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Garden State CLE Presents:

Extreme Risk Protection Orders



Lesson Plan

Robert Ramsey, Instructor

Introduction

The Prevention of Domestic Violence Act¹ (PDVA) serves as a prime example of a statutory scheme intended to provide civil restraints on criminal behavior. The PDVA provides a wide range of tools and options for judges of the Family Part of the Chancery Division to protect victims from abuse, harassment, stalking and physical attack. Despite the PDVA's utility in protecting victims of domestic violence, there are a wide variety of other circumstances where victims who are subject to grave danger do not qualify for protection, usually due to the relationship that that potential victim has to her assailant. History has demonstrated these circumstances to the Legislature. By way of example, in *M.A. v. E.A.*,² a young teenage victim was subject to an ongoing series of sexual assaults in her home by her stepfather. The victim's mother attempted to obtain a restraining order under the PDVA and was denied relief on the grounds that her daughter did not qualify as a victim of domestic violence due her age. The public outrage over this result culminated in 2015 in the enactment of the Sexual Assault Survivors Protection Act (SASPA).³ This legislation fills a void in the law and allows any person alleging to be a victim of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, and who is not eligible for a restraining order as a victim of domestic violence to file an application with the Superior Court alleging the commission of such conduct or attempted conduct and seeking a temporary protective order.⁴

¹ N.J.S.A. 2C:25-17 *et seq.* See Chapter 13 *supra*.

² *E.A. v. M.A.*, 388 N.J.Super. 612, 909 A.2d 1168 (App. Div. 2006).

³ N.J.S.A. 2C:14-13 to -21.

⁴ [N.J.S.A. 2C:14-14\(a\)\(1\)](#).

In addition to the enactment of SASPA, the legislature has further expanded the use of civil restraints to enjoin another type of deadly criminal behavior. One of the lessons learned by law enforcement in the investigation of mass shootings in the United States is that the perpetrators of these crimes often demonstrate discernable signs and symptoms that they are either planning or likely to engage in mass slaughter, often with legally acquired and possessed firearms. The clues to future catastrophe are often visible through posting on social media, comments to family or friends or revelations to mental health counselors. The key problem for law enforcement is that in many jurisdictions, there is no procedure available to involve the criminal or civil courts on a preemptive basis to remove the firearms from these dangerous people. In addition, the seizure of firearms from a private citizen in the absence of a crime raises significant constitutional issues under the Second Amendment.⁵

The New Jersey Legislature addressed these issues with the enactment of N.J.S.A. 2C:58-20, The Extreme Risk Protective Order Act of 2018 (the Act).⁶ The following sections will detail substantive law and procedures under this Act and SASPA as well.

⁵ *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

⁶ The statute goes into effect September 1, 2019.

Extreme Risk Protective Orders - Definitions

The definition section of the Act⁷ makes it clear that the Legislature's intent is to provide a broad sweep to this preventative measure. By way of example, a petition for an extreme risk protective order can be made by a household member, a family member or any law enforcement officer. The statute also confers civil and criminal immunity on a law enforcement officer who declines to seek an extreme protective order. Immunity is also extended to law enforcement agencies for any damage or deterioration of firearms or ammunition stored or transported under an order unless the damage or deterioration resulted from recklessness, gross negligence, or intentional misconduct by the law enforcement agency.⁸

The concept of a household member generally tracks the definition used in domestic violence cases and includes a spouse, domestic partner, partner in a civil union or former spouse, former domestic partner, or former partner in a civil union couple, or any other person who is a present household member or was at any time a household member. It also includes a person with whom the respondent has a child in common, or with whom the respondent anticipates having a child in common if one of the parties is pregnant; or a current or former dating partner.

The breadth of the statute can also be seen in its expansive concern for deadly weapons. The definition section makes clear that both traditional firearms and deadly weapons as defined under N.J.S.A. 2C:11-1 can be seized under the terms of an extreme protective order.

Finally, the definition section expands the time period related to evidence used to support the extreme protection petition to six months. Stated another way, evidence tending to demonstrate a potential deadly threat is relevant if it occurred within the prior six months before the filing of the petition.

⁷ N.J.S.A. 2C:58-21.

⁸ N.J.S.A. 2C:58-22.

Contents of Petition for Temporary Extreme Risk Protective Order

A petition seeking temporary relief in the form of an extreme risk protective order must establish that that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm.⁹ The petition forms are available at the courts, and at State, county, and municipal law enforcement agencies.

