



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Regarding Self-Representation in Involuntary Commitment and Termination of Parental Rights Matters

December 05, 2022

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary

In the Matter of the Civil Commitment of D.Y., the New Jersey Supreme Court addressed, for the first time, 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 considered 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 their 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 are silent on the issue of self-representation.⁵ Neither the SVPA nor the parental rights statutes address the procedures a litigant or a court must follow when individuals assert their right to self-representation in these types of proceedings.⁶

The Commission recommends the modification of N.J.S. 30:4-27.29 and N.J.S. 30:4C-15.4 to address an individual's right to self-representation.

Statutes Considered

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.

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

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. STAT. ANN. § 30:4-27.29(c) (West 2022).

⁴ N.J. STAT. ANN. § 30:4C-15.4(a) (West 2022)

⁵ *Id.* See also N.J. STAT. ANN. § 30:4-27.12 (West 2022) (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. STAT. ANN. § 30:4-27.31 (West 2022) (providing individuals subject to involuntary commitment with the right to counsel).

⁶ *D.Y.*, 218 N.J. 359 (2014); *and R.L.M.*, 236 N.J. 123 (2018).

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, however, D.Y. advised the trial court that he did not want to be represented by the appointed attorney but wished to represent himself.⁹ The trial court denied D.Y.’s motion to proceed without an attorney.¹⁰ The Court determined 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 an SVPA civil commitment proceeding and affirmed the decision of the trial court.¹³ His petition for certification was granted by the New Jersey Supreme Court.

In light of the mandatory language in N.J.S. 30:4-27.29(c) regarding the presence of counsel, the New Jersey Supreme Court considered the intent of the Legislature when enacting the statute.¹⁴ The Court’s plain 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

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 *D.Y.*, 218 N.J. at 364.

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.*

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 in implementing its holding, the Court promulgated guidelines to address self-representation in the context of an SVPA hearing.¹⁸

The Court opined that before undertaking self-representation, a committee must “clearly and unequivocally” waive the statutory right to full representation by counsel.¹⁹ In conjunction with the individual’s desire to represent themselves, the trial court must 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 a desire for self-representation or when the trial court should conduct an inquiry to determine whether the 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 at the trial court level.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 opined that a trial court judge may appoint “standby counsel”²³ to individuals who have exercised

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 “Standby counsel” is not defined in the New Jersey statutes. See *State v. Davis*, 45 N.J. 195, 198 (1965) (recognizing that a defendant has the constitutional right to conduct their own defense); *State v. Sinclair*, 49 N.J. 525, 552 (1967) (suggesting that on remand that if the defendant wishes to proceed pro se that counsel be assigned to aid the defendant and be available at all times in the courtroom to give such advice as requested) (1967); *State v. Wiggins*, 158 N.J. Super. 27, 33 (App. Div. 1978) (recognizing the utility of “standby counsel” to “aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary) (citing *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972)). See also *State v. Carter*, No. A-1146-18, 2021 WL 668029 (N.J. Super. Ct. App. Div. Feb. 22, 2021), cert. denied, 258 A.3d 345 (N.J. 2021) (citing *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) and noting that the role of standby counsel is

their Sixth Amendment right to represent themselves.²⁴ The appointment of standby counsel in the criminal context may occur even over the defendant’s objection.²⁵ Although N.J.S. 30:4-27.29(c) is silent on the issue of standby counsel, the New Jersey Supreme Court imported the use of “standby counsel” into the SVPA context.²⁶

Finally, the Supreme Court authorized the trial court to revoke a committee’s right to self-representation under certain circumstances.²⁷ 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.”²⁸ “Appropriate” actions include directing standby counsel to assume full control of the representation, and resuming the proceedings.²⁹ Notice of these consequences does not appear in the statute and does not appear to be a required colloquy that must be explained to the committee before he or she undertakes self-representation.

