SUPREME COURT OF NEW JERSEY
DOCKET NO. 079473

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY, **Plaintiff-Respondent,** **v.** **J.J.,** **Defendant-Appellant,** **IN THE MATTER OF R.A.J.,** **Minor.**	Civil Action **On Appeal From the Superior Court of New Jersey, Appellate Division** Sat Below: Hon. Clarkson S. Fisher, Jr., P.J.A.D. Hon. Mitchel E. Ostrer, J.A.D. Hon. Francis J. Vernoia, J.A.D

BRIEF OF AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Liza Weisberg (247192017)
Alexander Shalom
Jeanne LoCicero
Edward Barocas
American Civil Liberties Union of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973)854-1703
lweisberg@aclu-nj.org
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Court Rules

Constitutional Provisions

PRELIMINARY STATEMENT

To force a parent to accept unwanted representation in a termination of parental rights proceeding is, borrowing the words of Justice Frankfurter, to "imprison a man in his privileges and call it the Constitution." Adams v. U.S. ex rel. McCann, 317 U.S. 269, 280 (1942). Only drained of the values of dignity, autonomy, and liberty that are its lifeblood can the right to an attorney's assistance impose a burden of compelled counsel. Indeed, it ceases to be a right when it becomes a straightjacket.

Deciding that J.J. should not be permitted to represent himself in the adjudication of his parental rights, the courts below fashioned an anomaly justified by neither law nor logic. While the vast majority of civil litigants must proceed *pro se* because they cannot afford to hire an attorney, and while criminal defendants and civil committees are trusted to stake their liberty on their self-representation, one group apparently stands apart, uniquely undeserving of the freedom to act as their own advocates: parents fighting to keep custody of their children from the State. But nothing in the nature of parental rights, the principles of due process as applied to parental rights, or the language and structure of the statute that codifies the right to representation in termination proceedings suggests the soundness of this anomaly.

In fact, each of these considerations compel the conclusion that a parent has a right to represent himself.

The statute that announces the right to counsel in termination matters plainly indicates that a parent may invoke that right or forego it. N.J.S.A. 30:4C-15.4 authorizes the Office of the Public Defender to represent indigent parents who "request[] counsel." N.J.S.A. 30:4C-15.4(a). The option to make a request for representation would be effectively meaningless if the drafters envisioned a regime that prohibited self-representation by parents. What, then, would a prohibition on self-representation look like, had the Legislature actually intended to impose one? The statute furnishes an example in its subsection pertaining to the rights of children in termination proceedings, which states that every such child "*shall* be represented by a law guardian . . . ." N.J.S.A. 30:4C-15.4(b) (emphasis added). Had the Legislature meant for parents to be bound by the same scheme of compulsory counsel, it would have used the same simple language. Instead of reading the statute to contain superfluous text, this Court should accept its plain and logical meaning in granting parents a right of self-representation.

The constitutional guarantees of procedural and substantive due process also secure the right of self-representation. Because termination proceedings are heard before judges rather than juries and with the participation of a lawyer representing the child's

interests, the risk that a parent's self-representation will hinder the accuracy of the proceedings is diminished, particularly as compared to the criminal context (where the right of self-representation is well established). By contrast, where a parent is forced to accept representation against his will, the chances are great that he will be moved to interrupt, contradict, or otherwise undermine his lawyer's presentation. The record here, as captured in the Appellate Division's opinion, offers evidence of this reality. Procedural fairness requires a right of self-representation. Moreover, there is a fundamental right of self-representation embedded in our nation's history and implicit in the Constitution's reverence for individual autonomy. A blanket prohibition on self-representation is a glaring failure of narrow tailoring under the strict scrutiny test this Court should apply.

There is no case more personal than one that threatens to sever a parent's legal relationship with a child. A parent must have the right to defend this bond personally, in his own voice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus relies on the facts and procedural history as recounted in the Appellate Division opinion.

[1] The Statement of Facts and Procedural History, required by R. 2:6-2(a)(3) & (4), are combined here for the convenience of the Court. Throughout this brief amicus cites exclusively to the Appellate Division opinion rather than directly to the trial transcript. While R. 2:6-2(a)(4) requires citations to the

ARGUMENT

I. THE STATUTE THAT GRANTS PARENTS A RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES PROVIDES A COROLLARY RIGHT OF SELF-REPRESENTATION.

The plain language of N.J.S.A. 30:4C–15.4(a) manifests the Legislature's purpose to enshrine a right of self-representation. The principal project of statutory interpretation is to discern the Legislature's intent and to give effect to it. State v. Hudson, 209 N.J. 513, 529 (2012). Courts look first to the statute's plain language and ascribe terms their ordinary meaning. State v. S.B., 230 N.J. 62, 68 (2017). Courts "can also draw inferences based on the statute's overall structure and composition." Id. Throughout this process, courts "should strive for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void or insignificant." G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs., 157 N.J. 161, 172 (1999). Likewise, courts "will not adopt an interpretation of the statutory language that leads to an absurd result . . . ." State v. Morrison, 227 N.J. 295, 308 (2016).

In order to read N.J.S.A. 30:4C–15.4(a) to impose a burden of mandatory representation in termination of parental rights cases, this Court would have to contravene the settled tenets of statutory interpretation. The statute provides, in pertinent part:

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transcripts, amicus has not been given access to the sealed transcripts.

> a. In any action concerning the termination of parental rights . . . 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. . . .
>
> b. A child who is the subject of an application for the termination of parental rights . . . shall be represented by a law guardian . . . .
>
> [N.J.S.A. 30:4C-15.4.]

The Appellate Division panel found that this statute "does not explicitly grant a right of self-representation . . . ." But against the background norm of civil *pro se* litigation, the drafters had no need to address the right explicitly. Foreclosing the right of self-representation – i.e., carving out a set of cases in which representation is mandatory – would have required explicit language. Maintaining the status quo does not.

The Court heeded this logic in In re Civil Commitment of D.Y., which located a right of self-representation in statutory language significantly more ambiguous than the language at issue here. 218 N.J. 359, 365 (2014). D.Y. concerned the right of individuals committed pursuant to the Sexually Violent Predator Act (SVPA) to represent themselves at civil commitment hearings. The relevant statute provided 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." N.J.S.A. 30:4–27.29(c). The Court interpreted the statute "in light of New Jersey's historical recognition of a competent litigant's election to represent himself or herself in civil proceedings." D.Y., 218 N.J. at 383. The Court found nothing in the statute to suggest that the Legislature intended to depart from this tradition. "Significantly, the Legislature did not bar an individual facing SVPA commitment from representing himself or herself, or state that an individual may participate in the proceedings only through counsel." Id. Accordingly, the Court read the statute to demand that a competent civil committee be represented by counsel or that he represent himself with standby counsel present. Id. at 359. In the absence of a clear, express statement, the Court refused to find an exception to the rule of self-representation.

This rule is bolstered by, appropriately enough, a Rule. As the Appellate Division panel recognized, New Jersey's Court Rules provide that any person who is a party in interest but not qualified to practice law "shall nonetheless be permitted to appear and prosecute or defend an action in any court . . . ." R. 1:21-1(a). This Rule, along with the long and robust history of *pro se* advocacy and the recognition of the right of self-representation in virtually every context courts have examined (including the criminal context, Faretta v. California, 422 U.S. 806, 807 (1975)

and since D.Y., the civil commitment context) informs the plain meaning of a statute's text.

