Domestic Violence Benchbook—Fourth Edition

A Guide to Civil & Criminal Proceedings

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Michigan Supreme Court

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This fourth edition was initially published in 2013, and the text has been revised, reordered, and updated through July 23, 2025. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

Acknowledgments

Work on the fourth edition of this benchbook was overseen by an Editorial Advisory Committee facilitated by MJI former Publications Manager Sarah Roth and former MJI Research Attorney Corrie Schmidt-Parker, who revised this edition of the benchbook.

MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

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The first edition of the *Domestic Violence Benchbook* was funded by a grant, administered by the Domestic & Sexual Violence Prevention & Treatment Board, United States Department of Justice, Office of Violence Against Women. The first edition of the benchbook was researched and written by former MJI Research Attorney, Mary M. Lovik, and edited by former MJI Judicial Education & Publications Manager, Leonard Kowalski.

The Michigan Judicial Institute (MJI) was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing a comprehensive continuing education program for judicial branch employees; assisting judicial associations and external organizations to plan and conduct training events; providing complete and up-to-date legal reference materials for judges, quasi-judicial hearing officers, and others; maintaining a reference library for use by judicial branch employees; and conducting tours of and other public outreach activities for the Michigan Supreme Court Learning Center. MJI welcomes comments and suggestions. Please send them to: **Michigan Judicial Institute, PO Box 30048, Lansing, MI 48909, or call (517) 373-7171.**

Using This Benchbook

Although this benchbook is primarily intended for use by judges, it also contains information useful to law enforcement officers, court personnel, attorneys, and domestic violence service providers. The purpose of this benchbook is to address Michigan and federal law governing domestic violence in the three courtroom contexts where it is most likely to be at issue: criminal proceedings, personal protection proceedings, and domestic relations proceedings. Note that allegations of domestic violence may simultaneously be at issue in multiple courts and multiple counties as criminal, domestic relations, and personal protection proceedings are instituted; accordingly, each court involved in these disparate proceedings can best respond to the parties' situation if it acts with an understanding of how its decision-making might affect (or be affected by) other proceedings in the court system.

To supplement the information, *committee tips* are provided throughout the benchbook content. This supplementary information has been included primarily to address safety concerns that accompany the legal issues in cases involving allegations of domestic violence. The *committee tips* come from the judges, service providers, and court personnel who participated in the drafting of this benchbook since its creation. The *committee tips* in this benchbook represent the best professional judgment of Advisory Committee members and are not intended to be authoritative statements by the Justices of the Michigan Supreme Court.

This benchbook also contains the following helpful features:

- **BOOKMARKS**

  Bookmarks have been included on the left-hand side of the document for navigational purposes. The bookmarks are both expandable and collapsible, are clickable, and list all of the benchbook's chapters, sections, subsections, and sub-subsections.

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- **INDEXES**

This benchbook contains a Subject Matter Index and a Tables of Authority. The Subject Matter Index provides a centralized, comprehensive list of principal topics contained in the benchbook and clickable page numbers that take the reader directly into the text where that topic is discussed. The Tables of Authority provides a list of all the authority cited throughout the benchbook and also provide clickable page numbers.

- **GLOSSARY**

This benchbook contains a Glossary that provides a centralized, comprehensive list of definitions for key terms that are referenced throughout the benchbook. Note that where a term located in the benchbook content is defined in the Glossary, it will appear as gold and is clickable.

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Glossary

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1.1 Defining Domestic Violence

The term *domestic violence* has been given different definitions, depending on the source defining the term. These definitions have been cited where applicable and should be consulted in appropriate cases. The following definitions should not be construed to encompass all definitions of *domestic violence* or to encompass all contexts where *domestic violence* may be defined.

> **Note:** In this benchbook, the term *domestic violence* is used interchangeably with *domestic abuse*.

Although a glossary has been created and appears at the end of this book, the following definitions have been intentionally left in this chapter. However, they also appear in the glossary for the reader's convenience.

