COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

PLYMOUTH COUNTY **No. 2014-P-0285**

DAWN ROCCAFORTE,
Appellee/Plaintiff,

vs.

MICHAEL HUSSEY,
Appellant/Defendant

BRIEF, ADDENDUM AND RECORD APPENDIX FOR APPELLANT ON APPEAL FROM HINGHAM DISTRICT COURT CASE NUMBER 0058-RO-0332

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ISSUES PRESENTED

Did the District Court, without making findings of fact and without any evidence of a substantial likelihood of imminent physical harm to the Plaintiff, err in denying Defendant/Appellant's motion to terminate an order pursuant to G.L. c. 209A?

Did the District Court violate Appellant's right to due process under the U.S. Constitution and the Massachusetts Declaration of Rights where he was denied the opportunity to cross-examine the witness against him?

Did the District Court err in denying Appellant's motion to terminate where the record demonstrates continuing the restraining order was no longer equitable?

STATEMENT OF THE CASE

On October 4, 2000, Plaintiff Dawn Roccaforte ("Ms. Roccaforte") filed a criminal complaint in Hingham District Court and was granted an ex parte G.L. c. 209A restaining order against her then-boyfriend Defendant Michael Hussey ("Mr. Hussey"). (R.

1, n. 1).[1] A hearing was held on October 18, 2000, before Judge Geraldine Lombardo (Ret.) to determine whether an extension of the restraining order was warranted. Following this hearing, Judge Lombardo extended the order for six months. (R. 1, n. 4).

A hearing was held on April 18, 2001, before Judge Lombardo to determine whether to further extend the restraining order. Mr. Hussey told the Court he was no longer in contact with Ms. Roccaforte and had not contacted her since the order had been issued. He requested the Court to make the order permanent so that he was not subjected to monthly visits from local police. After the hearing, Judge Lombardo entered an order making permanent the restraining order issued October 18, 2000. (R. 1, n.5).

On August 8, 2013, Mr. Hussey filed a motion in the Hingham District Court to vacate the restraining order made permanent in April, 2001. (R. 9). A hearing was held August 16, 2013, before Judge Mary Amrhein to determine whether conditions existed to warrant continuing the order or to vacate it. Both parties appeared *pro se*. Following the hearing, Judge

[1] The Record Appendix is cited by page as "(R. ___)" and is reproduced post

Amrhein declined to vacate the order against Mr. Hussey without findings of fact or evidence presented under G.L. c. 209A § 3. (R. 11).

Mr. Hussey filed a Notice of Appeal on September 9, 2013. (R. 12).

STATEMENT OF FACTS

On October 4, 2000, Ms. Roccaforte received an ex parte G.L. c. 209A restraining order in the Hingham District Court against Mr. Hussey by asserting the following in her sworn affidavit:

> "the Defendant is now a x-boyfriend he refuses to let me go on with my life, he threatened me he would hurt me and he threatened to kill a friend of mine he has a pistol permit an a pistol and a couple of rifles. he has in the past tried to strangle me he tried to brake my arm. he's left bruises on my feet. he's a very destructive person he has contacted to courthouse looking for me today."

(R. 5). The ex parte order indicated it was issued without advance notice "because the Court determined that there is a substantial likelihood of immediate danger of abuse." (R. 3). A hearing was scheduled for October 18, 2000, just shy of the ten-day expiration of the ex parte order. (R. 4). On that date, Ms. Roccaforte, presumably a Victim Witness advocate, and

Mr. Hussey all appeared before Judge Geraldine Lombardo without attorneys.[2]

The ex parte order was extended for six months and a return hearing was scheduled to determine whether there was a continuing need for the order. (R. 4). On April 18, 2001, the parties again appeared before Judge Lombardo. Mr. Hussey told the Court there had been no contact and no incidents and that he wanted to stop being harassed and continually visited by police so he requested the order be made permanent. Judge Lombardo complied with the request and entered a permanent order without additional findings.[3]

For thirteen (13) years, there was no contact between the parties and in fact, Ms. Roccaforte admitted she had not even thought about Mr. Hussey or the restraining order. (R. 24). Mr. Hussey came to the Hingham District Court and filed a motion to vacate

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[2] There are no recordings available of any hearing held in 2000 or 2001 in accordance with court procedures that audio transcripts of hearings are destroyed after three years.