Four years later, in *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, the New Jersey Supreme Court utilized the self-representation guidelines promulgated in *D.Y.* in the context of a litigant’s request to represent himself during a hearing to terminate his parental rights.

to aid the [defendant] if and when the [defendant] requests help, and to be available to represent the [defendant] in the event that termination of the defendant's self-representation is necessary.”) (alterations original); *See also State v. Gallagher*, 274 N.J. Super. 285, 296 (App. Div. 1994) (holding that “[s]tandby counsel may be appointed to provide the defendant with advice and assistance and to facilitate communications with the court....). *Compare State v. McDonald*, 143 Wash. 2d 506, (2001) (defining standby counsel’s role as not necessarily representing the defendant but as providing technical information and being available to represent the accused on a moment's notice in the event termination of the defendant's self-representation is necessary.); *State v. Small*, 988 S.W.2d 671, 672 n. 1 (Tenn.1999) (defining “standby counsel” as counsel who is not actively participating in the trial but is available to step in and take over as counsel if called upon to do so by either the defendant or the trial court.); *People v. Williams*, 58 Cal.4th 197, 255(2013) (noting that “[“standby counsel ... takes no active role in the defense, but attends the proceedings so as to be familiar with the case in the event that the defendant gives up or loses his or her right to self-representation”]); *Chaleff v. Superior Court* (1977) 69 Cal.App.3d 721, (Hanson, J. concurring) (construing the term ‘standby counsel’ to mean an attorney who is present in the courtroom and follows the evidence and proceedings but does not give legal advice to the defendant. He ‘stands by’ in the event it is necessary for the trial court to revoke defendant's in propria persona status or even remove the defendant from the courtroom because of disruptive tactics so the case may proceed in an orderly manner to verdict.).

²⁴ *Id.* at 377.

²⁵ *Id.*

²⁶ *Id.* at 384.

²⁷ *Id.* at 386.

²⁸ *Id.*

²⁹ *Id.* *See Faretta*, 422 U.S. 806, 834 n. 46 (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”); *State v. 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”).

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

"R.L.M. is the biological mother of six children. J.J. is the biological father of R.L.M.'s two youngest children..." one of whom was the subject of R.L.M.'s appeal.³⁰ The Family Part of the New Jersey Superior Court, over several years, terminated R.L.M.'s parental rights to her five older children.³¹ J.J. is the biological father of R.L.M.'s two youngest children.³² In a separate action, the Family Part had terminated J.J.'s parental rights to his son.³³ In a guardianship action brought against both R.L.M. and J.J., the New Jersey Division of Child Protection and Permanency (Division or DCP) 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.³⁴

During four case management conferences, and a pretrial conference, J.J. vacillated between being represented by counsel and representing himself.³⁵ 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.³⁶ When the defendant was not absent from his trial, he interrupted his counsel's examination and cross-examination of witnesses,³⁷ insisted that the attorney focus on reopening the Division's action in an unrelated matter,³⁸ and reiterated his request to dismiss his attorney or represent himself.³⁹

On multiple occasions, the trial court denied J.J.'s request to discharge his attorney and represent himself.⁴⁰ The trial court issued a 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."⁴¹ Based on an assessment of 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.⁴² Guardianship of R.A.J. was awarded to the Division.⁴³

³⁰ *R.L.M.*, 236 N.J. at 132.

³¹ *Id.* at 133.

³² *Id.* at 132.

³³ *Id.*

³⁴ *Id.* at 134.

³⁵ *Id.* at 134-135.

³⁶ *Id.* at 135, 137.

³⁷ *Id.* at 136.

³⁸ *Id.* (Division's counsel confirmed that the current matter was unrelated to issues in an earlier proceeding involving J.J.'s son).

³⁹ *Id.* at 135-137.

⁴⁰ *Id.* at 136-137.

⁴¹ *Id.*

⁴² *Id.* at 137.