- For purposes of the Batterer Intervention Standards for the State of Michigan,[1] *domestic violence* is defined as follows:

  > "Domestic Violence is a pattern of controlling behaviors, some of which are criminal, that includes but is not limited to physical assaults, sexual assaults, emotional abuse, isolation, economic coercion, threats, stalking and intimidation. These behaviors are used by the batterer in an effort to control the intimate partner. The behavior may be directed at others with the effect of controlling the intimate partner." Batterer Intervention Standards for the State of Michigan, Section 4.1.

- For purposes of the Domestic Violence Prevention and Treatment Act, *domestic violence* is defined as follows:

  > "'Domestic violence' means the occurrence of any of the following acts by an individual that is not an act of self-defense:
  >
  > (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
  >
  > (*ii*) Placing a family or household member in fear of physical or mental harm.
  >
  > (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

[1] The Batterer Intervention Standards for the State of Michigan are standards promulgated to assist courts in identifying Batterer Intervention Services (BIS) providers. For additional information on the BIS, see Section 1.5(B).

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 400.1501(d).[2]

Note: MCL 400.1501(e) defines *family or household member* to include any of the following:

"(*i*) A spouse or former spouse.

(*ii*) An individual with whom the person resides or has resided.

(*iii*) An individual with whom the person has or has had a dating relationship.

(*iv*) An individual with whom the person is or has engaged in a sexual relationship.

(*v*) An individual to whom the person is related or was formerly related by marriage.

(*vi*) An individual with whom the person has a child in common.

(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)."

- For purposes of a peace officer investigating or intervening in a *domestic violence incident* under the Code of Criminal Procedure, that term "means an incident reported to a law enforcement agency involving allegations of 1 or both of the following:

  (*i*) A violation of a personal protection order issued under . . . MCL 600.2950, or a violation of a valid foreign protection order.

[2] Several other statutes refer to this definition of *domestic violence* by reference. See, e.g., MCL 600.2157a (admissibility of statements between domestic violence counselor and victim), MCL 600.2972 (motion to seal court records in domestic violence case), MCL 712.1 (safe delivery of newborns), MCL 750.136b (child abuse), MCL 765.6b (release of defendant subject to protective conditions), and MCL 780.951 (presumption regarding self defense). While the Child Custody Act, MCL 722.21 *et seq.* does not define *domestic violence* or explicitly refer to MCL 400.1501, the Court of Appeals held that "'domestic violence' as used by MCL 722.23(k) [(best-interest factors)] includes 'domestic violence' as defined in MCL 400.1501." *Brown v Brown*, 332 Mich App 1, 12 (2020).

(*ii*) A crime committed by an individual against his or her spouse or former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship,[3] or an individual who resides or has resided in the same household." MCL 764.15c(7)(c).[4]

- For purposes of admitting other acts of *domestic violence* into evidence in a criminal proceeding involving domestic violence, that term "means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(6)(a).[5]

  Note: MCL 768.27b(6)(b) defines a *family or household member* to include any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not

[3] MCL 764.15c(7)(b) defines dating relationship as "that term [is] defined in . . . MCL 600.2950."

[4] See Section 3.3 for more information on the requirements of MCL 764.15c.

[5] See Section 4.5(B)(4) for more information on the admissibility of other acts of domestic violence.

include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

See also MCL 600.2950, which discusses domestic relationship personal protection orders (PPOs), and MCL 750.81 and MCL 750.81a, which discuss criminal domestic assaults.[6]

1.2 Summary of Benchbook Contents

This benchbook contains comprehensive coverage of domestic violence and related subject matter. Where no other Michigan Judicial Institute (MJI) publication addresses a topic, a complete discussion of the topic is provided. However, where another MJI publication contains a detailed discussion of the same topic, this benchbook summarizes the topic, discusses its relevance to domestic violence, and refers the reader to the other MJI publication where the topic is discussed in more detail.

