

September 15, 2021

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Francis V. Kenneally, Clerk
Supreme Judicial Court of Massachusetts
John Adams Courthouse, Suite 1400
Boston, MA 02108

Re: *Commonwealth of Massachusetts v. Leon Dufresne*, (SJC 13123) – *amicus curiae* letter in support of convening a Study Group on implementing a right to counsel in proceedings under G. L. c. 209A

Dear Clerk Kenneally:

The Boston Bar Association (“BBA”) respectfully submits this letter in response to the amicus solicitation issued by the Justices in the above-captioned case.¹ The BBA has long embraced a right to counsel for indigent parties in civil proceedings where critical human rights are at stake and believes that if one party to an abuse prevention case is afforded a right to counsel, it is essential that the adverse party have an equal right. Further, while a right to counsel should never be denied because of practical issues related to implementing that right, the BBA recognizes that there are numerous issues that will arise in cases where both parties to a Ch. 209A proceeding are afforded counsel. As a result, if the Court decides that there should be a right to counsel for both parties in Ch. 209A cases, the BBA respectfully proposes that the Court appoint a Study Group to make recommendations as soon as feasible as to how best to implement a systematic approach to ensure that the basic features of G. L. c. 209A – speedy redress and protection of abuse survivors in myriad ways – remain paramount and effective.

1. Any right to counsel in abuse prevention cases must be afforded to all parties.

The BBA is deeply committed to expanding the civil right to counsel in civil proceedings when critical human rights are at stake. As set forth in the BBA’s 2008 report, *Gideon’s New Trumpet: Expanding the Civil Right to Counsel In Massachusetts* (“Report”),² Massachusetts residents enjoy a right to counsel in certain civil matters by judicial decision or legislation but, as the BBA contemplated in 2008, these limited rights must expand over time to address the justice gap that too often leaves low-income litigants to

¹ The Court solicited amicus briefs on the following issues: “Whether, or in what circumstances, a defendant is entitled to the assistance of counsel in connection with G. L. c. 209A proceedings; whether a defendant’s constitutional right to the assistance of counsel or due process is infringed if he or she is criminally charged with violation of a civil abuse prevention order that issued, pursuant to G. L. c. 209A, while the defendant was not represented by counsel.”

² https://bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf

find for themselves in a court system that, despite many efforts to assist self-represented litigants, still poses daunting challenges for the unrepresented. Since the Report was issued, the Court has done just that in some circumstances. See *L.B. v. Chief Justice of Probate and Family Court Dep't*, 474 Mass. 231 (2016) (recognizing right to counsel for parents in petitions for removal of the guardian or modification of the guardianship when the parent presents a meritorious or colorable claim); *In re Guardianship of V.V.*, 470 Mass. 590 (2015) (recognizing right to counsel for parents in guardianship proceedings initiated by private parties); *Adoption of Meaghan*, 461 Mass. 1006 (2012) (recognizing right to counsel for children and indigent parents in termination/adoption proceedings filed by “person(s) with care and custody” of a child).³

The *Dufresne* case raises the issue whether a right to counsel should be found for indigent defendants in proceedings under G. L. c. 209A, the Abuse Prevention Act.⁴ Mr. Dufresne relies, among other grounds, on his liberty interest in avoiding potential incarceration for violation of a Ch. 209A order in a collateral criminal proceeding as the basis for his defense that he cannot be convicted because counsel was not appointed to represent him in the underlying Ch. 209A case. But there is far more at stake in a Ch. 209A case. The purpose of Ch. 209A is to ensure the personal safety of survivors of domestic violence, and the court’s broad powers under the Act include not only stay-away orders restraining personal liberty (and ultimately potential criminal liability if the defendant violates the order) but orders that may affect child custody, housing and much more. Moreover, these interests are often at risk for the plaintiff as well, since survivors denied a Ch. 209A order may be forced to leave both home and children to preserve their lives.

There can be little doubt that these basic human needs implicated in Ch. 209A orders fall within the realm of the most critical human rights that require the highest protection available to ensure equal access to justice, *i.e.*, full representation. Report at 4. In the words of the seminal resolution adopted by the ABA in 2006, and endorsed by the BBA, the Massachusetts Bar Association, and the Massachusetts Access to Justice Commission, legal counsel should be provided “as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, *safety*, health or child custody....” *Id.*, at 5 (emphasis supplied).