Prior to filing a petition with the court, a family or household member may request assistance from a State, county, or municipal law enforcement agency which shall advise the petitioner of the procedure for completing and signing a petition for a temporary extreme risk protective order. A law enforcement officer from the agency may assist the family or household member in preparing or filing the petition. This assistance may include, but not be limited to, providing information related to the statutory factors supporting a petition, joining in the petition, referring the matter to another law enforcement agency for additional assistance, or filing the officer's own petition with the court.

The application for a temporary extreme risk protection order is not the exclusive remedy available to petitioners. Petitioners may also simultaneously seek protection under the Prevention of Domestic Violence Act¹⁰ or an involuntary commitment to a mental health facility.¹¹

A petition for a temporary extreme risk protective order must include an affidavit setting forth the facts tending to establish the grounds for granting the petition, or the reason for believing that they exist. It should also include, to the extent available, the number, types, physical description, and locations of any firearms and ammunition currently believed by the petitioner to be controlled or possessed by the respondent.¹²

⁹ N.J.S.A. 2C:58-23.

¹⁰ N.J.S.A. 2C:25-17 *et seq.*

¹¹ N.J.S.A. 30:4-27.1 *et seq.*

¹² N.J.S.A. 2cL58-23(b).

Issuance of Temporary Protective Order

Because of the risk of mass murder or widespread injury, petitions for a temporary extreme risk protective order are to be considered by judges and county prosecutors on an expedited basis.¹³ In considering the merits of the petition for temporary relief, the judge may take live testimony under oath from the petitioner, other witnesses and the investigating police. The judge may also rely upon the petitioner's affidavit.

The standard for issuing the temporary protective order is one of good cause. A judge must issue the order if the court finds good cause to believe that the respondent poses an immediate and present danger of causing bodily injury to the respondent or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm. In making this decision, the Court should also consider additional factors which will be provided on an expedited basis by the county prosecutor's office.¹⁴ These data include whether the respondent:

- (1) has any history of threats or acts of violence by the respondent directed toward self or others;**
- (2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;**
- (3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c. 261 (C.2C:25-17 et seq.);**
- (4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the "Sexual Assault Survivor Protection Act of 2015," P.L.2015, c. 147 (C.2C:14-13 et al.);**

¹³ N.J.S.A. 2C:58-23(a).

¹⁴ N.J.S.A. 2C:58-23(f).

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of P.L.1992, c. 209 (C.2C:12-10), or domestic violence offense enumerated in section 3 of P.L.1991, c. 261 (C.2C:25-19);

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse; or

(8) has recently acquired a firearm, ammunition, or other deadly weapon.

Contents of Temporary Protective Order

If the temporary order is granted by the judge, its term and conditions shall require the respondent to do all the following:

- 1.) Respondent will be prohibited from having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition,**
- 2.) Respondent will be prohibited from securing or holding a firearms purchaser identification card or**
- 3.) Respondent will be prohibited from possessing or applying for a permit to purchase a handgun¹⁵ handgun during the period the protective order is in effect;**
- 4.) Respondent must surrender in a safe manner to the local law enforcement agency all firearms and ammunition in the respondent's custody or control, or which the respondent owns or possesses, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. The court also shall notify the respondent that the respondent is prohibited from purchasing firearms or ammunition or applying for a firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun.¹⁶**
- 5.) Comply with a search warrant to recover firearms and authorize the law enforcement officer who serves the order shall request that all firearms and ammunition immediately be surrendered.**

¹⁵ N.J.S.A. 2C:58-3.

¹⁶ N.J.S.A. 2C:58-26(b).

In addition, the temporary order will require the respondent to complete the following affirmative acts:

- 1.) To surrender firearms and ammunition in the respondent's custody or control, or which the respondent possesses or owns,**
- 2.) Surrender any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent.¹⁷ Any card or permit issued to the respondent shall be immediately revoked.¹⁸**

A temporary extreme risk protective order will remain in effect indefinitely and until a court of competent jurisdiction issues a further order. Any temporary extreme risk protective order shall be deemed to be in effect throughout the State, and must be enforced by all law enforcement officers.¹⁹

¹⁷ N.J.S.A. 2C:58-26.

¹⁸ N.J.S.A. 2C:58-3.

¹⁹ N.J.S.A. 2C:58-23(k).