A brief summary of the benchbook content is as follows:

- Chapter 2 discusses offenses that involve domestic violence.
- Chapter 3 discusses statutory provisions and case management practices governing pretrial release and probation of offenders.
- Chapter 4 addresses evidentiary issues applicable to criminal cases involving allegations of domestic violence.
- Chapter 5 discusses personal protection orders (PPOs), including the different types of PPOs available and the statutory and court rule provisions for issuing, dismissing, modifying or terminating, extending, and enforcing the PPOs. The chapter also discusses peace bonds and foreign protection orders.
- Chapter 6 discusses federal and state statutory firearms restrictions applicable to domestic violence cases.
- Chapter 7 outlines some case management strategies available to the court in dealing with court proceedings where allegations of domestic violence exist, including offering separate waiting areas for crime victims, the

[6] For a detailed discussion of domestic relationship PPOs under MCL 600.2950, see Section 5.2(A). For a detailed discussion of domestic assaults under MCL 750.81, see Section 2.2(A), and under MCL 750.81a, see Section 2.2(B).

confidentiality of records and/or certain information contained in the records, and using alternative dispute resolution for case management involving domestic violence.

- Chapter 8 addresses the impact allegations of acts of domestic violence and criminal sexual conduct convictions have on domestic relations cases. Chapter 8 also addresses the impact allegations of domestic violence have on proceedings that involve multiple jurisdictions.

Included in this benchbook, is also the following appendix:

- Appendix, which contains a table summarizing the federal and statutory firearms restrictions that apply to individuals who are subject to certain criminal proceedings and court orders involving domestic violence cases.

1.3 Documents Filed by Incarcerated Parties

A pleading or other document filed by an individual who is not represented by an attorney and who is incarcerated in a prison or jail "must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline." MCR 1.112. Proof that the document was timely filed "may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." *Id.*

1.4 Statewide Agencies That Address Domestic and Sexual Violence

There is broad consensus that the most effective response to domestic and sexual violence is a **coordinated community response**, in which the court's efforts are part of a continuum of services offered by the justice system and social services communities. Courts can best function as part of a coordinated community response when they are aware of the variety of specialized services provided by domestic and sexual violence agencies. This section contains information about such agencies at the statewide level.

The Michigan Domestic and Sexual Violence Prevention and Treatment Board, the Michigan Coalition Against Domestic and Sexual Violence, and the Michigan Resource Center on Domestic and Sexual Violence are organizations operating at the statewide level to address the prevention

and treatment of domestic and sexual violence from the perspective of abused individuals. Although these agencies do not provide direct assistance to persons subject to domestic and sexual abuse, they can provide local referrals, information about domestic and sexual violence, training resources, and technical assistance to courts.

Michigan has a hotline to provide crisis support for all victims, survivors, support people, and professionals serving those individuals.[7] The hotline is available 24 hours a day, seven days a week, and 365 days a year. Trained advocates provide support specific to each unique situation. The hotline is free and accessible by phone, text, chat, and TTY (for individuals who are deaf or hard of hearing). To reach the support offered by the hotline, an individual may call 866-864-2338, text 877-861-0222 (standard text messaging rates apply), chat MCEDSV.org/chat, or TTY 517-898-5533.[8]

A. Michigan Domestic and Sexual Violence Prevention and Treatment Board (MDSVPTB)

"The Michigan Domestic and Sexual Violence Prevention and Treatment Board (MDSVPTB) was established in 1978 by state legislation that created a Governor-appointed Board responsible for focusing state activity on domestic violence. The Board offices are administratively housed within the Michigan Department of Health and Human Services." Michigan Department of Health & Human Services (MDHHS), *About the Board*. "The Board develops and recommends policy; develops and provides technical assistance and training to the criminal justice, child welfare, etc.; and administers state and federal funding for domestic and sexual violence services." *Id*.

Among other responsibilities, the MDSVPTB coordinates statewide efforts to educate the justice system and other professionals about domestic and sexual violence. See MCL 400.1504. For a complete list of the legislatively mandated powers and duties of the MDSVPTB, see MCL 400.1504.

MCL 400.1501(d) defines domestic violence for purposes of the MDSVPTB's activities. However, several other statutes incorporate this definition by reference.

For additional information on the MDSVPTB, including contact information, see the Council on Law Enforcement and Reinvention,

[7]The hotline was implemented in February 2022.