[3] Plaintiff disagreed with this assessment of what happened at that hearing when she testified during a hearing on August 16, 2013. (R. 27-28). Again, without a recording available, there is no affirmative evidence available as to exactly what transpired. There were no findings entered and the only indication of any ruling is the checked box on the bottom of the form.

the permanent restraining order.[4] A hearing was held on the motion on August 16, 2013, before Judge Mary Amrhein.

During the hearing, Judge Amrhein first asked Ms. Roccaforte about the circumstances that gave rise to the original order.[5] (R. 14). In 2000, Ms. Roccaforte and Mr. Hussey were in a dating relationship and had been dating for approximately one year. (R. 15). She claimed that at the time she came in for an initial order of protection that Mr. Hussey had "chocked me in the past" and had "threatened to shoot me with his rifle that he kept under his mattress." (Id.).

Ms. Roccaforte admitted she had never seen the alleged rifle but rather agreed with Judge Amrhein that she was aware of it. (R. 16). Ms. Roccaforte, without citing any specifics generally alleged "he used to hit me but not with a closed fist." (Id.).

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[4] Mr. Hussey titled his motion as one to "vacate" the abuse prevention order but actually only challenged its prospective application and did not challenge the underlying grounds upon which the original order was entered. Because the underlying basis is not challenged, the motion actually seeks to terminate, not vacate, the protective order. *Iamele v. Asselin*, 444 Mass. 734, 742, (2005).

[5] It is unclear from the transcript whether or not Judge Amrhein, in fact, had before her any findings of fact or original papers related to the October 18, 2000, order.

She said she attempted to "break things off" and moved in with her sister and that was when she sought the order of protection in October, 2000. (Id.).

Ms. Roccaforte said she has "called the police" on some occasions but not specifically the one precipitating the October, 2000, restraining order. (R. 16-17). She also alleged Mr. Hussey had "hit me, but not in the face or anything" and also that he had tried to "choke me" although there were never any marks. (R. 17). She explained, again at the suggestion of the Court, Mr. Hussey allegedly would hit her or choke her in such a way as to not leave marks. (R. 18).

Among the allegations of violence was a charge that Mr. Hussey hit Ms. Roccaforte on her feet, by slapping them and punching them. (R. 19). She alleged there were bruises and that she did report this matter to the police. (Id.). Mr. Hussey was not charged and Ms. Roccaforte did not know if police took photographs of her alleged "bruises from my ankles all the way to my toes." (Id.)

Ms. Roccaforte alleged because Mr. Hussey's father was a police officer, Mr. Hussey could "do whatever he wants" and that the police "would take his

side." (R. 20). She offered no evidence and none was elicited from the Court. Asked if she was still in fear, she responded she was. (Id.).

"I am because I just don't – I was happy for the last, you know, 13 years, *never thought about it or anything* and then he just brought it all up and - -" (R. 20) (emphasis added).

Ms. Roccaforte said she still wanted the order "even though nothing has happened and nothing has occurred in the past 13 years." (R. 21). She said her concern was that Mr. Hussey had discovered her address in order to serve her with court papers. (Id).

The Court noted, erroneously, that the initial order entered in October, 2000, "was extended on several occasions and then made permanent" in April, 2001. (R. 15). In fact, the Order had been extended a single time for six months following the October 18, 2000, hearing, and then made permanent. (R. 1). The Court never provided Mr. Hussey an opportunity to cross-examine Ms. Roccaforte concerning the testimony she provided.