The statute in the present case not only lacks any clear, express statement prohibiting self-representation, it contains language that affirmatively signals a right of self-representation. This makes the statutory argument for such a right even stronger than it was in D.Y., where the former but not the latter could be said. The statute here establishes two prerequisites to a parent's representation by the Office of the Public Defender: first, the parent must be indigent, and second, the parent must *request counsel.* This second condition would be utterly "inoperative, superfluous, void or insignificant," G.S., 157 N.J. at 172, if the statute did not confer both a right to counsel, upon request, and a right to waive it. The plain language and ordinary meaning of the phrase "requests counsel" can support no other reading.

Similarly, the statute describes the right to counsel in volitional terms. It orders not that parents be represented by counsel, but rather that they receive "notice of the right to retain and consult with legal counsel." N.J.S.A. 30:4C-15.4(a). Retaining and consulting with a lawyer are affirmative, deliberate actions, not passive burdens. That lawyer is an assistant – someone with whom to consult – not a master. See Faretta, 422 U.S. at 820 (finding support for defendant's right of self-representation in

Sixth Amendment's regard for counsel as "an assistant" or "aid to a willing defendant," rather than a "master."). To thrust counsel on the unwilling parent would violate the respect for agency and autonomy that the statute, by its language, affirms.

In telling contrast, the statute does not contemplate any request by the child, nor notice to the child of the right to retain and consult with an attorney. Rather, it simply directs that the child "shall be represented by a law guardian." N.J.S.A. 30:4C-15.4(b). The drafters knew how to make representation mandatory; they did so using these three simple words – "shall be represented" – with respect to children. With respect to parents, they did not. Unless we are prepared to accuse the Legislature of using misleading and superfluous language, the conclusion is inescapable: N.J.S.A. 30:4C-15.4(a) affords parents the right of self-representation.

This conclusion also avoids an absurd result. If the statute contained no right of self-representation and instead required every parent to accept representation by counsel, the State, upon haling a parent into court to defend his fitness to care for his child, would then have to force the parent who did not qualify for representation by the Office of the Public Defender based on indigence to reach into his pockets to hire a private attorney. This scenario is repugnant as a matter of public policy.

The Appellate Division panel in this case dipped a cautious toe in the waters of statutory interpretation but declined to dive in, explaining that J.J. did not raise a statutory or rule-based right to represent himself. N.J. Div. of Child Prot. & Permanency v. R.L.M., 450 N.J. Super. 131, 149 (App. Div. 2017). To the extent this claim is accurate, the most likely explanation is that J.J. considered the right of self-representation so obvious that explicitly addressing or justifying it was unnecessary. The argument that dominated J.J.'s appellate brief concerned the insufficiency of the colloquy to determine whether a waiver of counsel was made knowingly and voluntarily – an argument that presupposes the existence of a right of self-representation. See Def. App. Br. at 18-23.[2]

J.J. was not unreasonable to consider the right self-evident. The trial judge in this matter, other Appellate panels, this Court, and the Rules of Court for proceedings involving the Division of Child Protection and Permanency all appear to take for granted that a parent may defend his parental rights *pro se.* In response to a request to represent himself, the judge presiding over J.J.'s trial assured him, "certainly you have the right to represent yourself." R.L.M., 450 N.J. Super. at 138. In a recent opinion, the Appellate Division, without pausing to consider whether there

[2] "Def. App. Br." refers to the appellate brief of Defendant-Appellant J.J.

existed a predicate right of self-representation, determined that a mother's waiver of counsel was accepted without a proper colloquy. N.J. Div. of Child Prot. & Permanency v. Q.W., No. A-1406-15T2, 2018 N.J. Super. Unpub. LEXIS 73, at *15-16 (App. Div. Jan. 11, 2018); AA1.[3] Similarly, in In re Adoption of a Child by J.E.V. and D.G.V., the Court described the prerequisite inquiry to assure a parent who wishes to proceed *pro se* acts knowingly and voluntarily. 226 N.J. 90, 114 (2016). The Rules that pertain to Division of Child Protection and Permanency proceedings reference *pro se* litigants three times. R. 5:12-4.[4] If J.J. raised his statutory right of self-representation obliquely, it was because that right is too ordinary and uncontroversial to warrant a direct defense.

II. THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS SECURE A RIGHT OF SELF-REPRESENTATION IN TERMINATION OF PARENTAL RIGHTS CASES.

A. Forcing an Attorney on an Unwilling Parent Offends Procedural Due Process.

[3] AA refers to amicus's appendix. Consistent with R. 1:36-3, the unpublished opinion referenced here is appended to this brief. There are no contrary opinions to cite.

[4] Rule 5:12-4(a) requires a case management conference "As soon as the litigants have retained counsel or have chosen to proceed pro se . . . ." Rule 5:12-4(e) authorizes courts to order the Division of Child Protection and Permanency to file a written plan memorializing findings of abuse or neglect, which "shall be served upon all counsel or parties appearing pro se . . . ." Rule 5:12-4(f) authorizes the same as to periodic progress reports, likewise to be served "upon all counsel or parties appearing pro se."

A right of self-representation is essential to the fair adjudication of parental rights. "It is not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C., 452 U.S. 18, 37 (1981). In Lassiter, the United States Supreme Court held that the nature of the process due in parental rights termination proceedings turns on a balancing of the three factors outlined in Mathews v. Eldridge, 424 U.S. 319 (1976): (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure and the probable value, if any, of additional or substitute safeguards; and (3) the governmental interests supporting use of the chosen procedure. Id. at 27; see Santosky v. Kramer, 455 U.S. 745, 754 (1982).

It is "plain beyond the need for multiple citation" that a parent's desire for and right to the care and custody of his child is an interest of the highest order. Lassiter, 452 U.S. at 27. The State has "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." Santosky, 455 U.S. at 766. Largely decisive is the remaining factor: the risk of error created by barring self-representation and the value of allowing it.

Notably, the Appellate Division performed an inverse analysis, focusing on the risk of error created by allowing parents to proceed *pro se* and the value of counsel. But the present case is not about the value of counsel – a matter this Court has already settled. See J.E.V., 226 N.J. at 105; New Jersey Div. of Youth & Family Svcs. v. B.R., 192 N.J. 301, 306 (2007). The baseline has shifted. The question is no longer whether extending access to counsel to all parents makes termination cases fairer; the question now is whether *forcing* counsel on all parents makes termination cases fairer. A proper procedural due process analysis here centers on the risk of thrusting counsel upon a competent person who, in full view of the perils of his position, rejects an attorney's assistance, and the value of allowing a person to exercise his autonomy in that narrow instance.

Forcing a lawyer on an unwilling parent poses a potent threat to the integrity of the parent's case and the adjudicative process on whole. As the Court observed in Faretta, "Where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly." 422 U.S. at 834. A system of compelled counsel "can only lead him to believe that the law contrives against him." Id. A parent, silenced and shackled to a mouthpiece he does not endorse, may understandably feel moved to assert his autonomy by interrupting and objecting to his lawyer's

presentation and even withholding critical information – as J.J. apparently did here. R.L.M., 450 N.J. Super. at 140–42. The spectacle of a fractured defense undermines the parent's case and makes a sham of the lawyer's role as an advocate and representative.