[8]Changes may have occurred to these means of accessing support in a crisis since this benchbook was last updated. MCEDSV operates the hotline, and information about the hotline may be found on its website at https://mcedsv.org/hotline-domestic-violence/hotline-chat/.

Michigan Domestic and Sexual Violence Prevention Treatment Board, and the Michigan Department of Health & Human Services, *Domestic & Sexual Violence*.

B. Michigan Coalition to End Domestic and Sexual Violence (MCEDSV)

"[The Michigan Coalition to End Domestic and Sexual Violence] MCEDSV is a statewide [private, non-profit] membership organization whose members represent a network of over 70 domestic and sexual violence programs and over 200 allied organizations and individuals. We have provided leadership as the statewide voice for survivors of domestic and sexual violence and the programs that serve them since 1978. MCEDSV is dedicated to the empowerment of all the state's survivors of domestic and sexual violence. Our mission is to develop and promote efforts aimed at the elimination of all domestic and sexual violence in Michigan." Michigan Coalition to End Domestic and Sexual Violence, *About Us*.

For additional information on the MCEDSV, including contact information, see the Michigan Coalition to End Domestic & Sexual Violence website.

C. Battering Intervention Services Coalition of Michigan (BISC-MI)

The Battering Intervention Services Coalition of Michigan (BISC-MI) is a private, non-profit statewide organization that "provide[s] a working forum for interaction and information sharing among agencies and individuals concerned with the provision of batterer intervention services in Michigan, . . . create[s] and maintain[s] coordinated community actions that hold batterers accountable for their behavior, and promote[s] victim safety, autonomy and empowerment." Battering Intervention Services Coalition of Michigan (BISC-MI), *About BISC-MI*.

For additional information on the BISC-MI, including contact information, see the Battering Intervention Services Coalition of Michigan website.

1.5 Community-Based Efforts That Address Domestic and Sexual Violence

A. Domestic & Sexual Violence Service Agencies

Michigan domestic and sexual violence service agencies provide abused individuals with help and support in getting free from violence. For additional information, including a list of local domestic and violence service agencies, see the Michigan Department of Health & Human Services, *Domestic & Sexual Violence*.

Domestic and sexual violence service agencies provide many forms of assistance to victims of domestic and sexual violence. For information on services provided county-by-county throughout Michigan, see Michigan.gov, *Find Services In Your Area*.

The Code of Criminal Procedure provides that "[a] police officer or a prosecuting attorney may provide a domestic or sexual violence service provider agency with the name, demographics, and other pertinent information of, and information to facilitate contact with, a victim of domestic or sexual violence for the purpose of offering supportive services to the victim." MCL 776.21b(1). "If a police officer or prosecuting attorney provides information to a domestic or sexual violence service provider agency under [MCL 776.21b], that police officer or prosecuting attorney shall notify the victim of domestic or sexual violence that the information was provided." MCL 776.21b(1). MCL 776.21b "does not authorize the disclosure of a confidential address." MCL 776.21b(2).

"The providing of information by a police officer or prosecutor under [MCL 776.21b(1)] is in addition to any other requirement under law to provide notice or information to a victim of domestic or sexual violence, including, but not limited to, [MCL 780.753 and MCL 752.953]." MCL 776.21b(3).

B. Batterer Intervention Services (BIS)

Although the Battering Intervention Services (BIS) providers may vary in their approach, the BIS programs are generally designed to hold domestic and sexual violence perpetrators accountable for their actions and to provide the domestic and sexual violence perpetrators with an opportunity to change their behavior. See the Battering Intervention Services Coalition of Michigan (BISC-MI), *BISC-MI Mission Statement*.

To assist courts in identifying BIS providers that respond to the need for safety and accountability, many states and several Michigan localities promulgated batterer intervention standards.[9] These

standards articulate minimum guidelines for the operation of batterer intervention services as they work to provide abusers with an opportunity to change their criminal behavior. See the Batterer Intervention Standards for the State of Michigan.