Mr. Hussey testified that what she alleged originally was untrue and noted there were never any charges filed, no police reports ever completed and

there was no evidence presented to Judge Lombardo in 2000 to support her allegations. "She's been known to do this in the past. She did it to the boyfriend just prior to this. She did the same thing." (R. 22).

The Court inquired of Mr. Hussey whether or not he understood the order entered in 2001 has a "no contact provision" to which Mr. Hussey responded that he was aware and that no contact has taken place. (R. 24). The Court acknowledged there was no contact but then asked why he would be searching for Ms. Roccaforte's address and he replied that he was told he needed to have her correct address in order to serve the notice of the hearing and so found it at the express direction of the Court. (R. 23-24). The Court appeared surprised by the explanation. (R. 24).

Mr. Hussey told the Court the reason he sought to vacate the order was to have his rights restored and because he had lost a job as a result of the order being on him. (R. 25). He also explained he was an avid target shooter and, during the prior decade or more, he had been able to count on a friend to enjoy this activity. He told the Court his friend was moving and he was unable to obtain a permit to have a

weapon for target shooting as a result of the restraining order. (Id.).

The Court next inquired of Mr. Hussey whether he understood that the order entered in April, 2001, was a permanent order. In fact, Mr. Hussey had requested that at the time because he did not wish to constantly have to come in on a recurring basis. (R. 26). His fear, because Ms. Roccaforte had done this in the past, is that she would continually seek extension after extension and the court would simply grant it time and time again. (R. 26-27).

The Court surmised Judge Lombardo would have examined the facts at the time and in this case found that there was sufficient evidence to make the order permanent. (R. 29). The Court then denied relief. There were no further proceedings. (R. 30).

ARGUMENT

I. The District Court, without findings of fact, an inquiry into the present state of the relationship between the parties, or the presentation of any credible specific evidence of a substantial likelihood of imminent physical harm to the Plaintiff, erred in denying Defendant/Appellant's motion to terminate an order pursuant to G.L. c. 209A.

The Supreme Judicial Court recently clarified that the standard to apply when considering a motion to terminate an abuse prevention order is two-fold: there must be a significant change in circumstances not foreseen when the last order was issued, and the order is no longer necessary to protect the plaintiff from a reasonable fear of harm. *See MacDonald v. Caruso*, 467 Mass. 382, 385 (2014). A defendant must demonstrate both parts by clear and convincing evidence. *Id.*, *at* 382-83. A significant change in circumstances must involve more than the passage of time and compliance alone is not enough. *Id.*, at 388.

"We review the record to determine whether the judge's ruling was an abuse of discretion or other error of law." *See Palumbo v. Palumbo*, 84 Mass. App. Ct. 1122 at *2 (2013) *citing E.C.O. v. Compton*, 464 Mass. 558, 561-62 (2013). "When we face 'the absence of specific findings and conclusions of law' and we

'are unable to determine the standard the judge applied,' *we are compelled to remand for findings and a further hearing*." *Id., citing Iamele v. Asselin*, 444 Mass. 734, 735 (2005)(emphasis added).

Here, Appellant articulated two significant changes in circumstance not present at the time the last order was entered in April, 2001. First, Appellant's personal circumstances have compelled him to re-enter the workplace, a concern not present during the past 13 years. As a result of the restraining order, he lost one job and has been unable to secure a new one. Appellant articulated this reason to the District Court during the hearing.

Second, at the time of the last order entered in April 2001, Appellant turned over his firearms as a result of the order being entered. An avid target shooter, he was able to continue to participate in his recreational enjoyment because he had a friend with whom he could participate and upon whom he could rely. That friend is now moving away and it has become necessary to re-acquire a Firearms Identification Card to obtain a weapon for his recreational use. As a

result of the restraining order, he is statutorily barred from doing so.[6]

Clearly, Appellant demonstrated to the District Court the significant change in circumstances that were unforeseen at the time of the entry of the last order in April, 2001. These averments were unchallenged and, because the District Court failed to articulate any findings or even what standard of proof it was applying, Appellant has met his initial burden.