Where the competent adult, apprised of the risks, voluntarily waives counsel, this spectacle is avoided and at least two distinct features of termination of parental rights proceedings mitigate the typical hazards of *pro se* litigation. First, judges – not juries – find facts in Family Part trials. See Brennan v. Orban, 145 N.J. 282, 302 (1996). Judges in "[t]rial courts handling civil, probate, and family disputes routinely encounter litigants who appear without counsel." D.Y., 218 N.J. at 376. Judges are adept at handling the challenges and irregularities a *pro se* party may introduce and far less likely than the lay juror to be distracted by a *pro se* party's missteps. "In short, New Jersey's courts have vast experience in the oversight of matters in which litigants represent themselves." Id. If there is any forum equipped to entertain *pro se* litigants, it is the Family Part.

Moreover, judges in termination of parental rights cases triangulate the child's best interests based on evidence and argument from three parties: the parent, the State, and, crucially, the child. The Appellate Division worried that, while a self-represented criminal defendant is "entitled to 'go to jail under

his own banner,'" R.L.M., 450 N.J. Super. at 145 (quoting Faretta, 422 U.S. at 839), a parent's "self-destructive self-representation in a termination of parental rights hearing affects a broader set of interests than the parent's – including the child's interest in the parental relationship." Id. But it is purely and precisely the job of the child's statutorily mandated lawyer to represent the child's interests in termination cases. See N.J.S.A. 30:4C–15.4(b); New Jersey Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 113 (2008). In addition to representing the child's interests, the child's lawyer contributes to fact gathering, ensuring a robust record that serves the truth-seeking function of litigation. Meanwhile, a criminal prosecution, particularly one that results in a sentence of incarceration, works a profound hardship on families without any protections for those collateral interests.

In light of the unique courtroom composition in termination cases – namely, the absence of a jury and the presence of a lawyer for the child – the value of self-representation considerably outweighs its potential harms. Indeed, self-representation serves the shared interest of the parent, the child, and the government in promoting the accuracy and integrity of the proceedings.

B. Substantive Due Process Protects the Fundamental Right of Self-Representation in Termination of Parental Rights Cases.

The Fourteenth Amendment's Due Process Clause protects against certain actions by state government "regardless of the fairness of the procedures used to implement them." Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)). Fundamental liberty interests protected under this "substantive" component of the Due Process Clause may not be infringed "*at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Id. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (emphasis in original).

Likewise, Article I, Paragraph 1 of the New Jersey Constitution contains a substantive due process guarantee rooted in its "general recognition of those absolute rights of the citizen which were a part of the common law." Lewis v. Harris, 188 N.J. 415, 434 (2006) (quoting King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974)) (internal quotation marks omitted). Indeed, this Court has frequently found that our State Constitution provides even greater protection than the United States Constitution. See, e.g., Robinson v. Cahill, 62 N.J. 473, 482, 509, cert. denied sub. nom. Dickey v. Robinson, 414 U.S. 976 (1973) (finding a fundamental right to thorough and efficient public education).

Under the Fourteenth Amendment's substantive due process provision, courts engage in a two-step inquiry to determine whether a fundamental right is implicated. Lewis, 188 N.J. at 435. First, the asserted fundamental right must be deeply rooted in history and tradition and "implicit in the concept of ordered liberty." Glucksberg, 521 U.S. at 720-21 (quoting Palko v. State of Connecticut, 302 U.S. 319, 326 (1937)) (internal quotation marks omitted). Second, the interest must be identified by a "careful description." Id. (quoting Reno, 507 U.S. at 302) (internal quotation marks omitted). Under Article I, paragraph 1, courts conduct a flexible test; even rights not considered "fundamental" may merit protection based on a balancing of "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). The Court need not undertake this analysis, however, because a prohibition on self-representation is unconstitutional even under the more rigid and demanding federal substantive due process standard.

The Supreme Court decided the seminal self-representation case, Faretta v. California, under the Sixth Amendment but drew unmistakably from substantive due process principles. As the Court described in Martinez v. Court of Appeals of California, Fourth Appellate District, the Faretta decision rested on "three interrelated arguments." 528 U.S. 152, 156 (2000).

First, the Court examined the extensive historical record of self-representation in English and early American common law, finding that the right to self-represent was deeply rooted in our nation's history and traditions. Id. at 156; Faretta, 422 U.S. at 812-17. This historical analysis was indistinguishable from that required by the substantive due process test. Second, the Court analyzed the language and structure of the Sixth Amendment, which gives the criminal defendant the personal right to control his own defense. Martinez, 528 U.S. at 159; Faretta, 422 U.S. at 821-24. And third, again echoing the substantive due process analysis, the Court determined that the right of self-representation arises from "that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 843 (quoting Illinois v. Allen, 397 U.S. 337, 350—351 (1970) (Brennan, J., concurring))(internal quotation marks omitted). Faretta is a useful guidepost for understanding self-representation as a fundamental right protected by substantive due process.

Although the historical record discussed in Faretta focused on criminal trials, the history of self-representation in the civil context is equally long and robust. See Iannoccone v. Law, 142 F.3d 553, 557-58 (2d Cir. 1998); Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

In the English courts, lawyers were helpful in navigating the "complicated forms of action and veritable maze of writs and

confusing procedures," Iannoccone, 142 F.3d at 557, but individuals retained the right to plead their own cases. In 1259, pressured by subjects who were unhappy with the growing caste of professional lawyers, King Henry III decreed that, except in three specific types of actions, citizens could "plead their own causes without lawyers." The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. at 1325 (quoting Sir Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I (2d Ed. 1898)).

Self-representation also predominated in the early American colonies. Colonists "brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers." Faretta, 422 U.S. at 826. Several colonies went so far as to prohibit "pleading for hire." Id. at 826; see, e.g., Massachusetts Body of Liberties ch. 26 (1641). The two proprietary colonies that would become New Jersey, among several others, affirmatively guaranteed the right of self-representation in all cases, civil and criminal. See Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New-Jersey in America, ch. XXII (1677) ("[N]o person or persons shall be compelled to fee any attorney or counsellor to plead his cause, but that all persons have free liberty to plead his own cause if he please."), available at http://westjersey.org/ca77.htm; The Fundamental Constitutions of the Province of East New Jersey in

America, ch. XIX (1683) ("And in all courts persons of all perswasions may freely appear in their own way, and according to their own manner, and there personally plead their own causes themselves, or if unable, by their friends, no person being allowed to take money for pleading or advice in such cases."), available at http://avalon.law.yale.edu/17th_century/nj10.asp; see also 1 Edward Q. Keasbey, The Courts and Lawyers of New Jersey: 1661-1912, at 228 (Lewis Historical Pub'g Co. 1912) ("In West New Jersey it was enacted by the first Assembly, November 25, 1681, that 'no person or persons shall be compelled to fee any attorney or counselor to plead his or their cause, but that all persons have free liberty to plead his own cause if he please.'").