The purpose of the Batterer Intervention Standards for the State of Michigan is to "**[a]ssist in helping judges** and others identify Batterer Intervention Services (BIS) that are reliable, predictable[,] and responsive sources of intervention (treatment)[,] [and to] [p]rovide the public **and the court** with realistic expectations of service." SCAO Administrative Policy Memorandum 1999-01, p 2.

The Batterer Intervention Standards for the State of Michigan require "[e]ach [BIS] provider [to] develop an agreement with its referring courts regarding reporting procedures (e.g. when the batterer re-offends or fails to comply with program rules and expectations)." Batterer Intervention Standards for the State of Michigan, *supra* at §8.14. To facilitate communication with the referring court regarding a participant's progress, it is critical that a BIS provider obtain the participant's consent to release information to the court and/or probation department.[10] See *Id.* at §8.3.

The Batterer Intervention Standards for the State of Michigan also require the BIS providers to "report to probation, the court[,] and/or Child Protective Services any criminal behavior or violation of court order relating to domestic violence that is relayed by the batterer during the court of service." *Id.* at §6.2.

C. Ethical Concerns With Judicial Participation in Coordinated Community Response

A judge may participate in a coordinated community response to domestic violence so long as the "activity as a member of an organization [does not] cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and

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[9] "Implementation of the Batterer Intervention Standards [was] part of a joint effort between the State Court Administrative Office, the Governor's Office, the Prosecuting Attorneys Association of Michigan [], the [Department of Human Services], [and the] Domestic [and Sexual] Violence Prevention and Treatment Board to facilitate the use of high quality batterer treatment programs and to strengthen the coordination of justice system response to the crime of domestic violence." SCAO Administrative Policy Memorandum 1999-01, p 3. Following implementation of the Batterer Intervention Standards, the SCAO Administrative Policy Memorandum 1999-01, dated January 11, 1999, was issued to encourage state courts to follow the guidelines set out in the Batterer Intervention Standards for the State of Michigan.

[10] The BIS providers are required to "comply with all legally mandated reporting requirements regarding suspected child abuse and neglect and the duty to warn third parties." Batterer Intervention Standards for the State of Michigan, *supra* at §6.1. See MCL 722.623–MCL 722.624 (duty to report child abuse and neglect), and MCL 330.1946 (duty to warn third parties).

United States Constitutions."[11] MCJC 2(F). For a list of quasi-judicial activities a judge may engage in, see MCJC 4.

However, "[a] judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice." MCJC 4(I).

Additionally, "[a] judge must avoid all impropriety and appearance of impropriety." MCJC 2(A).

See State Bar of Michigan Ethics Opinion, JI-66 (March 23, 1993), regarding a judge's participation on the board of a civic organization dedicated to helping certain victims, presumably including those of domestic violence. Many other ethics opinions, judicial tenure commission opinions, and opinions from other jurisdictions exist that address ethical concerns related to judicial participation on various committees or organizations. A full discussion of those are beyond the scope of this benchbook.

1.6 Additional Domestic and Sexual Violence Resources

A. Publication: National Judicial Education Program's (NJEP) *Judges Tell*

Legal Momentum's National Judicial Education Program (NJEP) developed the publication *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case* from a nationwide survey of judges who had participated in NJEP's *Understanding Sexual Violence* programs. The publication covers twenty-five points ranging from basic information about the prevalence and impact of sexual assault to *pro se* defendants seeking to cross-examine their alleged victims.

For additional information on NJEP and the Legal Momentum, see the Legal Momentum, *Courts, The Justice System, and Women*.

B. Educational Material: NJEP's Teen Dating Violence Information Sheets

"Legal Momentum's National Judicial Education Program [(NJEP)] has created a set of educational materials for judges, courts, court-related professionals, schools, parents, teens, and the community to

[11] "A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic." MCJC 2(F).

learn about the dangers and consequences of Teen Dating Violence [(TDV)]." Legal Momentum, *NJEP Resources on Teen Dating Violence*.

"These eleven Information Sheets provide an introduction to many of the issues involved in TDV and its intersections with other areas of the law, and the Resources Sheet is a compilation of useful resources about teen dating violence for judges, courts, school, parents, teens, and the community."