As to the second prong of the *MacDonald* standard, there was no evidence presented during the hearing to support anything more than a subjective, generalized, non-specific statement that Appellee was still in fear. The District Court made no inquiry into the state of the relationship and made no findings suggesting the Court did anything other than to rely on what Appellee purportedly conveyed.

In deciding whether to grant or deny a party's request for relief, the basis on which the order was initially issued is not subject to review or attack. Rather the court must consider the nature of the

[6] No firearms identification card may be issued to any person who is subject to a permanent or temporary protection order issued pursuant to c. 209A. *See* G.L. c. 140, § 129B(1)(viii)(b).

relief sought keeping in mind the primary purpose of a c. 209A order: to protect a party from harm or fear of imminent serious harm. *See Mitchell v. Mitchell*, 62 Mass. App. Ct. 769, 780 (2005).

This Court has made it clear that a generalized apprehension is not enough to justify a c. 209A order. *See Szymkowski v. Szymkowski*, 57 Mass. App. Ct. 284, 287 (2003)(Generalized apprehension, nervousness, feeling aggravated or hassled when there is no threat of imminent serious physical harm does not rise to the level of fear of serious physical harm.)

There must be more than "[g]eneralized apprehension, nervousness, feeling aggravated or hassled" because what is of "central importance" is the fear of imminent serious physical harm. The applicant's fear must be more than subjective and unspecified, viewed objectively the question is whether the plaintiff's apprehension that force may be used is reasonable. *See Vittone v. Clairmont*, 64 Mass. App. Ct. 479, 486 (2005); *see also Carroll v. Kartell*, 56 Mass. App. Ct. 83, 87 (2002).

Here, the District Court based its decision entirely on the nature of the original proceeding without ever determining the current state of the

relationship between the parties, which was non-existent and had been for more than a decade. Further, the District Court not only relied upon the original order, without any record upon which to do so, but also incorrectly favored the Plaintiff with the presumption that the original order was correct and circumstances had not changed.

Appellee admitted she had not even thought about the order for 13 years and never thought about Appellant either. There was never any contact and there was never any incident in the 13 years since Judge Lombardo made the initial restraining order permanent. And yet, Appellee suddenly and without evidence, claims she is still in fear although could not say why.

Appellant recognizes that while the absence of abuse and compliance with the order are not, in and of themselves, reasons to terminate the order, "passage of time and compliance are factors for the court to consider in determining, under the totality of circumstances, whether a defendant no longer poses a reasonable threat of imminent serious physical harm to the plaintiff. *MacDonald, supra., at* 389.

Although the absence of abuse during the pendency of an order, by itself, will not bar the issuance of an extension of an abuse prevention order, (*see Doe v. Keller*, 57 Mass. App. Ct. 776, 778 (2003)) the court should consider all of the evidence in determining whether the plaintiff's continuing fear is reasonable. *See Smith v. Jones*, 75 Mass. App. Ct. 540, 543-546 (2009). In *Smith*, the Appeals Court held that since defendant had not attempted to contact the plaintiff in three years and there was no additional evidence supporting the plaintiff's fear of imminent physical harm, a permanent extension of the abuse prevention order was inappropriate.

Here, Appellant had no contact with Appellee for 13 years and Appellee admitted she had not even thought about the restraining order, or Appellant, for the same amount of time. During the hearing on Appellant's motion to terminate, the District Court never heard any additional evidence supporting the contention that Appellee was still in fear and never inquired as to why Appellee was fearful. The District Court simply asked if she was still fearful and accepted that without any further inquiry.

Without understanding the "current state of the affairs at the time of the hearing," the District Court could not possibly determine Appellee's supposed fear of harm was reasonable. *See Banna v. Banna*, 78 Mass. App. Ct. 34, 36 (2010). "Because there was no basis on which the judge could determine whether the extension of the restraining order should be granted, the order must be vacated." *Id.* As in *Banna*, this Court should reverse the District Court's decision and remand for further hearing.