⁴³ *Id.*

Both R.L.M. and J.J. appealed the termination of their parental rights.⁴⁴ In addition, J.J. appealed the trial court’s denial of his application to represent himself.⁴⁵ The Appellate Division affirmed the trial court’s determination.⁴⁶ 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 because the trial court denied his request to represent himself.⁴⁷

In *N.J. Division of Child Protection & Permanency v. R.L.M.*, one issue was presented to the New Jersey Supreme Court — whether parents may represent themselves in an action to terminate parental rights instituted pursuant to N.J.S. 30:4C-15 to -20.⁴⁸ Although N.J.S. 30:4C-15.4(b) mandates that a child who is the subject of a parental rights termination action be represented by the Law Guardian, no such mandatory language was utilized by the Legislature when discussing 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,” let alone a requirement that the parent be fully represented by a lawyer.⁴⁹ The absence of such language, the Court continued, 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.⁵⁰

In *R.L.M.*, much like in *D.Y.*, the Supreme Court set forth guidelines to assist the trial courts in addressing self-representation requests by litigants. First, “the parent must assert his or her right of self-representation in a timely manner.”⁵¹ Next, the parent must “clearly and unequivocally invoke the right to self-representation on the record and must knowingly, intelligently, and voluntarily waive his or her right to counsel.”⁵² Further, the trial court may, in its discretion, appoint standby counsel.⁵³ 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.⁵⁴

⁴⁴ *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.

⁴⁵ *Id.* at 138.

⁴⁶ *Id.*

⁴⁷ *Id.* certification granted at 231 N.J. 414 (2017).

⁴⁸ *R.L.M.*, 236 N.J. at 140-141.

⁴⁹ *Id.* at 148. See discussion *supra* pp. 3-5.

⁵⁰ *Id.* at 148-149.

⁵¹ *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.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The Supreme Court determined that J.J. did not assert his right to self-representation in a timely, clear, and unequivocal manner.⁵⁵ The termination of parental rights represents a form of State action that is both severe and irreversible.⁵⁶

It is of concern that neither J.J. nor a similarly situated parent would know how to timely, clearly, and unequivocally assert such a right. Given what is at stake, a parent subject to the termination of their parental rights should be able to discern what is required so that they may represent themselves.

Outreach

In connection with this project, the Commission sought comments from knowledgeable individuals and organizations including: the Office of the Attorney General of New Jersey; County Prosecutor’s Association of New Jersey; Office of Corrections Ombudsperson; the Division of Child Protection and Permanency, Department of Children and Families; New Jersey State Office of the Public Defender, Law Guardian; Office of Parental Representation; Office of the Public Defender; several defense attorneys; the American Civil Liberties Union – New Jersey; Association of Criminal Defense Lawyers; County Prosecutors; The New Jersey State Bar Association – Criminal Law Section; and the New Jersey Institute for Social Justice.

• Proposed Modification

The Office of the Attorney General, Department of Law and Public Safety, Division of Law (“Division”) provided comment to the Commission.⁵⁷ The Division proposed the “[i]nclusion of the word ‘timely’ within the [proposed] modified statutory language [of N.J.S. 30:4C-15.4(2)(A)].”⁵⁸ The Division explained that the addition of this word would “emphasize that the family court is charged with balancing the timing of the [self-representation] request with the permanency needs of the child....”⁵⁹ The proposed modification, according to the Division, “would most accurately reflect the intent of the legislature and the opinion of the Supreme Court of New Jersey....”⁶⁰ The omission of the “key term[, timely,] would run the risk of undermining the primary focus of parental termination cases, the child’s right to timely permanency.”⁶¹

Conclusion

⁵⁵ *Id.* at 152.

⁵⁶ *Id.* at 144 citing *In re Guardianship of J.C.*, 129 N.J. 1 (1992) (*quoting Santosky v. Kramer*, 455 U.S. 745 (1982)).

⁵⁷ E-mail from Jennifer Lochel, Section Chief, Dep. Att’y Gen., Dep’t of Law and Public Safety, to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm’n (Dec. 01, 2022, 10:54 AM) (on file with the NJLRC) [hereinafter Att’y Gen. E-mail of Dec. 01, 2022].

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Id. R.L.M.*, 236 N.J. at 149 (noting that given the complexity of the proofs and child’s need for permanency, parent should state intention to proceed pro se as early as possible and well in advance of trial).

⁶¹ *Id.* at 4.