Later, "[a]fter the Declaration of Independence, the right of self-representation, along with other rights basic to the making of a defense, entered the new state constitutions in wholesale fashion." Faretta, 422 U.S. at 828-29. Advocating for the Pennsylvania Declaration of Rights in 1776, Thomas Paine declared self-representation a natural right, with representation by counsel secondary to it. Id. at 830 n. 39 (quoting 1 B. Schwartz, The Bill of Rights: A Documentary History 316 (1971)) ("Either party . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading

by proxy, that is, by a council, is an appendage to the natural right [of self-representation] . . . .").

As part of the Judiciary Act of 1789, Congress provided that "in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." 1 Stat. 73, 92 (1789). President Washington signed this provision into law the day before the Sixth Amendment was proposed, Faretta, 422 U.S. at 812, and it remains in place with only minimal textual revisions, 28 U.S.C. § 1654 (2012). The historical case for the right of self-representation in the civil context is every bit as strong as in the criminal context. Iannoccone, 142 F.3d at 557-58.

Parental rights are also deep-rooted in our country's history. Cf. Martinez, 528 U.S. at 159 (finding no right of *appellate* self-representation due, in part, to absence of historical tradition of appellate review). The Supreme Court has identified "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). Beginning "[a]s early as the 1640s, the colonial laws authorized public authorities to remove children from their families and place them with other families

who could raise them in a manner deemed appropriate." Susan Vivian Mangold, Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment As Protection in the Foster Care System, 36 New Eng. L. Rev. 69, 81 (2001). In 1642, for example, Massachusetts Bay enacted a law, to be enforced through the courts, authorizing the removal of children from a deficient parent's home. Id. at 82.

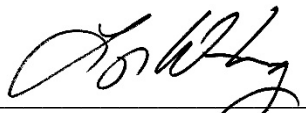
In view of the longstanding respect both for an individual's right to plead his own case and a parent's right to care for and keep custody of his child, the right of self-representation in termination cases is fundamental. A blanket prohibition on self-representation cannot withstand strict scrutiny. The State has a compelling interest in ensuring that termination proceedings are accurate and orderly. Disallowing a competent parent to represent himself in all circumstances, however, is not tailored in the slightest to serve that interest. Less restrictive alternatives – such as requiring the trial judge to engage in a thorough colloquy to ensure that any waiver of counsel is knowing and voluntary – are available and easily implemented. Moreover, self-representation "is not a license to abuse the dignity of the courtroom." Faretta, 422 U.S. at 834 n.46. A trial judge may retain authority to "terminate self-representation by a defendant who deliberately engage[s] in serious and obstructionist [behavior]." Id.

An absolute prohibition on self-representation is a blunt tool that is neither necessary nor suited to the job of making termination proceedings more accurate, more efficient, or more just. Every parent who must stand before a judge to defend custody of his child has a fundamental right to stand alone.

CONCLUSION

For the foregoing reasons, amicus urges this Court to reverse the Appellate Division and find that parents have a right of self-representation in termination of parental rights cases.

Respectfully submitted,



LIZA WEISBERG (247192017)
ALEXANDER SHALOM
JEANNE LOCICERO
EDWARD BAROCAS
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
Counsel for Amicus Curiae

Dated: February 13, 2018

N.J. Div. of Child Prot. & Permanency v. Q.W.

Superior Court of New Jersey, Appellate Division

April 25, 2017, Submitted; January 11, 2018, Decided

DOCKET NO. A-1406-15T2

Reporter
2018 N.J. Super. Unpub. LEXIS 73 *

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY, Plaintiff-Respondent, v. Q.W., Defendant-Appellant, and A.W. and M.T., Defendants. IN THE MATTER OF N.W. and A.W., Minors.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FN-09-0424-12.

Counsel: Joseph E. Krakora, Public Defender, attorney for appellant (Joan T. Buckley, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Steven J. Colby, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Charles Ouslander, Designated Counsel, on the brief).

Judges: Before Judges Leone and Vernoia.

Opinion by: LEONE

Opinion

The opinion of the court was delivered by LEONE, J.A.D.

Defendant Q.W. (Mother) appeals from an October 19, 2015 order terminating this Title Nine proceeding. Mother claims the trial court erred in proceeding to a fact-finding hearing without Mother's knowing and intelligent waiver of her right to counsel. We agree. We delineate the proper colloquy for a family court to follow in determining whether a waiver of counsel has been made knowingly and intelligently. We vacate the September 20, 2012 finding of abuse or neglect and remand for a new fact-finding hearing at which Mother has an opportunity to be represented by counsel. **[*2]**

I.

We summarize the underlying facts. Mother and defendant A.W. (Father), who is the father of the child A.W. (Daughter), were accused of abusing or neglecting Daughter (born 2006) and Mother's son N.W. (born 1999).[1] Specifically, Mother and Father were accused of engaging in substance abuse and allowing the children to witness and become involved in domestic violence between Mother and Father, including an incident on May 15, 2012. Father was also accused of pushing, hitting, or attempting to push or hit the children on May 15.

On May 16, 2012, an emergency removal of the children was conducted by what is now known as the Division of Child Protection and Permanency (Division). On May 18, 2012, the Division filed a request for an order to show cause (OTSC), as well as a complaint alleging abuse or neglect by Mother and Father in violation of N.J.S.A. 9:6-8.21(c)(4)(b).

On May 18, the initial OTSC hearing was held before the OTSC judge. Mother was present and represented

[1] The Division later added N.W.'s father M.T. as a defendant, but no findings were made against M.T. Neither M.T. nor Father have appealed.

provisionally by an assistant public defender (A.P.D.), who argued the children should be returned to Mother because she had just obtained a temporary restraining order against Father. Father appeared without counsel, but the OTSC judge told him **[*3]** the A.P.D. also spoke for him. The judge upheld the removal, and awarded the Division care, custody, and supervision of the children.

The June 11 return hearing on the OTSC was held before a different judge (motion judge). At the start of the hearing, the A.P.D. who had represented Mother stated her client "has indicated that at this time she would like to proceed pro se." The motion judge conducted the following colloquy:

> THE COURT: All right. [Mother], why do you want to proceed pro se?
>
> . . . .
>
> [MOTHER]: Because I feel like I have to speak to you and talk to you more on my own behalf. . . . Maybe you can get a . . . proper understanding. . . .
>
> THE COURT: [You understand] these are very serious proceedings that could ultimately lead to the termination of your parental rights and if you represent yourself, you have to abide by the same rules of evidence as an attorney, so when we have a fact finding trial you're going to have to understand those rules of evidence so that you can proceed and defend yourself.
>
> Do you think you'd be able to do that? . . .
>
> [MOTHER]: Yes. Yes, [judge].
>
> THE COURT: If I find that you are not able to do that, I'm going to appoint an attorney and I might even appoint **[*4]** a guardian ad litem if I don't feel you are capable of doing that. Do you still want to proceed pro se? Did you read the complaint? Do you understand the charges . . . do you know why you're here?
>
> [MOTHER]: Yes, I know why I'm here.
>
> THE COURT: Why?
>
> [MOTHER]: Because someone — well, someone that I no longer am friends . . . with had called [the Division] on me.
>
> THE COURT: But do you understand that a Judge has already granted the initial order to show cause and has granted the Division custody of your children?
>
> [MOTHER]: Well, I was told that that Judge wasn't familiar with Family Court. That's what she told me.[2]
>
> . . . .
>
> THE COURT: Do you think that . . . you're going to be able to represent yourself? You sure you want to represent yourself?
>
> [MOTHER]: I don't feel like I'm . . . being helped by her, not last time . . . or this time.
>
> THE COURT: . . . [A]re you going to hire your own attorney or you can go to legal services?
>
> [MOTHER]: I asked her can I do that and she told me that I can't just switch from her to another person.
>
> THE COURT: Well, if I grant your application you can.
>
> [MOTHER]: Oh, okay. I would like to do that.
>
> THE COURT: Well, I would recommend that you have an attorney.
>
> [MOTHER]: Okay. **[*5]**
>
> THE COURT: If you don't want to use the public defender, that's fine. I can relieve the public defender as counsel. But I would strongly suggest you either hire an attorney or you go to legal services and see if they would represent you.
>
> [MOTHER]: Thank you.
>
> THE COURT: All right. You're relieved as counsel.
>
> [THE A.P.D.]: Thank you.