Restraining Order Post-Issuance Requirements

Once a court has issued a temporary extreme protective order, it must take certain steps to make sure that all the interested parties have been duly notified. This process includes the following steps:

(a) Responsibilities of the Issuing Court

(1) The Court will immediately forward a copy of the order to the petitioner and county prosecutor in the county in which the respondent resides; and

(2) send a copy of the order and the petition to the appropriate law enforcement agency in the municipality in which the respondent resides.

(b) Responsibilities of Local Police

(1) Upon receipt, the local police are responsible for personally serving a copy of the order on the respondent. Service on the respondent should be made immediately, or as soon as practicable.

(2) If personal service cannot be made upon the respondent, the court may order other appropriate substituted service. However, at no time can a petitioner who is a family or household member be asked or required to serve any order on the respondent. The law enforcement agency serving the order may not charge a fee or seek reimbursement from the petitioner for service of the order. Finally, the police may not authorize a permit to purchase a firearm to a person who is under the restraints of an extreme risk protective order.²⁰

(c) Responsibilities of the County Prosecutor

(1) Notice of temporary extreme risk protective orders must be sent by the county prosecutor to the appropriate chiefs of police, members of the State Police, and any other appropriate law enforcement agency or court.

²⁰ N.J.S.A. 2C:58-3(c)(10).

(d) Responsibilities of the Administrative Office of the Courts

N.J.S.A. 2C:58-30 requires that the Administrative Office of the Courts maintain a central registry containing the names and other pertinent information of respondents who have been subject to either temporary or permanent extreme risk protective orders. The information in this registry is confidential and available to law enforcement.²¹ A respondent may have his name removed from the registry upon the issuance of an order terminating the final order.

(e) Disposition of Seized Weapons

A respondent who has been the subject of a firearms seizure under the authority of an extreme risk protective order may request that the weapons and ammunition be transferred to a federally licensed firearms dealer and sold.²²

²¹ N.J.S.A. 2C:58-30.

²² N.J.S.A. 2C:58-26(b)(2) and N.J.S.A. 2C:58-27.

Protective Orders Filed against Law Enforcement Officers

Because of the special responsibilities of law enforcement personnel, the Act has certain screening procedures that must be used whenever the respondent is a police officer.²³ A petition for a temporary extreme risk protective order filed against a law enforcement officer must be filed in the law enforcement agency in which the officer is employed. The law enforcement officer or employee receiving the petition shall advise the petitioner of the procedure for completing and signing a petition. Upon receipt of the petition, the law enforcement officer's employer shall immediately initiate an internal affairs investigation.

The disposition of the internal affairs investigation shall immediately be served upon the county prosecutor who shall make a determination whether to refer the matter to the courts for the issuance of a temporary protective order. The law enforcement officer's employer must take appropriate steps to implement any findings set forth in the disposition of the internal affairs investigation. The respondent law enforcement officer may not be terminated during the pendency of the internal affairs investigation.

²³ N.J.S.A. 2C:58-23(1).

Hearing for a Final Extreme Risk Protective Order

The hearing procedures for consideration of a final extreme risk protective order generally follow the same procedures used in the Family Court in domestic violence cases, although there are significant differences between the two procedures. Although both types of hearing must be held within 10 days,²⁴ the extreme risk hearing may be heard before any judge in any Division and Part of the Superior Court. The following procedures govern the Court's decision whether to grant the extreme risk protective order.

(a) Burden of Proof.

The Legislature has assigned preponderance of the evidence as the required burden of proof in the hearings. This means that the proceeding is essentially civil in nature.²⁵ **If the court finds by a preponderance of the evidence at the hearing that the respondent poses a significant danger of bodily injury to the respondent himself or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm, the court must issue an extreme risk protective order.**

(b) Petitioner's Proofs at the Hearing

A Superior Court judge hearing a petition for a permanent order may consider any relevant evidence.²⁶ The key issue is the imminent threat the respondent poses to specific individuals or the public based upon the use of firearms. To buttress this evidence, the county prosecutor is responsible for providing the judge with the following background information about the respondent:

(1) has any history of threats or acts of violence by the respondent directed toward self or others;

(2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;

²⁴ N.J.S.A. 2C:25-29(a) and N.J.S.A. 2C:58-24(a).

²⁵ N.J.S.A. 2C:58-24(b).

²⁶ N.J.S.A. 2C:58-24(c).