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

The Commission recommends the modification of N.J.S. 30:4-27.29, N.J.S. 30:4C-15.4, and similar statutes,⁶² to address the right to self-representation and incorporate the guidelines discussed by the Court in *D.Y and R.L.M.* to effectuate the Legislature’s intent.

⁶² See also N.J.S. 30:4-27.26 Definitions; sexually violent predator act (noting the absence of a definition of “standby counsel.”); N.J.S. 30:4-27.30 (enumerating a list of individuals required to receive notice of court hearing); N.J.S. 30:4-27.31 (providing individuals subject to involuntary commitment with the right to counsel).

Appendix One

The proposed modifications to **N.J.S. 30:4-27.26, 30:4-27.29, 30:4-27.31** (shown with ~~strikethrough~~, and underlining), follow:

N.J.S. 30:4-27.26 Definitions; sexually violent predator act

As used in this act:

* * *

“Standby counsel,” for purposes of this act, means an attorney who has been appointed by the court or privately retained⁶³ to:

(1) attend the court proceedings of a person subject to involuntary commitment who has waived their right to counsel;⁶⁴

(2) be available to provide the person subject to involuntary commitment with advice and guidance if and when requested;⁶⁵ and

(3) be available to represent the person subject to involuntary commitment if termination of the person’s self-representation is necessary.⁶⁶

* * * *

COMMENT

The term “standby counsel” appears twenty-seven times in the New Jersey Supreme Court’s opinion in *In re Civil Commitment of D.Y.* This term does not appear in The New Jersey Sexually Violent Predator Act (SVPA). The proposed modification balances New Jersey’s respect for a civil litigant’s right to self-representation with the Legislature’s intent to permit a competent individual subject to the SVPA to represent themselves provided that the support of standby counsel is available to assist the litigant in navigating the complex issues and liberty interests involved in such a case.

The proposed definition has been synthesized from the *D.Y.* Court’s discussion of the role of standby counsel in SVPA proceedings.

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

a. A person who is involuntarily committed pursuant to section 5 of this act shall receive a court hearing with respect to the issue of continuing need for involuntary commitment as a sexually violent predator within 20 days from the date of the temporary commitment order.

b. The Attorney General is responsible for presenting the case for the person's involuntary commitment as a sexually violent predator to the court.

⁶³ *In re Civil Commitment of D.Y.*, 218 N.J. at 366, 378-79, 384.

⁶⁴ *Id.* at 384, 386.

⁶⁵ *Id.* at 386.

⁶⁶ *Id.*

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) be represented by counsel; or

(2) represent themselves, provided that:

(A) they are found to be mentally competent;⁶⁷ and,

(B) standby counsel is present at the hearing.⁶⁸

d. A person subject to involuntary commitment who waives the right to be represented by counsel, as provided for in subsection a. of N.J.S. 30:4-27.31, and exercises their right to self-representation pursuant to subsection c.(2) of this section, shall:

(1) [timely,]⁶⁹ clearly[,], and unequivocally⁷⁰ inform the court of this election prior to the court hearing held pursuant to N.J.S. 30:4-27.29 [this section]⁷¹ or N.J.S. 30:4-27.30;⁷²

(2) knowingly, intelligently, and voluntarily waive⁷³ the right to be represented by counsel as provided for in subsection a of N.J.S. 30:4-27.31, and acknowledge.⁷⁴

⁶⁷ *In re Civil Commitment of D.Y.*, 218 N.J. at 384.

⁶⁸ *Id.*

⁶⁹ Staff is seeking guidance from the Commission regarding the inclusion of the word “timely” in this subsection. Compare Appendix Two, N.J.S. 30:4C-15.4(a)(2)(A) (including the word “timely” after balancing the timing of an individual’s self-representation request with the permanency needs of the child).

⁷⁰ *Id.*

⁷¹ *In re Commitment of K.D.*, 357 N.J. Super. 94, 98 (App. Div. 2003) (noting that the function of the “initial” or “20-day” hearing is “to afford the defendant the right to challenge and the State right to justify the commitment.”). *In re Commitment of M.G.*, 331 N.J. Super. 365, 384 (App. Div. 2000) (noting that the pre-commitment notice, and procedure to be more restrictive than a criminal probable cause hearing and that the person subject to commitment does not have the right to cross-examine the physicians who prepared the certifications and may only challenge the State’s showing that there is *prima facie* evidence that the person is a sexually violent predator).