The A.P.D. did not participate further in the June 11 hearing. The motion judge heard testimony, received some comments from Mother, and ordered the children to continue in the Division's care, custody, and supervision. At the end of the hearing, the judge scheduled the next hearing for 9:00 a.m. on September 20, 2012, before a different judge (the trial judge). The motion judge added: "I would strongly suggest, [Mother], that you get an attorney to represent you."

The motion judge's June 11 order stated that the A.P.D. "was relieved as [Mother's] attorney per [Mother's] request. [Mother] was advised of her right to counsel, however, she indicated that she will proceed pro se on this matter." The order added that the September 20 hearing was a "Fact-Finding." The Division's attorney sent Mother a letter listing the exhibits and witnesses the Division would call, **[*6]** and explaining the findings the Division would seek at the September 20 fact-finding hearing.

When the September 20, 2012 fact-finding hearing commenced at about 10:00 a.m. before the trial judge, Mother and Father were not present. Father's attorney

[2] Mother's use of "she" and "her" apparently referred to the A.P.D.

informed the trial judge "it's my understanding that [Mother] is pro se and will be representing herself and she is also not in the building." The following exchange took place:

> [DIVISION'S ATTORNEY]: And, Your Honor, just by way of — for more information, both defendants were present at the last court hearing, which was before [the motion judge]. [Mother] chose to proceed pro se.
>
> . . . .
>
> [DIVISION'S ATTORNEY]: She did have a public defender assigned.
>
> THE COURT: Did [the motion judge] question her . . . extensively?
>
> [DIVISION'S ATTORNEY]: Yes, extensively.
>
> . . . .
>
> THE COURT: And she specifically chose to be pro se for the fact finding hearing, also?
>
> [DIVISION'S ATTORNEY]: [The motion judge] went through that with her, Your Honor, yes.
>
> THE COURT: And was she notified of the fact finding in court . . . of this date? Was she told it would be in this courtroom rather [than] in [the motion judge]'s?
>
> [DIVISION'S ATTORNEY]: Yes, Your Honor.

A probation officer **[*7]** left a phone message for Mother on the record stating that the trial judge was proceeding with the fact-finding hearing. The trial judge was "quite concerned" because Mother was "acting as her attorney now." The judge wondered "if although she's insisting on being pro se if she's not showing up if I should appoint an attorney to represent her." The following exchange occurred:

> [FATHER'S ATTORNEY]: The only issue I can . . . anticipate with that, Judge, . . . is the attorney is going to make an objection that they're not prepared to proceed with it. There are voluminous records in this case, and I know, I can anticipate that no attorney would be able to competently represent her just popping in right now. . . .
>
> . . . .
>
> [DIVISION'S ATTORNEY]: She had appointed [the A.P.D.] as her public defender. She chose to not have [the A.P.D.] represent her. And as I said before, . . . [the motion judge] did question her extensively, warned her of the difficulty of proceeding pro se, and that was thoroughly done on the record. I think both counsel were there, too.
>
> THE COURT: Yeah.
>
> [FATHER'S ATTORNEY]: . . . I do recall the discussions that she was seeking private counsel. I think it was the issue she **[*8]** didn't want a public defender, she wanted a private attorney.
>
> And, you know, I know she spoke briefly to me about that and I explained to her that I represented . . . her boyfriend, . . . so I cannot represent her. But that was what she expressed to me. So I don't know if she retained private counsel. I don't know.

After a brief recess during which the trial judge apparently telephoned the motion judge, the trial judge decided to proceed, stating:

> [B]ased on what you've told me and my conversation with [the motion judge], we're going to go forward. [The motion judge] has a memory of her being noticed in court that the fact finding would be here this morning and we have to consider moving ahead for the best interest of the children.
>
> She had the opportunity to have counsel and very competent counsel and did not. So we're going to proceed. We're going to start the fact finding.

The trial judge heard the Division's testimony. During the testimony, Mother tried to call the Division caseworker four times. The trial judge told the caseworker: "it's up to you if you want to call her. We're proceeding." The judge heard summations from Father's attorney, the Law Guardian, and the Division's attorney. **[*9]** At 12:37 p.m., as the judge was announcing the decision, Mother appeared in the courtroom. The judge did not discuss with her the waiver of counsel issue. Instead, the judge told her to sit quietly and continued announcing the decision. Mother subsequently interrupted several times to disagree with the judge's recitation of the facts. She eventually asked: "Why am I here? . . . To listen to her talk"? She left the courtroom before the judge concluded her opinion. The court found both Mother and Father abused or neglected the children.

At the next compliance review, Mother appeared without an attorney, complaining that the trial judge did not give her a chance to speak or do anything. She appeared pro se at two more compliance reviews before saying at a May 13, 2013 permanency hearing that she "would like to obtain an attorney." She was represented by counsel at all remaining hearings.

On October 19, 2015, another judge entered an order terminating litigation, as the children had been returned to Mother's physical and legal custody. Mother appeals, arguing she did not waive her right to counsel.

II.

The Division and the Law Guardian argue we should not hear Mother's challenge to her alleged **[*10]** waiver of counsel because she did not present that challenge in the family court. "[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." *Selective Ins. Co. of Am. v. Rothman*, 208 N.J. 580, 586, 34 A.3d 769 (2012) (quoting *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973)). However, Mother lacked a full "opportunity for such a presentation" at the fact-finding hearing if, as she claims, she was wrongly deprived of the assistance of counsel. *Ibid.* Although other counsel were appointed for Mother many months later, those counsel were appointed for other purposes, not for challenging the fact-finding hearing. In any event, we choose to address Mother's challenge because it "concern[s] matters of great public interest." *Ibid.; see Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 231, 708 A.2d 401 (1998).

Trial courts generally are "in the best position to evaluate defendant's understanding of what it meant to represent h[er]self and whether defendant's decision to proceed pro se was knowing and intelligent." *State v. DuBois*, 189 N.J. 454, 475, 916 A.2d 450 (2007). The court's decision is reviewed for an abuse of discretion. *Ibid.* We must hew to that standard of review.

III.

Mother argues the family court **[*11]** abused its discretion in allowing the fact-finding hearing to proceed while she was not represented by counsel and without her first making a valid waiver of her right to counsel. We agree.

