to represent themselves in these types of proceedings.⁶

Relevant Statutes

Excerpts of the relevant statutory language from the two statutes in issue are as follows:

N.J.S. 30:4-27.29 Hearing Regarding Continuing Commitment; right to counsel

(c) A person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel.

¹ *In the Matter of the Civil Commitment of D.Y.*, 218 N.J. 359 (2014).

² *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. 123 (2018).

³ N.J.S. 30:4-27.29(c).

⁴ N.J.S. 30:4C-15.4a.

⁵ N.J.S. 30:4C-15.4a. *See also* N.J.S. 30:4-27.12 (requiring that a patient subject to involuntary commitment to treatment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel); N.J.S. 30:4-27.29 (mandating that a person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel); *and*, N.J.S. 30:4-27.31 (providing individuals subject to involuntary commitment with the right to counsel).

⁶ *See In the Matter of the Civil Commitment of D.Y.*, 218 N.J. 359 (2014); *and, see N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. 123 (2018).

N.J.S. 30:4C-15.4 Right to Legal Representation; Parent; Child

a. In any action concerning the termination of parental rights filed pursuant to section 15 of P.L.1951, c. 138 (C.30:4C-15), the court shall provide the respondent parent with notice of the right to retain and consult with legal counsel. If the parent appears before the court, is indigent and requests counsel, the court shall appoint the Office of the Public Defender to represent the parent. The Office of the Public Defender shall appoint counsel to represent the parent in accordance with subsection c. of this section.

[...] Nothing in this section shall be construed to preclude the parent from retaining private counsel [...]

Background & Analysis⁷

• *In the Matter of the Civil Commitment of D.Y.*

After D.Y. was convicted of several state and federal charges involving sexual assaults on minors, the State filed a petition seeking his involuntary civil commitment.⁸ Pursuant to N.J.S. 30:4-27.31(a), an individual facing involuntary civil commitment has the right to be represented by counsel or, if indigent, by appointed counsel. At his initial commitment hearing, D.Y. advised the trial court that he did not want to be represented by the appointed attorney; rather, he wished to represent himself.⁹ The Court denied D.Y.'s motion to proceed without an attorney.¹⁰ The Court said that individuals subject to SVPA commitment must be represented by counsel pursuant to N.J.S. 30:4-27.29(c).¹¹

Alleging violations of both the Sixth and Fourteenth Amendments to the United States Constitution, D.Y. appealed the denial of his motion to appear pro se during his SVPA proceeding.¹² The Appellate Division concluded that neither constitutional principle afforded the defendant the right to self-representation in SVPA civil commitment proceeding and affirmed the decision of the trial court.¹³ The defendant's petition for certification was granted by the New Jersey Supreme Court.

Faced with the mandatory language of N.J.S. 30:4-27.29(c) regarding the presence of counsel, the Supreme Court considered the intent of the Legislature when it enacted the statute.¹⁴

⁷ The background and analysis of each of each matter discussed herein is so intertwined that they have been presented in one section for the convenience of the reader.

⁸ *In the Matter of the Civil Commitment of D.Y.*, 218 N.J. 359, 364 (2014).

⁹ *Id.* at 364-365.

¹⁰ *Id.* at 365.

¹¹ *Id.* See N.J.S. 30:4-27.29(c) which provides, “[a] person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel.”

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The Court’s reading of the statute confirmed that an SVPA committee is required to “[...] have counsel present at [a] hearing[...].” and bars him or her from appearing before the court without counsel.”¹⁵ The Court, however, found no evidence that the Legislature intended to preclude individuals facing SVPA commitment from representing themselves.¹⁶ Thus, the Court held that the “plain language of [the statute] requires that there be one of two alternative forms of representation at SVPA commitment hearings: (1) full representation of the committee by counsel, or (2) self-representation by an individual who is competent to conduct his or her case, with standby counsel available throughout the hearing and available to assist the committee if needed.”¹⁷ To assist the trial courts’ implementation of its holding, the New Jersey Supreme Court promulgated guidelines to address self-representation in the context of an SVPA hearing.¹⁸

Before undertaking self-representation, a committee must “clearly and unequivocally” waive his or her statutory right to full representation by counsel.¹⁹ The trial court must also find that the waiver of counsel is “knowing, intelligent and voluntary.”²⁰ Neither the plain language of the statute, nor the Supreme Court guideline, specifies how or when a committee must notify the court of their desire for self-representation, or when the trial court should conduct an inquiry to determine whether the committee’s election is knowing, intelligent and voluntary. Also absent from the statute is any mention of standby counsel.