³ The BBA acknowledges that the trend toward expanding the civil right to counsel seen in these cases has not been uniformly followed. *Dep't of Revenue v. Grullon*, 485 Mass. 129 (2020), involved a civil contempt order based on unpaid child support. While the Court vacated the order due to the failure to afford the defendant the requisite due process safeguards, the Court declined to reach the question whether there is a right to counsel for a defendant parent in all such cases. In *Guardianship of K.N.*, 476 Mass. 762 (2017), this Court held that an indigent *guardian* (also claiming to be a *de facto* parent) did not have a protected liberty interest that would require a right to counsel, but recognized that the equitable powers of the Probate and Family Court allows a judge to grant a motion requesting counsel for such a guardian where the judge concludes that doing so would materially assist in determining the best interests of the child.

⁴ As noted in other *amici* submissions, the issues presented by this case arise in other contexts as well, for example, with respect to harassment prevention order proceedings under G. L. c. 258E.

While the Report did not include recommendations specifically applicable to Ch. 209A or other abuse prevention proceedings,⁵ the BBA recognized several guiding principles to determine when there should be a right to counsel. Two of them apply to the *Dufresne* case.

- A. Power imbalances often found in Ch. 209A cases can be meaningfully addressed by appointment of counsel.

One of the core principles underscoring the need for counsel is “when a potential loss of basic human needs due to a dramatic power imbalance [is . . .] at stake.” *Id.* at 7. Such a power imbalance exists when the adverse party is represented by counsel because

[a]t best, the result is a severe challenge to the adversary system and the judges, mediators, clerks and opposing counsel who must navigate the ethical quagmire which can result when one party is unrepresented. At worst, the situation reflects the ultimate breakdown of an adversary system that depends upon a rough equality between the parties.

Id. at 8.

Appointment of counsel for both defendants and plaintiffs would avoid precisely the type of “asymmetry of representation” that the United States Supreme Court acknowledged in *Turner v. Rogers*, 564 U.S. 431, 447 (2011) would “alter significantly the nature of the proceedings.” Unlike the situation in *Dep’t of Revenue v. Grullon*, 485 Mass. 129 (2020), in which the party seeking to obtain child support has significant support from the Department of Revenue, *id.* at 143 (Gants, C.J., concurring opinion), the record presently before the Court does not clearly establish that Ch. 209A plaintiffs are similarly supported by either governmental or private advocates.⁶ Given the nature of the competing interests in Ch. 209A cases, the asymmetry that might be created by appointment of counsel for defendants is best addressed by appointment of counsel for both parties.

These concerns about power imbalances are particularly acute in the Chapter 209A context. Plaintiffs may not only be on the wrong end of power imbalances with respect to defendants, their alleged abusers, but by definition, plaintiffs’ personal and familial safety is at stake in such proceedings. Mr. Dufresne’s use of a right to counsel argument as a defense to a Ch. 209A criminal enforcement action could potentially upend the entire Ch.

⁵ As noted in the Report, the BBA did not propose a right to counsel pilot project in the area of Ch. 209A restraining orders in 2008 due to perceived concerns in the domestic violence community and among some in the court system. *Id.* at 8. Consistent with the notion that the civil right to counsel is a right that will evolve over time, the passage of time from 2008 to 2021 is more than sufficient to warrant a fresh look at whether the time has come to recognize a right to counsel for parties to abuse prevention cases.

⁶ The BBA notes that the record is similarly scant on other matters often considered in civil right to counsel analysis, such as alternative procedural safeguards to protect the liberty interest or core personal rights threatened by proceeding without counsel; this may be due to the unusual situation in which the right to counsel is not raised affirmatively in the underlying proceeding but as a defense in a subsequent related criminal proceeding.

Francis V. Kenneally, Clerk

September 15, 2021

Page 4

209A process, with dramatic consequences for survivors of violence who may imperil their safety by declining to seek protection from the legal system.

For these reasons, the BBA supports the position of Amici the Women's Bar Association of Massachusetts and the National Coalition for a Civil Right to Counsel that the right to counsel in a Ch. 209A proceeding must be afforded to both parties to Ch. 209A cases.

- B. Civil proceedings related to criminal proceedings in which the deprivation of liberty is at stake present a compelling case for right to counsel.