⁷² *Id.* See also *Martinez v. Ct. of Appeal of California, Fourth App. Dist.*, 528 U.S. 152 (2000) (holding that a request for self-representation must be made in a “timely manner.”); see also *State v. Roth*, 289 N.J. Super. 152, 165 (App. Div.), *certif. denied*, 146 N.J. 68 (1996) (requiring that “[a] defendant who desires to exercise his right to proceed pro se must do so with reasonable diligence.”); compare *State v. Thomas*, 362 N.J. Super. 229, 240 (App. Div.) (finding that the “[d]efendant’s assertion of his right to self-representation was timely made, about six weeks prior to trial”), *certif. denied*, 178 N.J. 249, 837 A.2d 1092 (2003); with *State v. Pessolano*, 343 N.J. Super. 464, 473 (App. Div.), *certif. denied*, 170 N.J. 210 (2001) (finding that trial judge did not abuse his discretion in denying “defendant’s application to proceed pro se [when it] was made after the jury was selected and immediately before opening statements.”).

⁷³ U.S.C.A. Const. Amend. 6; N.J.S.A. Const. Art. 1, par. 10. *State v. DuBois*, 189 N.J. 454 (2007). See *State v. Harris*, 384 N.J. Super. 29, 894 A.2d 8 (App. Div. 2006) (finding that the right to self-representation is not absolute and requires a knowing, intelligent, and voluntary election to conduct one’s own defense).

⁷⁴ *State v. Outland*, 245 N.J. 494, 506 (2021) (synthesizing the requirements a court must discuss with a pro se defendant as set forth in *State v. Crisafi*, 128 N.J. 499, 509, 511 (1992) and *State v. Reddish*, 181 N.J. 553, 594 (2004) and outlining the following topic areas:

(1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge

(A) the nature of the proceedings, and possible outcomes;⁷⁵

(B) the technical problems associated with self-representation and the risks if the defense is unsuccessful;⁷⁶

(C) the necessity of complying with the rules of criminal procedure and the rules of evidence;⁷⁷

(D) that lack of knowledge of the law may impair their ability to defend themselves;⁷⁸

(E) the impact that the dual role of counsel and defendant may have on the effectiveness of their defense;⁷⁹

(F) proceeding without counsel means they will be unable to assert an ineffective assistance of counsel claim; and⁸⁰

(G) the ramifications of self-representation on the right to remain silent and the privilege against self-incrimination.⁸¹

e. A person whom the court has found competent and who represents themselves in a hearing in compliance with the rules of court shall not be compelled to accept the advice of standby counsel.⁸²

f. The court may direct standby counsel to assume full representation of the person subject to involuntary commitment⁸³ if the person:

(1) disobeys the judge's instructions;⁸⁴

of the law may impair defendant's ability to defend himself or herself; (5) the impact that the dual role of counsel and defendant may have; **(6) the reality that it would be unwise not to accept the assistance of counsel;** (7) **the need for an open-ended discussion so that the defendant may express an understanding in his or her own words;** (8) the fact that, if defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination).

⁷⁵ *State v. Outland*, 245 N.J. at 506.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* See *State v. Crisafi*, 128 N.J. 499, 512 (1992) (noting "dual role as attorney and accused might hamper the effectiveness of their defense") and (one of the two cases cited by *DuBois*, 189 N.J. 454, 468-69 (2007), which is quoted in *Outland* as "synthesizing the requirements set forth in *Crisafi* and *Reddish*").

⁸⁰ *Id.*

⁸¹ *Id.* But see U.S. CONST. amend. V; *Aruanno v. Hayman*, 384 F. App'x 144, 151 (3d Cir. 2010) (citing *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (finding that because the New Jersey Sexually Violent Predatory Act is civil in nature a constitutional claim of self-incrimination in violation of Fifth Amendment to the United States Constitution, which applies only to criminal cases, must fail).