"Courts have long recognized that parents charged with abuse or neglect of their children have a constitutional right to counsel." *N.J. Div. of Youth & Family Servs. v. E.B*, 137 N.J. 180, 186, 644 A.2d 1093 (1994). The Legislature has also granted a statutory right to retain counsel, and to have counsel appointed if indigent, in Title Nine cases. N.J.S.A. 9:6-8.43(a); *see* N.J.S.A. 9:6-8.30(a). "The right is also embodied in our Rules of Court." *N.J. Div. of Child Prot. & Permanency v. R.L.M.*, 450 N.J. Super. 131, 142, 160 A.3d 714 (App. Div. 2017) (citing *R.* 5:3-4(a)). "This requirement ensures that parents have a meaningful opportunity to be heard during Title Nine proceedings and that their fundamental interest in the custody and care of their children is protected." *State v. P.Z.*, 152 N.J. 86, 112, 703 A.2d 901 (1997).

The need for counsel is crucial at the fact-finding hearing. "The fact-finding hearing is a critical element of the abuse and neglect process. . . . The judge's determination has a profound impact on the lives of families embroiled in this type of a crisis." *N.J. Div. of Youth & Family Servs. v. J.Y.*, 352 N.J. Super. 245, 264-65, 800 A.2d 132 (App. Div. 2002). Accordingly, a defendant has "the constitutional right to assistance of counsel during the fact-finding . . . hearings." *N.J. Div. of Youth & Family Servs. v. B.H.*, 391 N.J. Super. 322, 346, 918 A.2d 63 (App. Div. 2007).

Here, it is undisputed Mother had a right to appointed counsel at the fact-finding hearing. **[*12]** However, the family court allowed her to waive counsel and proceed to the fact-finding hearing without representation by counsel. Thus, we must address defendant's claim that the waiver of appointed counsel was invalid.[3]

Our Supreme Court recently addressed the waiver of appointed counsel in a private adoption case. *J.E.V.*, 226 N.J. at 114. The Court advised:

> If a parent wishes to proceed pro se, the court should conduct an abbreviated yet meaningful colloquy to ensure the parent understands the nature of the proceeding as well as the problems she may face if she chooses to represent herself. *Cf. State v. Crisafi*, 128 N.J. 499, 511-12, 608 A.2d 317 (1992) (describing more in-depth inquiry required before defendant in criminal case may waive right to counsel). Only then will the court be in a position to confirm that the parent both understands and wishes to waive the right to

[3] We recently held a defendant in a termination case who unsuccessfully sought permission to represent himself had no "constitutional right of self-representation," and that N.J.S.A. 30:4C-15.4(a) did "not explicitly grant a right of self-representation." *N.J. Div. of Child Prot. & Permanency v. R.L.M.*, 450 N.J. Super. 131, 147-48, 160 A.3d 714 (App. Div.), *certif. granted*, __ N.J. __, 2017 N.J. LEXIS 1289 (2017). Nonetheless, we recognized defendants in family cases have a non-absolute "Rule-based right to appear pro se." *Id.* at 148 (citing *R.* 1:21-1(a)). Here, we need not address the source of defendant's right to proceed pro se because she was allowed to proceed pro se, unlike R.L.M. Thus, the issue before us is the adequacy of "the trial court's prerequisite inquiry to assure the parent acts knowingly and voluntarily" when the parent is allowed to "waive the right to counsel." *Id.* at 147 n.10 (citing *In re Adoption of J.E.V.*, 226 N.J. 90, 114, 141 A.3d 254 (2016)).

appointed counsel.

[*Ibid.*]

To discern the nature of the "abbreviated yet meaningful" colloquy envisioned by *J.E.V.*, we must examine the "more in-depth inquiry" required for criminal cases by *Crisafi* and its progeny. *Ibid.*[4]

In criminal cases, the court must "determine whether an accused has knowingly and intelligently waived that right and to establish the **[*13]** waiver on the record," and the accused "'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'" *Crisafi*, 128 N.J. at 509-10 (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Specifically, *Crisafi* required:

> To ensure that a waiver of counsel is knowing and intelligent, the trial court should inform *pro se* defendants of the nature of the charges against them, the statutory defenses to those charges, and the possible range of punishment. . . .
>
> In general, the court should also inform defendants of the technical problems they may encounter in acting as their own counsel and of the risks they take if their defense is unsuccessful. Further, the court should inform the defendants that they must conduct their defense in accordance with the relevant rules of criminal procedure and evidence, that a lack of knowledge of law may impair their ability to defend themselves, and that their dual role as attorney and accused might hamper the effectiveness of their defense. Also, the court should explain to the defendants the difficulties in acting as their own counsel and should specifically advise the defendants that it would be unwise **[*14]** not to accept the assistance of counsel.
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> [*Id.* at 511-12 (citations omitted).]

Subsequently, the Supreme Court in *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173 (2004), "added to the *Crisafi* inquiry." *DuBois*, 189 N.J. at 468 (citing *Reddish*, 181 N.J. at 594-95).

> Taken together, then, the *Crisafi*/*Reddish* inquiry now requires the trial court to inform a defendant asserting a right to self-representation of (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 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 **[*15]** against self-incrimination.
>
> [*Id.* at 468-69.]

From this "more in-depth inquiry required before [a] defendant in [a] criminal case may waive [the] right to counsel," we must draw an abbreviated yet meaningful colloquy. *J.E.V.*, 226 N.J. at 114 (citing *Crisafi*, 128 N.J. at 511-12). We believe warnings (1), (3), (4), (5), (6), and (8), adapted for family cases, are essential to an "abbreviated yet meaningful colloquy to ensure the parent understands the nature of the proceeding, as well as the problems she may face if she chooses to represent herself." *Ibid.* Such warnings are also essential to provide an adequate evidentiary record for both the family and appellate courts to determine if a

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[4] Other states similarly have looked to their criminal case law to determine the necessity and nature of the colloquy required before a defendant in a family case with a constitutional right to counsel can waive that right. *See, e.g., In re Zowie N.*, 135 Conn. App. 470, 41 A.3d 1056, 1065 (Conn. App. Ct. 2012); *Moore v. Hall*, 62 A.3d 1203, 1210-11 (Del. 2013); *Adoption of William*, 38 Mass. App. Ct. 661, 651 N.E.2d 849, 851 (Mass. App. Ct. 1995); *In re Adoption of J.D.F.*, 2009 ND 21, 761 N.W.2d 582, 587 (N.D. 2009). Some courts require the criminal standard without change. *Bearden v. State Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397, 401-03 (Ark. 2001); *In re C.L.S.*, 403 S.W.3d 15, 21-22 (Tex. App. 2012). Like our Supreme Court in *J.E.V.*, some courts have explicitly recognized "[t]here is no requirement . . . the court engage in a full *Faretta*-type admonition and inquiry." *In re Angel W.*, 93 Cal. App. 4th 1074, 113 Cal. Rptr. 2d 659, 668 (Ct. App. 2001); *see In re J.M.*, 170 Ill. App. 3d 552, 524 N.E.2d 1241, 1251, 121 Ill. Dec. 193 (Ill. App. Ct. 1988); *In re W.W.E.*, 2016-Ohio 4552, 67 N.E.3d 159, 170-74 (Ohio Ct. App. 2016); *State v. State*, 2001 UT App 202, 29 P.3d 31, 34 (Utah Ct. App. 2001).

parent's waiver of counsel is knowing and voluntary.