(3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the “Prevention of Domestic Violence Act of 1991,” P.L.1991, c. 261 (C.2C:25-17 et seq.);

(4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the “Sexual Assault Survivor Protection Act of 2015,” P.L.2015, c. 147 (C.2C:14-13 et al.);

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of P.L.1992, c. 209 (C.2C:12-10), or domestic violence offense enumerated in section 3 of P.L.1991, c. 261 (C.2C:25-19);

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse; or

(8) has recently acquired a firearm, ammunition, or other deadly weapon.

Contents of Final Extreme Risk Protective Order

An extreme risk protective order issued pursuant to this section shall prohibit the respondent from having custody or control of, owning, purchasing, possessing, or receiving a firearm.²⁷ As a matter of law, the respondent while under the restraints of the extreme risk protective order will also be considered to be a “certain person” under N.J.S.A. 2C:39-7(b)(4)²⁸ and thus guilty of a crime of the 4th degree for possessing, purchasing, controlling or acquiring a firearm or ammunition.

²⁷ See also N.J.S.A. 2C:58-3(c)(10).

²⁸ “A person who is subject to a court order prohibiting the custody, control, ownership, purchase, possession, or receipt of a firearm or ammunition issued pursuant to the “Extreme Risk Protective Order Act of 2018,” P.L.2018, c. 35 (C.2C:58-20 et al.) who purchases, acquires, owns, possesses, or controls a firearm or ammunition is guilty of a crime of the third degree.”

Confidential Central Registry

N.J.S.A. 2C:58-30 requires that the Administrative Office of the Courts maintain a central registry containing the names and other pertinent information of respondents who have been subject to a permanent extreme risk protective order. The information in this registry is confidential and available to law enforcement.²⁹ A respondent may have his name removed from the registry upon the issuance of an order terminating the final order.

²⁹ N.J.S.A. 2C:58-30.

Procedures for Terminating a Final Extreme Risk Protective Order

The procedures for moving to vacate a final extreme risk protective order are set forth under N.J.S.A. 2C:58-25. The application to terminate the order may be made by either the respondent or the petitioner. It can be filed at any time following the issuance of the final order. The application must be heard by a Superior Court judge following proof of notice to the respondent, the petitioner, the county prosecutor and the local police that investigated the case initially.

(a) Proofs at the Termination Hearing

In cases where the respondent has filed the application to terminate, he has the burden of going forward with the evidence and must demonstrate by a preponderance of the evidence that he no longer poses a significant danger of causing bodily injury to the respondent himself or to other persons by having custody or control of, owning, possessing, purchasing, or receiving a firearm.

At the termination hearing, the judge may consider any relevant evidence, including whether the respondent has received, or is receiving, mental health treatment since the issuance of the initial temporary extreme risk protective order. Additionally, the judge must consider each of the following factors set forth under N.J.S.A. 2C:58-23(f). These include evidence about whether the respondent:

- (1) has any history of threats or acts of violence by the respondent directed toward self or others;**
- (2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;**
- (3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c. 261 (C.2C:25-17 et seq.);**

(4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the “Sexual Assault Survivor Protection Act of 2015,” P.L.2015, c. 147 (C.2C:14-13 et al.);

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to section 1 of P.L.1992, c. 209 (C.2C:12-10), or domestic violence offense enumerated in section 3 of P.L.1991, c. 261 (C.2C:25-19);

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse; or

(8) has recently acquired a firearm, ammunition, or other deadly weapon.

Return or Destruction of Seized Firearms and Ammunition

If the Superior Court grants an order terminating the extreme risk order, the respondent may petition the law enforcement agency holding his weapons for the return of any surrendered firearms or ammunition. Within 30 days of receiving a petition for the return of surrendered firearms or ammunition and after the termination of the order, the law enforcement agency shall return the firearm or ammunition³⁰ unless:

- (1) the firearm has been reported as stolen; or**
- (2) the respondent is prohibited from possessing a firearm under State or federal law.**

(a) Destruction of seized firearms and ammunition

A law enforcement agency holding any firearm or ammunition under a temporary or final extreme risk protective order for more than one year after the termination of the order may destroy the firearm or ammunition in accordance with the policies and procedures of the agency for destruction of firearms or ammunition.

³⁰ N.J.S.A. 2C:58-26(d).

Contempt of Court

A respondent who has been served with either a temporary or final extreme risk protective order and thereafter fails to comply with its terms and conditions can be charged with contempt of court under N.J.S.A. 2C:29-9. Contempt under these circumstances is a crime of the fourth degree.