For additional information on NJEP and the Legal Momentum, see the Legal Momentum, *Courts, The Justice System, and Women*.

C. Resource Guide: SCAO's Friend of the Court Domestic Violence Resource Guide

The State Court Administrative Office Friend of the Court Bureau developed the *Friend of the Court Domestic Violence Resource Guide* "to provide practical information about screening, detecting, and responding to domestic violence at various stages of the FOC case process. Specifically, this Guide will assist the FOC offices with the following:

- Understand the importance of screening and responses to domestic abuse.
- Identify FOC cases where domestic violence is present.
- Develop safety procedures to address domestic violence.
- Provide a safe environment when parties are at the FOC court office.
- Examine how domestic violence information will be used.
- Examine how to minimize contact between the parties.
- Examine how to keep screening protocols confidential." *Friend of the Court Domestic Violence Resource Guide*, p 1.

Chapter 2: Domestic Violence Crimes, Penalties, and Select Civil Remedies

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2.1 Chapter Overview

A. In General

Acts of domestic violence frequently include many different forms of criminal behavior. See *People v Wilson* (*Willie*), 265 Mich App 386, 393 (2005). Specifically, the Court of Appeals stated that:

> "Domestic violence includes any of the assaults [(assault, assault and battery, and aggravated assault)]. [E]ven murder may be characterized as domestic violence. Domestic violence is not a specific crime, but a description of circumstances surrounding a violent crime in which the perpetrator and the victim have a preexisting relationship that may be categorized as a 'domestic' relationship." *Wilson* (*Willie*), 265 Mich App at 393.

Any crime can be an act of domestic violence if perpetrated as a means of controlling another person who is a family or household member. See MCL 400.1501(d). To that end, this chapter only addresses crimes that specifically contemplate domestic violence. Crimes that may frequently occur in cases involving domestic violence, but are not discussed in this chapter, include:

- Arson. See MCL 750.72 (first-degree arson); MCL 750.73 (second-degree arson); MCL 750.73 (third-degree arson); MCL 750.75 (fourth-degree arson); MCL 750.77 (fifth-degree arson; MCL 750.78 (certain misdemeanor offenses involving fire); MCL 750.79 (offense involving inflammable, combustible, or explosive materials).

- Assaults on a person. See MCL 750.82 (felonious assault); MCL 750.83 (assault with intent to murder); MCL 750.84 (assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation); MCL 750.86 (assault with intent to maim); MCL 750.87 (assault with intent to commit a felony).

- Cruelty to animals. See MCL 750.50 (crimes against animals); MCL 750.50b (willfully or maliciously, and without just cause, killing, torturing mutilating maiming, disfiguring, or poisoning an animal).

- Cyberbullying another person. See MCL 750.411x.

- Extortion. See MCL 750.213.

- Homicide or attempted murder. See MCL 750.91 (attempted murder); MCL 750.316 (first-degree murder);

MCL 750.317 (second-degree murder); MCL 750.321 (manslaughter); MCL 750.322 (willful killing of unborn child by injuring mother in a way that if it had killed the mother would have constituted murder).

- Kidnapping or unlawful imprisonment. See MCL 750.349; MCL 750.349b.
- Obstruction of justice. See MCL 750.122; MCL 750.483a.
- Prohibited conduct against a pregnant woman causing death, miscarriage, stillbirth, or physical injury to the embryo or fetus. See MCL 750.90a *et seq*.

B. Prosecutorial Discretion

"A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute [a defendant] or what charges to file [against a defendant]." *People v Williams* (*Anterio*), 244 Mich App 249, 253-254 (2001) (trial court erroneously dismissed domestic assault charges after the victim-girlfriend refused to testify against the respondent-boyfriend by "characteriz[ing] the offense as a private crime and [] suggest[ing] that the victim[-girlfriend] has a legal right of any kind to decide whether [the] defendant[-boyfriend] is prosecuted[, which] is clearly inconsistent with the concept of public prosecutions of criminal offenses[,] . . . [where] [p]ut simply, in criminal cases, the prosecutor alone possesses the authority to determine whether to prosecute the accused").

