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Judge Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

Via electronic mail

Rule 3:5B: Extreme Risk Protective Orders

Dear Judge Grant:

On behalf of Partners for Women and Justice (“Partners”), please accept this comment to proposed Rule 3:5B on Extreme Risk Protective Orders (“ERPO”). Partners has provided free legal services to low-income victims and survivors of domestic violence in family court matters since 2003. Partners’ staff attorneys and pro bono counsel handle restraining orders and related matters, such as child support, custody and visitation in Essex, Union, Middlesex, Hudson and Passaic Counties.

Successful implementation of the Extreme Risk Protective Order Act of 2018 (“ERPOA”), N.J.S.A. § 2C:58:20 et seq., will potentially enhance safety inside the home, reduce suicides and homicides, protect law enforcement, and may help prevent mass shootings by removing weapons upon a showing that the respondent is a danger to self or others. The presence of a gun in the home is linked to a heightened risk of intimate partner homicide when domestic violence is present.¹ In intimate partner homicides, perpetrators are most likely to shoot their victims.² When physical abuse and guns are present in the home, a study of survivors living in shelters found that two-thirds of victims report that their partner used the weapon against them, most commonly as a threat to kill them.³ Likewise, suicidality is correlated with elevated risk of

¹ Campbell, Jacquelyn C et al., *Risk factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*. 93 American Journal of Public Health 1089, 1097 (2003)., available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>; Sorenson, Susan, *Firearm Use in Intimate Partner Violence*, 30 Evaluation Review 229-236 (2006); See Holson, Laura, *Murders by Intimate Partners Are on the Rise, Study Finds*, N. Y. Times, April 12, 2019.

² Sorenson, Susan B. *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon* 26, 3 Journal of Women's Health (2017): 249-258., available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5361762/>.

³ Sorenson, SB, and Douglas JW., *Weapons in the Lives of Battered Women* 94, 8 American Journal of Public Health (2004): 1412-7., available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448464/>.

intimate partner homicide.⁴ While gun forfeiture is already a part of every final restraining order under the Prevention of Domestic Violence Act (“PDVA”), N.J.S.A. § 2C:25-29(b), ERPOs provide another tool for family members who may not wish to, or be able to, terminate contact with the respondent or may be unable to satisfy the evidentiary requirements of the PDVA without the benefit of counsel. Partners offers the following comments on Rule 3:5B.

1. Superior Court Division Hearing ERPO Petitions

The designation of the proposed rule under Part III indicates a preliminary decision to give the Criminal Division jurisdiction to decide ERPO petitions. ERPO is a civil order intended to ensure the safe surrender of weapons and could just as easily, and indeed, more appropriately, belong to the Family Part. Like the PDVA, the effect of the entry of an ERPO is the removal of firearms from the respondent, not the bringing of criminal charges. ERPOs are only available to law enforcement or, like restraining orders, to those with a family, dating or household member relationship to the respondent. N.J.S.A. § 2C:58-21(2). Additionally, temporary and final ERPO hearings have some structural similarities to the temporary and final restraining order hearings pursuant to the PDVA which are handled in the Family Part.⁵ If these petitions can be heard in family court, petitioners who are concerned about the safety of a family member but wish to avoid triggering a criminal investigation and possible prosecution of the respondent will be more likely to apply for protection. An additional benefit to listing the rule under Family, Part V, is that a victim of domestic violence who decides to withdraw an application for a restraining order could pursue the ERPO instead, without having to leave the courthouse. Prosecutors are already assigned to the contempt calendar in the Family Part to prosecute violations of restraining orders and could likewise litigate ERPOs, with the assignment of counsel to respondents as needed.

2. Processing of Temporary ERPOS

Greater clarity about the process for seeking and obtaining a temporary ERPO is necessary to implement the statute. Under the PDVA, the police are required to offer the victim assistance with obtaining a temporary restraining order from the municipal court when the superior court is closed.⁶ If a comparable process is envisioned for the application for the temporary ERPO,⁷ the Attorney General will need to issue guidelines for the police and prosecutors on their respective roles in assisting the petitioner as well as criteria on when law enforcement should initiate the petition directly. Consideration should be given to potential jurisdictional questions that may arise when a municipal judge is asked to approve a search warrant, but the respondent lives in another municipality.

3. Standard for Temporary ERPOs

The Rule includes inconsistent standards for emergent relief which should be harmonized. The standard should conform to the Extreme Risk Protective Order Act which dictates that the temporary order shall issue “if the court finds good cause to believe that the respondent poses an *immediate and present*

⁴ Campbell, Jacquelyn C et al., *Intimate Partner Homicide: Review and Implications of Research and Policy Trauma*, 8, 3 Violence & Abuse (July 2007) 246-269.