⁸² *D.Y.*, 218 N.J. at 385.

⁸³ *Id.* at 386.

⁸⁴ *Id.* The language in the opinion is "[i]f the committee flouts the court's instructions."

(2) demonstrates disrespect for the judge, counsel, court staff or a witness;⁸⁵

(3) refuses to participate in the hearing;⁸⁶

(4) refuses to comply with relevant rules of procedural or substantive law;⁸⁷ or

(5) engages in any other behavior that the court determines to be disruptive to the court's calendar, or a hearing that is in progress.⁸⁸

Credits: L.1998, c. 71, § 6, eff. Aug. 12, 1999.

COMMENT

The proposed modifications balance New Jersey's respect for a civil litigant's right to self-representation with the Legislature's intent to permit a competent individual subject to the SVPA to represent themselves provided that the support of standby counsel is available to assist the litigant in navigating the complex issues and liberty interests involved in such a case. The proposed modifications address the *D.Y.* Court's concerns about "the challenges that a pro se litigant may pose to the court, counsel for the State, testifying experts, and the progress of the hearing itself."⁸⁹

The proposed modifications are based upon the Court's discussion of self-representation in *In re Civil Commitment of D.Y.*, and the common law.

N.J.S. 30:4-27.30. Service of notice of court hearing

a. (1) At least 10 days prior to a court hearing, the Attorney General shall cause notice of the court hearing to be served upon:

(A) the person;

(B) the person's guardian, if any;

(C) the person's next-of-kin;

(D) the person's attorney, if any;

(E) standby counsel if any;

(F) the agency with jurisdiction having custody of the person; and

(G) any other individual specified by the court.

(2) The notice shall contain the:

(A) date;

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Faretta*, 422 U.S. at 834 n. 46.

⁸⁸ *State v. Wiggins*, 158 N.J. Super. 27, 33 (App. Div. 1978).

⁸⁹ *D.Y.*, 218 N.J. at 366.

(B) time; and

(C) location of the court hearing.

(3) The person, standby counsel if any, and the person's attorney if any, shall also receive copies of:

(A) the clinical certificates for a sexually violent predator and supporting documents;

(B) the temporary court order; and

(C) a statement of the person's rights at the court hearing.

* * * *

Credits: L.1998, c. 71, § 7, eff. Aug. 12, 1999.

COMMENT

Consistent with contemporary drafting practices, the proposed modifications divide the text into lettered and numbered sections and subsections to improve accessibility and readability. The proposed modifications provide that “standby counsel” shall receive both notice of the court proceeding and copies of the enumerated documents to allow counsel to provide effective assistance to the pro se litigant or if called upon by the court to assume full representation of the person subject to involuntary commitment.

N.J.S. 30:4-27.31. Rights of person involuntarily committed

A person subject to involuntary commitment as a sexually violent predator has the following rights at a court hearing pursuant to section 71 and any subsequent review court hearing:

a. The right:

(1) to be represented by counsel; ~~or~~,

(2) if indigent, ~~by~~ to be represented by appointed counsel; ~~or~~

(3) to represent themselves, subject to N.J.S. 30:4-27.29;

b. The right to be present at the court hearing unless the court determines that because of the person's conduct at the court hearing the proceeding cannot reasonably continue while the person is present;

c. The right to present evidence;

d. The right to cross-examine witnesses; and

e. The right to a hearing in camera.

COMMENT

The proposed modifications explicitly reference the right to self-representation as discussed in *In re Civil Commitment of D.Y.*

Appendix Two

The proposed modifications to N.J.S. 30:4C-15.4 (shown with ~~strikethrough~~, and underlining and *italics*⁹⁰), follow:

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; or to represent themselves.

(1) If the respondent parent appears before the court, is indigent, and requests counsel, the court shall appoint the Office of the Public Defender to represent the parent.

(A) The Office of the Public Defender shall appoint counsel to represent the parent in accordance with subsection c. of this section.