In *D.Y.*, the Supreme Court acknowledged that litigants frequently represent themselves in civil, probate, and family matters in trial courts.²¹ In addition, the Court observed that both appellants and respondents in civil and family matters are permitted to conduct their appeals pro se in both the Appellate Division and the Supreme Court.²² In a criminal case, however, the Court said that a trial court may appoint standby counsel to individuals who have exercised their Sixth Amendment right to represent themselves.²³ The appointment of standby counsel in this context may occur even over the defendant’s objection.²⁴ Although N.J.S. 30:4-27.29(c) is silent on the issue of standby counsel, the New Jersey Supreme Court imported their use into the SVPA

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 384.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 376.

²² *Id.* See, e.g., *Price v. Himeji, LLC*, 214 N.J. 263, 268 (2013) (noting plaintiff’s self-representation in zoning dispute); *Leodori v. CIGNA Corp.*, 175 N.J. 293, 295 (2003) (stating that plaintiff represented himself in action brought under New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8); *LePore v. Nat’l Tool & Mfg. Co.*, 115 N.J. 226, 226-27 (1989) (noting that plaintiff appeared pro se in appeal from trial court’s dismissal of common law retaliatory discharge claim); *Buckley v. Trenton Saving Fund Soc’y*, 111 N.J. 355, 357 (1988) (identifying plaintiff as pro se in appeal of banking dispute); *S.B. v. G.M.B.*, 434 N.J. Super. 463, 468-69 (App.Div.2014) (noting that defendant represented herself in custody dispute with former spouse); *Sommers v. McKinney*, 287 N.J. Super. 1, 4-5, (App.Div.1996) (stating that plaintiff litigated fraud and legal malpractice against her former attorney pro se).

²³ *Id.* at 377.

²⁴ *Id.*

context.²⁵

Finally, the Supreme Court authorized the trial court, in appropriate cases, to revoke a committee's right to self-representation.²⁶ If, for example, the committee "flouts the court's instructions, demonstrates disrespect for the judge, counsel, court staff or a witness, or refuses to participate in the hearing, the trial judge should take appropriate action."²⁷ These actions include directing standby counsel to assume full control of representation of the committee, and resuming the proceedings.²⁸ Notice of these consequences does not appear in the statute, and it is not clear that it must be explained to the committee before they undertake self-representation.

• *N.J. Div. of Child Prot. & Perm. v. R.L.M.*

Over the course of several years, R.L.M.'s parental rights to her five older children had been terminated by the Family Part.²⁹ J.J. is the biological father of R.L.M.'s two youngest children.³⁰ The Family Part had terminated their parental rights to their son.³¹ In a guardianship action brought against both R.L.M. and J.J., the New Jersey Division of Child Protection and Permanency (Division or DCCP) filed a petition for guardianship pursuant to N.J.S. 30:4C-15 et seq. and to terminate their parental rights to their daughter, R.A.J.³²

During four case management conferences, and a pretrial conference, J.J. vacillated between being represented by counsel and representing himself.³³ Although J.J. appeared in court with his assigned counsel on the first day of trial, he advised the court that he did not want the attorney to represent him.³⁴ When he was not sporadically absent from his trial, J.J. interrupted his counsel's examination and cross-examination of witnesses³⁵, insisted that the attorney focus on reopening the Division's action in an unrelated matter³⁶, and reiterated his request to dismiss his

²⁵ *Id.* at 384.

²⁶ *Id.* at 386.

²⁷ *Id.*

²⁸ *Id.* See *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975) (stating "[t]he right of self-representation is not a license to abuse the dignity of the courtroom [nor] is it a license not to comply with relevant rules of procedural and substantive law."); see also *McKaskle v. Wiggins*, 465 U.S. 168, 184, (1984) (noting that "the right of self-representation, or the right to be absent from the proceedings, is not a license to disrupt the criminal calendar, or a trial in progress"); See *State v. Tedesco*, 214 N.J. 177, 198 (2013) (noting our trial judges' ability to control their courtrooms and "maintain proper decorum"); *Wiggins*, 158 N.J. Super. at 32, (stating that "trial judge ... has an absolute right to implement participation of effective counsel for the criminal defendant who foolishly walks out of the courtroom, desiring neither to participate nor to defend himself").

²⁹ *Id.* at 133.

³⁰ *Id.* at 132.

³¹ *Id.*

³² *Id.* at 134.

³³ *Id.* at 134-135.

³⁴ *Id.* at 135, 137.

³⁵ *Id.* at 136.