II. The District Court violated Appellant's right to due process under the U.S. Constitution and the Massachusetts Declaration of Rights where he was denied the opportunity to cross-examine the witness against him.

Although "[a]buse prevention order proceedings were intended by the Legislature to be as expeditious and informal as reasonably possible," *see Zullo v. Goguen,* 423 Mass. 679, 681 (1996), *citing Frizado v. Frizado, 420 Mass. 592,* 598 (1995)("the proceedings may not violate the due process rights of defendants in an attempt to accommodate plaintiffs.") *See C.O. v. M.M.*, 442 Mass. 648, 658-69 (2004).

The Supreme Judicial Court has recognized that a defendant, including a defendant in a hearing pursuant to G.L. c.209A, "has a general right to cross-examine

witnesses against him." *See C.O., supra., at* 656 *quoting Frizado supra. at* 597. Due process is guaranteed to all persons in a criminal proceeding under the Sixth Amendment to the United States Constitution, applied to the Commonwealth through adoption of the Fourteenth Amendment, as well as provided by Article 12 of the Massachusetts Declaration of Rights.

During the hearing below, Appellee presented testimony concerning the original order and also, and importantly, that she remained fearful of Appellant if the order was terminated. She offered no specifics and no further testimony about what has not changed in the past thirteen years, other than she had not even thought about the restraining order of Appellant during that time.

When her testimony was concluded, the District Court never invited Appellant to ask any questions or cross-examine Appellee on her testimony. The District Court denied Appellant a meaningful opportunity to cross-examine and such a denial is contrary to Appellant's statutory right pursuant to G.L. c. 209A, §4, as well as Appellant's Constitutional right to due process.

While a defendant's right to present evidence is not absolute, and while a judge may limit cross-examination for "good cause" in certain situations, (*see Silvia v. Duarte,* 421 Mass. 1007, 1008, (1995)) judicial discretion is not "unlimited," and "each side must be given a meaningful opportunity to challenge each other's evidence." *Frizado, supra.,* at 598 n. 5.

The entitlement to a fair hearing opportunity is substantial. The Supreme Judicial Court has reasoned that the target of a c. 209A order has an implied statutory and due process right to be heard, to present evidence, and to *cross-examine witnesses against him*. *See Harding v. Gascoyne*, 80 Mass. App. Ct. 1108 at *2 (2011) *citing Frizado v. Frizado,* 420 Mass. 592, 596–598 (1995)(emphasis added). Here, no such opportunity was given to Appellant. As a result, his due process right was violated and the Court should vacate the order from the District Court and remand the matter for further hearing.

III. The District Court erred in denying Appellant's motion to terminate where the record demonstrates continuing the restraining order was no longer equitable.

Where the defendant does not challenge on direct appeal the entry of a permanent abuse prevention order

under G.L. c.209A, it becomes a final equitable order. *See Zullo v. Goguen*, 423 Mass. 679, 682 (1996)("orders under c. 209A are equitable in nature"). Relief may be taken where it is "no longer equitable that the judgment should have prospective application." Mass. R. Civ. P. 60(b)(5); *see also MacDonald v. Caruso*, 467 Mass. 382, 387 (2014).

Recognizing the very real and often changing nature of relationships that may be the subject of a restraining order, G.L. 209A §3 provides that a "court may modify its [209A] order at any subsequent time upon motion by either party." *See MacDonald*, supra., at 387. Further, the Defendant bears the burden of proving a significant change in circumstances since the entry of the order that justifies termination of the order. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992)("a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree").

Here, Appellant challenged the continued prospective application of the restraining order entered 13 years ago. The evidence presented during the hearing on Appellant's motion demonstrates that

there is no longer a need to protect Appellee from imminent harm or the potential for harm. Appellee could not articulate why she subjectively believes she is still fearful even admitting she had not even thought about the restraining order or Appellant in all that time. Her subjective, non-specific, generalized belief is insufficient to meet the statutory requirement to continue the order.