(B) If the parent was previously represented by counsel from the Office of the Public Defender in a child abuse or neglect action filed pursuant to chapter 6 of Title 9 of the Revised Statutes on behalf of the same child, the same counsel, to the extent practicable, shall continue to represent the parent in the termination of parental rights action, unless that counsel seeks to be relieved by the court upon application for substitution of counsel or other just cause.

(2) If the respondent parent appears before the court and requests to represent themselves, the court may permit such representation if the court is satisfied that the respondent parent:

(A) *timely*,⁹¹ clearly, and unequivocally informed the court of this election⁹² prior to the final hearing for guardianship as set forth in N.J.S. 30:4C-15.2;⁹³

(B) knowingly, intelligently, and voluntarily waived the right to be represented by counsel;⁹⁴

⁹⁰ *Italics* indicates the addition of language proposed by commenters. See *supra* discussion p. 8 and note 57.

⁹¹ See *supra* discussion p. 8 and note 57.

⁹² *N.J. Div. of Child Prot. & Perm. v. R.L.M.*, 236 N.J. at 149. See also *In re Adoption of J.E.V.*, 226 N.J. at 114; and, see *State v. Figueroa*, 186 N.J. 589, 593 n.1 (2006) (“The need for an unequivocal request by a defendant is a necessary prerequisite to the determination that the defendant is making a knowing and intelligent waiver of the right to counsel.”).

⁹³ *Id.* See cases cited *supra* note 66. See generally N.J.S. 30:4C-15.2 (“A final hearing for guardianship shall be held within three months from the date the petition is filed with the Family Part of the Chancery Division of the Superior Court pursuant to ... [N.J.S. 30:4C-15].”); and N.J. STAT. ANN. § 30:4C-19 (West 2022) (providing that the adjournment of any hearing on a petition filed under N.J.S. 30:4C-15 shall not exceed a total period of 45 days).

⁹⁴ *Id.* at 149-150 quoting *State v. Figueroa*, 186 N.J. 589, 593 n.1 (2006).

(C) understands the nature of the termination of rights proceedings;⁹⁵ and,

(D) understands the disadvantages of self-representation.⁹⁶

(3) Notwithstanding the provisions of subsection (a)(2), the court may appoint standby counsel if the court concludes that such counsel is essential to the effective presentation of evidence and the progress of the hearing toward a timely permanency determination.⁹⁷

(A) The respondent parent shall not be obligated to follow the advice of standby counsel.⁹⁸

Option #1

(B) The court may direct standby counsel to assume full representation of the respondent parent⁹⁹ if the respondent parent:

(i) declines to follow the court’s instructions;¹⁰⁰

(ii) demonstrates disrespect for the judge, counsel, court staff or a witness;¹⁰¹

(iii) refuses to participate in the hearing;¹⁰²

(iv) refuses to comply with relevant rules of procedural or substantive law;¹⁰³ or

(v) engages in any other behavior that the court determines to be disruptive to the court’s calendar, or a hearing that is in progress.¹⁰⁴

Option #2

(B) The court may direct standby counsel to assume full representation of the respondent parent¹⁰⁵ if the respondent parent engages in any behavior that the

⁹⁵ *Id.* at 150 (noting that “the colloquy need not be as comprehensive as the colloquy mandated when a criminal defendant seeks to proceed unrepresented” but requiring that “[t]he court... be satisfied that the parent understands the nature of the termination of rights proceeding and the disadvantages of self-representation.” (citations omitted)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 151.

¹⁰⁰ *Id.* (providing that the parent respondent’s decision not to follow the court’s instructions may lead to the termination of this right).

¹⁰¹ *Id.* (providing that the court may “take appropriate steps if the unrepresented parent disrespects the court or any participant in the hearing.”).

¹⁰² *Id.*

¹⁰³ *Faretta*, 422 U.S. at 834 n. 46.

¹⁰⁴ *State v. Wiggins*, 158 N.J. Super. 27, 33 (App. Div. 1978).