³⁶ *Id.* (Division's counsel confirmed that the current matter was unrelated to issues in an earlier proceeding involving J.J.'s son).

attorney or represent himself.³⁷

On multiple occasions, the trial court denied J.J.'s request to discharge his attorney and represent himself, finding that J.J.'s "request at this late date would serve only to delay the proceedings and unduly interfere with the minor child's attempt to gain permanency in this matter."³⁸ Assessing the credibility of both fact and expert witnesses, the trial court ultimately found that the Division satisfied its burden of proof and terminated the parental rights of both R.L.M. and J.J.³⁹ Guardianship of R.A.J. was awarded to the Division.⁴⁰

Both R.L.M. and J.J. appealed the termination of their parental rights.⁴¹ In addition, J.J. appealed the trial court's denial of his application to represent himself.⁴² The Appellate Division affirmed the trial court's determination.⁴³ The New Jersey Supreme Court granted J.J.'s petition for certification in which he claimed only that he was entitled to a new trial as a result of the trial court's denial of his request to represent himself.⁴⁴

In *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, the New Jersey Supreme Court was asked to consider whether parents may represent themselves in an action to terminate their parental rights pursuant to N.J.S. 30:4C-15 to -20.⁴⁵ N.J.S. 30:4C-15.4(b) mandates that a child who is the subject of a termination of parental rights action be represented by the Law Guardian. No mandatory language regarding counsel applies to parental representation. In addition, the Court observed that there is no language analogous to the SVPA's requirement, discussed in *D.Y.*, that a parent have "counsel present".⁴⁶ The absence of such language suggested that a parent could elect to appear pro se in a termination proceeding, with the assistance of standby counsel at the court's discretion.⁴⁷

In *R.L.M.*, much like in *D.Y.*, the Supreme Court offered guidelines to assist the trial courts in dealing with self-representation requests by litigants. The "parent must assert his or her right of self-representation in a timely manner."⁴⁸ The parent must "clearly and unequivocally invoke the right to self-representation on the record and must knowingly, intelligently, and voluntarily waive

³⁷ *Id.* at 135-137.

³⁸ *Id.* at 136-137.

³⁹ *Id.* at 137.

⁴⁰ *Id.*

⁴¹ *Id.* The termination of the parties' parental rights exceeds the scope of this Memorandum. The balance of the Memorandum will therefore focus on the issue of self-representation.

⁴² *Id.* at 138.

⁴³ *Id.*

⁴⁴ *Id.* certification granted at 231 N.J. 414 (2017).

⁴⁵ *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. at 141.

⁴⁶ *Id.* at 148.

⁴⁷ *Id.* at 148-149.

⁴⁸ *Id.* at 149. Compare *In the Matter of the Civil Commitment of D.Y.*, 218 N.J. 359, 364 (2014) in which the Supreme Court does not set forth the requirement that a committee must assert his or her right of self-representation in a timely manner.

his or her right to counsel.”⁴⁹ The trial court may, in its discretion, appoint standby counsel.⁵⁰ Finally, the trial court judge has the authority to take remedial action in the event that the self-represented litigant declines to follow the court’s instructions, disrespects the court or any participant, or refuses to participate in the proceedings.⁵¹

The Supreme Court determined that J.J. did not assert his right to self-representation in a timely, clear and unequivocal manner.⁵² The termination of one’s parental rights represents a form of State action that is both severe and irreversible.⁵³ A plain reading of the N.J.S. 30:4C-15.4(a), does not make clear how to timely, clearly and unequivocally assert a right to self-representation.

Conclusion

In *In the Matter of the Civil Commitment of D.Y. and N.J. Div. of Child Prot. & Perm. v. R.L.M.*, the Supreme Court’s recognized the right of both committees in SVPA proceedings and respondents in termination of parental rights proceedings to represent themselves, subject to subject to the guidelines promulgated by the Court.

Staff seeks authorization to conduct additional research and outreach to ascertain whether it would be appropriate to modify N.J.S. 30:4-27.29 (c), N.J.S. 30:4C-15.4, and similar statutes⁵⁴, to alert individuals regarding their right of self-representation.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 152.

⁵³ *Id.* at 144 citing *In re Guardianship of J.C.*, 129 N.J. 1 (1992) (*quoting Santosky v. Kramer*, 455 U.S. 745 (1982)).

⁵⁴ *See also* N.J.S. 30:4-27.12(d) (requiring that a patient subject to involuntary commitment to treatment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel); *and*, N.J.S. 30:4-27.31 (providing individuals subject to involuntary commitment with the right to counsel).