Additionally, there is no evidence presently, and there was no evidence presented, to demonstrate Appellant poses any risk to Appellee. He simply wants to have his rights restored in order to participate in recreational target shooting and obtain meaningful employment, both of which are unreasonably denied him as a result of the instant order. Equity demands the Court terminate the order as its continued prospective application no longer serves the original purpose.

CONCLUSION

For all of the reasons stated in Arguments I, II, and III, the order must be reversed. For the reasons stated in Argument II, judgment must be entered for the Defendant-Appellant. In the alternative, Defendant-Appellant respectfully requests this Court vacate the order of the District Court denying

Appellant's relief and remanding the case for further hearing.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, Mark K. McCulloch, certify that on April ___, 2014, I served two copies of the foregoing Appellant's Initial Brief and Appendix by mailing same by USPS First Class postage pre-paid, to Dawn Roccaforte, 56-58 Rhodes Circle, Higham, MA 02043.

Dated: April ___ , 2014

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ADDENDUM

United States Constitution

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts Declaration of Rights

Article XII

"No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of

the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

Massachusetts General Laws

M.G.L.A. c. 209A § 1

As used in this chapter the following words shall have the following meanings:

"Abuse", the occurrence of one or more of the following acts between family or household members:
(a) attempting to cause or causing physical harm;
(b) placing another in fear of imminent serious physical harm;
(c) causing another to engage involuntarily in sexual relations by force, threat or duress.
"Court", the superior, probate and family, district or Boston municipal court departments of the trial court, except when the petitioner is in a dating relationship when "Court" shall mean district, probate, or Boston municipal courts.

"Family or household members", persons who:
(a) are or were married to one another;
(b) are or were residing together in the same household;
(c) are or were related by blood or marriage;
(d) having a child in common regardless of whether they have ever married or lived together; or
(e) are or have been in a substantive dating or engagement relationship, which shall be adjudged by district, probate or Boston municipal courts consideration of the following factors:
(1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship.

"Law officer", any officer authorized to serve criminal process.

"Protection order issued by another jurisdiction", any injunction or other order issued by a court of another state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or tribal court that is issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person, including temporary and final orders issued by civil and criminal courts filed by or on behalf of a person seeking protection.

"Vacate order", court order to leave and remain away from a premises and surrendering forthwith any keys to said premises to the plaintiff. The defendant shall not damage any of the plaintiff's belongings or those of any other occupant and shall not shut off or cause to be shut off any utilities or mail delivery to the plaintiff. In the case where the premises designated in the vacate order is a residence, so long as the plaintiff is living at said residence, the defendant shall not interfere in any way with the plaintiff's right to possess such residence, except by order or judgment of a court of competent jurisdiction pursuant to appropriate civil eviction proceedings, a petition to partition real estate, or a proceeding to divide marital property. A vacate order may include in its scope a household, a multiple family dwelling and the plaintiff's workplace. When issuing an order to vacate the plaintiff's workplace, the presiding justice must consider whether the plaintiff and defendant work in the same location or for the same employer.

M.G.L.A. c. 209A § 3

A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:

(a) ordering the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or minor;

(b) ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor;

(c) ordering the defendant to vacate forthwith and remain away from the household, multiple family dwelling, and workplace. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff, with notice to the defendant, for such additional time as it deems necessary to protect the plaintiff from abuse;

(d) awarding the plaintiff temporary custody of a minor child; provided, however, that in any case brought in the probate and family court a finding by such court by a preponderance of the evidence that a pattern or serious incident of abuse, as defined in section 31A of chapter 208, toward a parent or child has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an "abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse;

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte

under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

(e) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person. In determining the amount to be paid, the court shall apply the standards established in the child support guidelines. Each judgment or order of support which is issued, reviewed or modified pursuant to this chapter shall conform to and shall be enforced in accordance with the provisions of section 12 of chapter 119A;

(f) ordering the defendant to pay the person abused monetary compensation for the losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees;

(g) ordering information in the case record to be impounded in accordance with court rule;

(h) ordering the defendant to refrain from abusing or contacting the plaintiff's child, or child in plaintiff's care or custody, unless authorized by the court;

(i) the judge may recommend to the defendant that the defendant attend a batterer's intervention program that is certified by the department of public health.