¹⁰⁵ *R.L.M.*, 236 N.J. at 151.

court determines to be disruptive [to the court’s calendar, or a hearing that is in progress.]¹⁰⁶

(C) As used in this section “standby counsel” means an attorney who has been appointed by the court to:

(i) attend the court proceedings of a person whose parental rights may be terminated and who has waived the right to counsel;

(ii) provide advice and guidance, if and when requested, to a person whose parental rights may be terminated; and

(iii) be available to represent the person whose parental rights may be terminated if the court determines that the termination of the person’s self-representation is necessary.

(4) Nothing in this section shall be construed to preclude the respondent parent from retaining private counsel.

* * * *

COMMENT

- *Structure*

Consistent with contemporary drafting practices, the proposed modifications divide the text of the statute into lettered and numbered sections and subsections to improve accessibility. The proposed modifications to subsection a. set forth the types of legal representation available to a respondent parent in proceedings to terminate their parental rights – (1) the Office of the Public Defender; (2) self-representation; (3) standby counsel; and (4) private counsel.

- *Subsection (a)(1) – Office of the Public Defender*

In this newly proposed subsection, the term “respondent” has been added before the term “parent” to clarify which parent is eligible for Public Defender representation in a termination of rights proceeding. The balance of the language in this subsection remains unaltered.

- *Subsection (a)(2) – Self-representation*

The proposed modifications in this subsection set forth the Court’s requirement that the respondent parent “*timely*,¹⁰⁷ clearly, and unequivocally” invoke their right to proceed unrepresented; and, that the right to counsel has been knowingly, intelligently, and voluntarily waived by the respondent parent.

The addition of the word “timely” “emphasize[s] that the family court is charged with balancing the timing of the [self-representation] request with the permanency needs of the child...”¹⁰⁸ Additionally, the proposed modification, “would most accurately reflect the intent of the legislature and the opinion of the Supreme Court of New

¹⁰⁶ *Wiggins*, 158 N.J. Super. at 27, 33.

¹⁰⁷ *See supra* discussion p. 8 and note 57, 89-90.

¹⁰⁸ Att’y Gen. E-mail of Dec. 01, 2022, at 3.

Jersey....”¹⁰⁹ The omission of the “key term[, timely,] would run the risk of undermining the primary focus of parental termination cases, the child’s right to timely permanency.”¹¹⁰

In addition, the recommended statutory alteration incorporates the “abbreviated yet meaningful colloquy” set forth by the New Jersey Supreme Court in *N.J. Division of Child Protection & Permanency v. R.L.M.*¹¹¹

- *Subsection (a)(3) – Standby Counsel*

The proposed language clarifies that a court may appoint standby counsel ensure the effective presentation of evidence and the timely disposition of the action.

- *Subsection (a)(3)(A) – Control of the Case*

Consistent with the decision in *R.L.M.* the proposed language in this subsection clarifies that the respondent parent remains in control of their own case.¹¹²

- *Subsection (a)(3)(B) – The Recalcitrant Respondent*

The proposed language clarifies that a court has the authority to relieve a respondent parent from serving as their own counsel, under certain circumstances, to ensure the determination of the child’s best interests is not derailed by a recalcitrant respondent parent.

Option Number One

The proposed language in subsection (a)(3)(B)(i)-(v) sets forth the circumstances under which a court has the authority to relieve the respondent parent from serving as their own counsel.

Option Number Two

The language that has been proposed in option number two synthesizes the circumstances under which a court has the authority to relieve the respondent parent from serving as their own counsel. The proposed language is intended to be broad enough to include behavior that might not be included in an enumerated list.

- *Subsection (a)(3)(C) – Definition*

The proposed definition is based upon the New Jersey Supreme Court’s discussion of the role of standby counsel in *In the Matter of the Civil Commitment of D.Y.*¹¹³

- *Subsection (a)(4) – Private Counsel*

As originally drafted, N.J.S. 30:4C-15.4a. provides that a respondent parent may retain private counsel. This language has been retained with only the addition of the word “respondent” before the word parent to clarification and consistency.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 4.

¹¹¹ *R.L.M.*, 236 N.J. at 150.

¹¹² *Id.*

¹¹³ 218 N.J. 359 (2014).