Accordingly, we hold family courts in proceedings carrying a right to counsel must inform a defendant seeking to represent himself or herself of:

> (a) the nature of the charges in the family court complaint, and the potential consequences if the Division proves those charges;
> (b) the necessity that defendant comply with the rules of family and civil practice and the rules of evidence;
> (c) the fact that the lack of knowledge of the law may impair defendant's ability to defend himself or herself;
>
> (d) the impact that the **[*16]** dual role of counsel and defendant may have;
> (e) the reality that it would be unwise not to accept the assistance of counsel; and
> (f) the fact that, if defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim.[5]

Applying this abbreviated yet meaningful colloquy to an abuse or neglect case reflects the statutory and case law governing such cases. Under warning (a), a family court should advise defendant of the statutory relief the Division is seeking, which may include rulings by the court that the child is abused or neglected, that the child may be removed and placed **[*17]** in the custody or supervision of the Division or another person, that defendant's conduct or contact with the child may be limited by an order of protection, that defendant may be placed on probation, and that defendant may be required to accept services. *See* N.J.S.A. 9:6-8.50(a), (d), (e); N.J.S.A. 9:6-8.51(a); N.J.S.A. 9:6-8.53(a); N.J.S.A. 9:6-8.54(a); N.J.S.A. 9:6-8.55; N.J.S.A. 9:6-8.56; N.J.S.A. 9:6-8.58.

Under warning (a), the family court should also advise that a finding of abuse or neglect may result in an action to terminate defendant's parental rights to the child. *See N.J. Div. of Child Prot. & Permanency v. Y.N.*, 220 N.J. 165, 179,104 A.3d 244 (2014); *see also* N.J.S.A. 30:4C-15(a). Further, the court "should advise the defendant that as a result of a finding of abuse and/or neglect, the defendant's name shall remain on the [Division's] Central Registry of confirmed perpetrators" of child abuse, and that information about defendant may be released to employers, doctors, courts, law enforcement, child welfare agencies, and others. *Div. of Youth & Family Servs. v. M.D.*, 417 N.J. Super. 583, 618, 11 A.3d 381 (App. Div. 2011); *see* N.J.S.A. 9:6-8.10(a) to -8.10(e); N.J.S.A. 9:6-8.11; N.J.S.A. 30:5B-25.3.

Under warning (b), the family court should reference "the rules of family and civil practice" because civil family actions are governed by the rules governing family practice, and by the rules governing civil practice as applicable. *R.* 5:1-1. Warning (f) reflects both that defendant has a right to effective assistance of counsel, *N.J. Div. of Youth & Family Servs. v. B.R.*, 192 N.J. 301, 306, 929 A.2d 1034 (2007); *N.J. Div. of Child Prot. & Permanency v. P.D.*, 452 N.J. Super. 98, 116, 171 A.3d 659 (App. Div. 2017), and that the right is lost if defendant **[*18]** elects to represent himself, *see Reddish*, 181 N.J. at 594.

This meaningful colloquy is "abbreviated" by the omission from the "more in-depth" criminal colloquy of requirements which have reduced relevance in civil family proceedings. *See J.E.V.*, 226 N.J. at 114. A family court need not include *DuBois*'s warning (1)'s reference to "statutory defenses." 189 N.J. at 468. There are no statutory defenses in abuse or neglect proceedings that are not adequately referenced by describing the nature of the charges in the Division's complaint.

A family court also need not give *DuBois*'s warning (3) concerning "the technical problems associated with self-representation and the risks if the defense is unsuccessful." *Ibid.* Warnings (b), (c), and (d) already caution defendants about the principal technical

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[5] Delaware similarly requires "advising the parent about the dangers of self-representation, for example:

> (1) that the parent will have to conduct his or her case in accordance with the rules of evidence and civil procedure, rules with which he or she may not be familiar;
>
> (2) that the parent may be hampered in presenting his or her best case by a lack of knowledge of the law;
>
> (3) that the effectiveness of his or her presentation may be diminished by the dual role as attorney and respondent;
>
> (4) limited knowledge of the statutory grounds for the petition to terminate his or her parental rights; and
>
> (5) any other facts essential to a broad understanding of the termination proceeding."

[*Moore*, 62 A.3d at 1210-11.]

problems associated with self-representation, namely: the need to comply with the civil, family, and evidence rules; the effect of lack of knowledge of the law on the ability to defend; and the impact of the dual role of counsel and defendant. No other specific technical problems are mentioned in our precedential decisions, and none come to mind that would require warning (3) in a family case. *See also State v. King*, 210 N.J. 2, 19, 40 A.3d 41 (2012) (holding the colloquy's "goal is not to explore a defendant's **[*19]** familiarity with '"technical legal knowledge[,]"' for that is not required" (quoting *Reddish*, 181 N.J. at 595 (quoting *Faretta*, 422 U.S. at 835))).

As for the risks if the defense is unsuccessful, warning (a) already advises defendants of the potential consequences if the Division proves its charges. Warning (3) is thus largely covered by the remaining warnings, and can be removed to meet our Supreme Court's goal of an abbreviated colloquy.

A family court also need not give *DuBois*'s warning (7). 189 N.J. at 468. In *Reddish*, a capital case, our Supreme Court took "this opportunity to amplify our directive in *Crisafi*" by requiring criminal courts to "ask appropriate open-ended questions that will require defendant to describe in his own words his understanding of the challenges that he will face when he represents himself at trial." *Reddish*, 181 N.J. at 593, 595. Such open-ended questioning, while desirable, epitomizes the "more in-depth inquiry required before [a] defendant in [a] criminal case can waive [the] right to counsel." *J.E.V.*, 226 N.J. at 114. Eliminating that open-ended amplification is the most obvious way to follow our Supreme Court's instruction that family courts should "conduct an abbreviated yet meaningful colloquy." *Ibid.*

Finally, a family court need not give *DuBois*'s warning (9): **[*20]** "the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination." 189 N.J. at 468. This is another *Reddish* amplification which is more pertinent to criminal cases. 181 N.J. at 594. A criminal defendant who represents himself at a criminal trial runs the risk that any word he speaks may help convict him in that very trial. An action brought by the Division, such as an action alleging abuse or neglect under N.J.S.A. 9:6-8.21, is a separate civil proceeding. *Div. of Youth & Family Servs. v. Robert M.*, 347 N.J. Super. 44, 63, 788 A.2d 888 (App. Div. 2002) (citing *P.Z.*, 152 N.J. at 100). It is designed "to safeguard abused children from further harm" rather than to punish "criminal culpability." *Ibid.* As it is a separate, civil proceeding, there is no occasion for "requiring additional protections for the parents of abused children to be imported from our criminal jurisprudence into Title Nine proceedings." *See N.J. Div. of Youth & Family Servs. v. N.S.*, 412 N.J. Super. 593, 631, 992 A.2d 20 (App. Div. 2010) (quoting *P.Z.*, 152 N.J. at 112).