No filing fee shall be charged for the filing of the complaint. Neither the plaintiff nor the plaintiff's attorney shall be charged for certified copies of any orders entered by the court, or any copies of the file reasonably required for future court action or as a result of the loss or destruction of plaintiff's copies.

Any relief granted by the court shall be for a fixed period of time not to exceed one year. Every order shall on its face state the time and date the order is to expire and shall include the date and time that the matter will again be heard. If the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order. When the expiration date stated on the order is on a weekend day or holiday, or a date when the court is closed to business, the order shall not expire until the next date that the court is open to business. The plaintiff may appear on such next court business day at the time designated by the order to request that the order be extended. The court may also extend the order upon motion of the plaintiff, for such additional time as it deems necessary to protect from abuse the plaintiff or any child in the plaintiff's care or custody. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, of allowing an order to expire or be vacated, or for refusing to issue a new order.

The court may modify its order at any subsequent time upon motion by either party. When the plaintiff's address is inaccessible to the defendant as provided in section 8 of this chapter and the defendant has filed a motion to modify the court's order, the court shall be

responsible for notifying the plaintiff. In no event shall the court disclose any such inaccessible address.

No order under this chapter shall in any manner affect title to real property.

No court shall compel parties to mediate any aspect of their case. Although the court may refer the case to the family service office of the probation department or victim/witness advocates for information gathering purposes, the court shall not compel the parties to meet together in such information gathering sessions.

A court shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of abuse.

A court may issue a mutual restraining order or mutual no-contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact. The court shall then provide a detailed order, sufficiently specific to apprise any law officer as to which party has violated the order, if the parties are in or appear to be in violation of the order.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties for divorce, annulment, paternity, custody or support, guardianship, separate support or legal separation, or abuse prevention.

If there is a prior or pending custody support order from the probate and family court department of the trial court, an order issued in the superior, district or Boston municipal court departments of the trial court pursuant to this chapter may include any relief available pursuant to this chapter except orders for custody or support.

If the parties to a proceeding under this chapter are parties in a subsequent proceeding in the probate and family court department for divorce, annulment, paternity, custody or support, guardianship or separate support, any custody or support order or judgment issued in the subsequent proceeding shall supersede any prior custody or support order under this chapter.

M.G.L.A. c. 209A § 4

Upon the filing of a complaint under this chapter, the court may enter such temporary orders as it deems necessary to protect a plaintiff from abuse, including relief as provided in section three. Such relief shall not be contingent upon the filing of a complaint for divorce, separate support, or paternity action.

If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary relief orders without notice as it deems necessary to protect the plaintiff from abuse and shall immediately thereafter notify the defendant that the temporary orders have been issued. The court shall give the defendant an opportunity to be heard on the question of continuing the temporary order and of granting other relief as requested by the plaintiff no later than ten court business days after such orders are entered.

Notice shall be made by the appropriate law enforcement agency as provided in section seven.

If the defendant does not appear at such subsequent hearing, the temporary orders shall continue in effect without further order of the court.

M.G.L.A. c. 140, § 129B(1)(viii)(b)

A firearm identification card shall be issued and possessed subject to the following conditions and restrictions:

(1) Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority an application for a firearm identification card, or renewal of the same, which the licensing authority shall issue, unless the applicant is currently subject to a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction.

Mass. R. Civ. P. 60(b)(5)

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Put a copy of the order here

Then put Harding case then Palumbo case

RECORD APPENDIX

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Mark K. McCulloch, Esq., counsel for Defendant-Appellant, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the brief); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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