Another common theme that the Report focused on is the need for counsel in a civil case related to a criminal case, where one case is a collateral consequence of the other and unfairness results if counsel is provided on the criminal side, but not the civil side. Such matters will invariably raise complex questions which would easily challenge the ability of a self-represented litigant to handle. One example of this situation cited in the Report involves representation in eviction proceedings arising from criminal conduct. Report at 8-11. The *Dufresne* case presents the opposite scenario, in which it is the criminal proceeding that is a collateral consequence of the civil case, but the principle applies with equal force especially given the that, for understandable reasons, the defendant in the criminal case has no ability to revisit the issuance of the abuse prevention order.

2. The BBA respectfully submits that the Court should appoint a Study Group to make expeditious recommendations for how best to implement the right to counsel in Ch. 209A cases.

Any decision to recognize a right to counsel in this case will become immediately effective. As discussed in the *amicus* briefs, there are numerous issues that courts will have to grapple with when appointment of counsel is required for both parties in Ch. 209A cases. These include how to avoid delays and multiple hearings which may jeopardize the safety of the petitioner or discourage pursuing protection, and finding counsel in busy courts for every indigent party to a Ch. 209A case in an already strained public counsel system, given the significant number of cases that would involve the need for representation on both sides.

These circumstances should never lead to a reluctance to recognize a right to counsel when it should be required, as the United States Supreme Court has indicated with respect to cost considerations, *see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 28 (1981) (describing State's "pecuniary interest" as merely "legitimate" and "hardly significant enough to overcome private interests as important as those here."). Nor has it done so in the past when this Court has recognized a right to counsel in civil matters such as care and protection cases and termination of parental rights cases involving large numbers of litigants. But in light of these challenges, the BBA respectfully submits that the Court should appoint a broad-based Study Group to make recommendations for how best to implement any right to counsel in Ch. 209A cases, taking into account the competing concerns of the many stakeholders that will be substantially impacted by recognition of the necessity for counsel for low-income parties in these matters.

Francis V. Kenneally, Clerk

September 15, 2021

Page 5

The creation of a Study Group to assist in the analysis of such complex issues is in line with prior decisions of this Court. *See Commonwealth v. Pelosi*, 441 Mass. 257, 258 fn. 1 (2004) (announcing the “formation of a committee that will study and present to the court alternatives to the current protocol regarding defense access to privileged records in sexual assault cases”); *see also Commonwealth v. Dwyer*, 448 Mass. 122, 150 fn. 1 (2006) (acknowledging “the substantial contributions of the committee” announced in *Pelosi*). This could include not only recommendations to the Trial Court but also to the Legislature, including for additional funding for the appointment of counsel in this new category of right to counsel cases. This would also be similar to what the Court did in *L.B. v. Chief Justice of Probate and Family Court Dep’t*, in which the Court offered the Probate and Family Court guidance on the development of rules and polices to implement the right to counsel for parents at different phases of guardianship cases. *Id.* at 244. In this instance, however, the BBA respectfully submits it would be beneficial for the Court to first obtain input from those who will be impacted by changes to Ch. 209A proceedings necessitated by providing counsel to indigent parties. *See In re Georgette*, 439 Mass. 28, 45 (2003) (with regard to the ethical obligations of attorneys representing children in state intervention cases, charging the Standing Committee on the Rules of Professional Responsibility with developing standards or guidelines, after soliciting “the views of interested parties... including those of the department [Massachusetts Department of Social Services], CPCS [Committee for Public Counsel Services], other lawyers who practice in intervention cases, relevant organizations, and judges and staff members who handle the cases).

The BBA applauds the Court’s recognition of the importance of the right to counsel issue in its request for amicus briefs. For the reasons stated in this letter, the BBA believes that the type of valuable input sought by the Court would most effectively be offered in the format of a Study Group, ensuring that the voices of all critical stakeholders are heard at the table. The BBA stands ready, willing and able to assist the Court in this endeavor, should the Court decide that a Study Group is an appropriate next step.

Respectfully submitted,



Deborah J. Manus
President, Boston Bar Association

DECLARATION PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party or a party's counsel authored this letter in whole or in part. No party, party's counsel, or a person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the letter. Neither amicus curiae nor its counsel has either represented any of the parties to this appeal in another proceeding involving similar issues, or been or represented a party in a proceeding or legal transaction at issue in the present appeal.



Deborah J. Manus

CERTIFICATE OF SERVICE

I, Deborah Manus, certify that on September 15, 2021, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.



Deborah J. Manus