Thus, in a civil abuse or neglect proceeding, if a defendant with a right to counsel wishes to proceed pro se, a family court should conduct the abbreviated yet meaningful colloquy we have set forth above. That colloquy covers the crucial warnings a defendant should consider in order to make a knowing and intelligent waiver of counsel.

In requiring this abbreviated but **[*21]** meaningful colloquy, we set the baseline for a colloquy waiving the right to counsel in a family cases. Family courts are free to add to this colloquy. They may address any pertinent defenses, raise any other technical problems or risks of self-representation particular to the case, discuss the right to silence and the privilege against self-incrimination when prosecution is threatened, engage the defendant in open-ended questioning, or raise any other concern peculiar to the case to permit the court to determine if a defendant knowingly and intelligently waived the right to counsel. Nonetheless, we hold the abbreviated yet meaningful colloquy described above will suffice in all but the most exceptional circumstances.

IV.

We must now consider whether the colloquy conducted by the trial court covered the warnings in the abbreviated but meaningful colloquy described above. We recognize the court did not have the benefit of the *J.E.V.* opinion and "could not have anticipated our decision" implementing it. *See DuBois*, 189 N.J. at 472 (reversing even though the trial court could not have anticipated the *Reddish* decision). Nevertheless, "demonstrating that an individual has validly waived [the] right to counsel long **[*22]** required a showing that the waiver was knowing, voluntary and intelligent." *State v. Wessells*, 209 N.J. 395, 402, 37 A.3d 1122 (2012) (citing *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1964)). Similarly, family courts have long required a defendant's "waiver or renouncement of counsel . . . be made intelligently and understandingly." *In re Guardianship of C.M.*, 158 N.J. Super. 585, 592, 386 A.2d 913 (Cty. Ct. 1978); *see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 53, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). To make that showing in criminal cases, courts have long employed

the warnings enunciated in *Crisafi* in 1992 and *Reddish* in 2004. *J.E.V.* and our decision simply provide an abbreviated version.

Thus, we must review the abbreviated colloquy's requirements "to determine if each was satisfied." *See DuBois*, 189 N.J. at 469-73. Unfortunately, the colloquy by the motion judge did not include all the warnings required for a meaningful colloquy.

Regarding warning (a), the judge did not warn Mother about the nature of the charges in the family court complaint. The judge asked "Did you read the complaint? Do you understand the charges" but, before Mother could answer, the judge moved on to another question, "do you know why you are here?" Mother's answer — because a friend called the Division on her — failed to show she had any comprehension of the complaint or the charges. The judge also did not warn Mother adequately of the potential consequences. The judge informed Mother that the Division **[*23]** had already taken custody of her children, and that these were "very serious proceedings that could ultimately lead to the termination of your parental rights." However, the judge did not warn Mother of any of the other possible consequences, including that the Division was seeking continuing custody and a finding of abuse or neglect that would continue Mother on the central registry.

The motion judge did not give warnings (b), (c), and (d), except to note that Mother would have to comply with the rules of evidence. The judge did not mention the need to comply with the rules of family and civil procedure, the possible impairment to her defense from lack of knowledge of the law, or the effect of the dual role of counsel and defendant.

The motion judge did "recommend that [Mother] have an attorney" and "strongly suggest[ed she] either hire an attorney or [she] go to legal services and see if they would represent [her]." This conveyed the gist, albeit in the obverse, of warning (e), which advises that it would be unwise not to accept the assistance of counsel. Finally, the judge did not give warning (f) about the inability to claim ineffectiveness of counsel.

Thus, the motion judge did not **[*24]** conduct a meaningful colloquy. *See Crisafi*, 128 N.J. at 512. "Only then will the court be in a position to confirm that the parent both understands and wishes to waive the right to appointed counsel." *J.E.V.*, 226 N.J. at 114.

Moreover, "an unequivocal request for self-representation 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." *State v. Figueroa*, 186 N.J. 589, 593 n.1, 897 A.2d 1050 (2006); *see N.J. Div. of Child Prot. & Permanency v. R.L.M.*, 450 N.J. Super. 131, 150, 160 A.3d 714 (App. Div. 2017). Mother did not make an unequivocal request to proceed pro se.

Mother initially indicated she thought it was in her best interest to represent herself rather than be represented by the A.P.D. However, once the motion judge asked Mother if she was going to hire her own attorney or go to legal services, and told her that she could switch from the A.P.D. to another attorney, Mother indicated she "would like to do that." When the judge recommended she retain an attorney or approach legal services, Mother apprised "Okay" and "Thank You." Once the judge raised the possibility of obtaining another counsel, Mother endorsed getting another attorney rather than proceeding pro se. Indeed, at the fact-finding hearing, Father's attorney recalled "the issue [was] she didn't want a public defender, she wanted **[*25]** a private counsel," "was seeking private counsel," and had tried to get him to represent her. Thus, Mother did not make an unequivocal request to proceed without a lawyer.

The trial judge tried to verify that Mother had validly waived her right to counsel. The Division's attorney told the trial judge the inquiry before the motion judge was "extensive," but in fact the inquiry was inadequate. The trial judge did not obtain a transcript of the prior proceeding before the motion judge. The trial judge appears to have spoken with the motion judge, but what was said is not of record. When Mother later appeared, the trial judge did not speak with Mother directly. In any event, the trial judge did not remedy that Mother received an insufficient colloquy and did not unequivocally elect to proceed without counsel.[6]

V.

In criminal cases, "the failure of the trial court to engage

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[6] Whether Mother had waived her right to counsel is a separate issue from whether she had waived her right to be present by failing to appear for the fact-finding hearing. Nonetheless, we acknowledge "that the deficiencies in the manner in which the trial court handled [this issue] are undoubtedly due, in some measure, to the way in which defendant presented the issue" by failing to appear at the beginning of the hearing when the trial judge might have questioned her directly. *See King*, 210 N.J. at 20.

in a thorough exchange with defendant 'does not end our inquiry whether a defendant has waived counsel knowingly and intelligently.'" *DuBois*, 189 N.J. at 473 (quoting *Crisafi*, 128 N.J. at 512). "In the exceptional case, if the record indicates that the defendant actually understood the risks of proceeding *pro se*, a waiver may suffice." *Crisafi*, 128 N.J. at 513. "This limited exception, **[*26]** when the absence of a searching inquiry will not undermine the waiver of counsel, applies only in rare cases." *Ibid.* We hold this limited exception applies equally in termination of parental rights and abuse and neglect proceedings.

However, this is not such an exceptional case. *See State v. Blazas*, 432 N.J. Super. 326, 338-39, 74 A.3d 991 (App. Div. 2013). There is no indication Mother was an experienced litigant who actually understood the risks of proceeding pro se. *Cf. Crisafi*, 128 N.J. at 513-16; *DuBois*, 189 N.J. at 473-74. More significantly, it is ambiguous whether Mother actually elected to proceed pro se or simply wanted different counsel. Thus, we must conclude the motion and trial judges abused their "discretion in finding that defendant knowingly and intelligently waived [her] right to counsel." *DuBois*, 189 N.J. at 475.

We vacate and remand for a new fact-finding hearing at which Mother has an opportunity to be represented by counsel. We do not reach the merits of the family court's finding of abuse and neglect.

Vacated and remanded. We do not retain jurisdiction.

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