⁵ If ERPO is heard in family court, it will be important for the family judges to understand the distinct standards for weapons forfeiture under ERPO versus the PDVA. Restrictions on firearms are automatic with a temporary and final restraining order and a search may be ordered based on reasonable cause. N.J.S.A. § 2C:39-1.

⁶ State of New Jersey Domestic Violence Procedures Manual at 2.2.1 (Oct. 9, 2008), available at <https://njcourts.gov/courts/assets/family/dvprcman.pdf?c=gkg..>

⁷ The statute authorizes law enforcement to assist the petitioner in preparing the petition or to initiate the petition directly on behalf of law enforcement, N.J.S.A. § 2C:58-23, but this guidance is insufficient for law enforcement agencies to follow.

danger of causing bodily injury to the respondent or others by having custody or control of owning, possessing, purchasing or receiving a firearm.” N.J.S.A. § 2C:58-23(e) (emphasis added). The standard is correctly described in R. 3:5B(d)(1), but confusion is created by conflating the standard for the final with the temporary in Subsection 6, entitled “Emergent Relief” and identifying the legal standard as requiring proof of “significant danger of bodily injury.” R. 3:5B(a)(6). Subsection 6 instead should be amended to read:

(6) Emergent Relief. If it appears that the respondent poses an immediate and present danger of causing bodily injury to the respondent or others by having custody of control of owning, possessing, purchasing or receiving a firearm, the court shall . . . order emergency relief . . . “

R. 3:5B(a)(6) (new language italicized).

If the temporary order does not issue, the rule, and to some degree, the legislation are silent as to whether a hearing to consider issuing the final ERPO should proceed. We would note that in other states, e.g., New York, that have adopted ERPO-like statutes, it is possible to proceed to a final hearing even if the temporary restraints were denied.⁸ New Jersey’s law leaves open this possibility. The language of ERPOA indicates that a hearing should be held, without conditioning the hearing upon the grant of the preliminary ERPO: “A hearing for a final extreme risk protective order shall be held in the Superior Court . . . within 10 days of the filing of a petition” N.J.S.A. § 2C:58-24(5)(a). This construction of the statute allows for the possibility that the petitioner may fail to satisfy the element of imminence of harm at the temporary hearing but prevail at the final hearing, which has a lower threshold of harm -- “significant danger” -- but a higher evidentiary standard, that of preponderance of the evidence. N.J.S.A. § 2C:58-24 (5)(b); R. 3:5B(e)(6). The higher threshold for harm on the temporary reflects a legislative intent to include the element of imminence of the threat before removing firearms on an ex parte basis. Likewise, in other contexts, a failure to prevail on an order for temporary restraints does not moot the litigant’s application for a final injunction. The rule would benefit from clarification on the procedure when the temporary order is denied.

4. Prosecuting ERPOs while Respecting the Safety Concerns of Domestic Violence Victims

At the hearing for the final ERPO the prosecutor “shall produce any and all available evidence” and disclose all such evidence to the respondent. R. 3B(e)(4)-(5). The available evidence may include history of threats, acts of violence, cruelty to animals, drug or alcohol history or evidence of weapons possession, R. 3B(a)(5), all of which could be in the possession of a victim of domestic violence, who may or may not be the petitioner. Some victims of domestic violence may feel that testifying in the final ERPO hearing could jeopardize their own safety and trigger retaliation. The statute should not be construed to compel the production of evidence in such situations and should be read instead to further its over-arching purpose of mitigating community risk.

5. Conclusion

ERPO has the potential to augment public safety in New Jersey by disarming individuals who pose a threat to themselves or others if permitted access to firearms. To effectuate the goals of the legislation will require outreach and education of the public as well as training of the police, clerk’s office, prosecutors, and judiciary staff. Partners has provided trainings on the Sexual Assault Protection Act, N.J.S.A. § 2C:14-13, et seq., which took effect in 2016, and, in our experience, there is likewise a need for public education

⁸ “If the application for a temporary extreme risk protection order is not granted, the court shall notify the petitioner and, unless the application is voluntarily withdrawn by the petitioner, nonetheless schedule a hearing on the application for a final extreme risk protection order.” N.Y. CPLR § 6342(5).

on this new legislation. We look forward to partnering with the judiciary, prosecutors, and community groups on ERPO.

Thank you for your consideration of Partners' comments and proposals for modification of Rule 3:5B. If there are opportunities for further comment as these rules evolve, we would be happy to participate.

Respectfully Submitted,

/s/

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Policy Counsel