> **Note:** "[D]espite the victim[-girlfriend's] failure to appear on the trial date, the prosecutor arguably had a viable basis to proceed by showing that the victim[-girlfriend] was an unavailable witness [under MRE 804(a)(5)]." *Williams* (*Anterio*), 244 Mich App at 254.

C. Court-Appointed Foreign Language Interpreter[1]

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[2] A person financially able to pay for the interpretation costs may be ordered to

[1] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[2] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

2.2 Domestic Assault

"[T]he Legislature defines an assault as being a domestic assault if the defendant and the victim have ever been married to each other, have ever resided together, had a child in common, or have ever had a dating relationship." *People v Wilson*, 265 Mich App 386, 393-394 (2005).

A. Assault and Assault and Battery

1. Criminal Penalty

"Except as provided in subsection (3),[3] (4), or (5), an individual who assaults or assaults and batters the individual's spouse or former spouse, an individual with whom the individual has had a dating relationship, an individual with whom the individual has had a child in common, or a resident or former resident of the individual's household, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00 or both." MCL 750.81(2).

> **Note:** "The three categories of victims set forth in [MCL 750.81(2)] are discrete classifications, and if a victim falls within one of these classifications, the statute applies. Coverage extends, in the first category, to offenders who presently or previously were married to the victim or, in the second category, to offenders who biologically parented a child with the victim. Either of these categories may apply regardless of whether the offender and victim ever resided together in the same household. The third category applies to offenders who resided in a household with the victim at or before the time of the assault (or assault and battery) regardless of the victim's relationship with the offender. [MCL 750.81(2)] thus applies to 'domestic' offenders broadly defined as including persons joined by marriage, common parenting, or common household residence with the victim." *In re Lovell*, 226 Mich App 84, 87-88 (1997) (Court of

[3] MCL 750.81(3) prescribes a misdemeanor penalty of "imprisonment for not more than 93 days or a fine of not more than $500.00, or both[]" for the assault or assault and battery of a pregnant woman whom the assailant knows to be pregnant. MCL 750.81(4)-(5) provide enhanced penalties for repeat offenders. For additional information on enhanced penalties, see Section 2.2(A)(3).

Appeals found that "[t]he phrase 'a resident . . . of his or her household' [] encompasse[d] [a] parent-child relationship" where the 16-year-old defendant-daughter allegedly assaulted and battered her mother).

First-time offenders who are in violation of MCL 750.81(2) may be eligible for deferred proceedings under MCL 769.4a. See Section 2.2(C) for a detailed discussion of deferred proceedings.

2. Restitution

Victims of assault and assault and battery are entitled to restitution. See MCL 780.794(2) (juvenile offenders); MCL 780.826(2) (misdemeanor offense).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

3. Enhanced Penalties

MCL 750.81(4)-(5) prescribe enhanced penalties for repeat offenders.[4] If the prior conviction involved a crime listed in MCL 750.81(4)-(5), and that prior crime was committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, a resident or former resident of the assailant's household, or a pregnant woman whom the assailant knew to be pregnant, the penalties for the current offense will be enhanced as follows:

- Offenders with a single prior conviction are "guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both[.]"MCL 750.81(4).
- Offenders with 2 or more prior convictions are "guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both[.]" MCL 750.81(5).

Note: There is no statutory requirement that the victim involved in the prior conviction be the same person as the victim of the current offense.

The prior convictions that result in enhanced penalties under MCL 750.81(4)-(5) are:

[4] See Section 2.2(D) for the required procedures for seeking an enhanced sentence.

- A violation of MCL 750.81 (assault) or a local ordinance substantially corresponding to MCL 750.81;
- A violation of MCL 750.81a (assault and infliction of serious injury);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation);
- A violation of MCL 750.86 (assault with intent to maim); and
- A violation of a law of another state or a local ordinance of another state that substantially corresponds to MCL 750.81a, MCL 750.82, MCL 750.83, MCL 750.84, or MCL 750.86.

4. Technical Probation Violation

MCL 771.4b(1) (providing for a period of incarceration for technical probation violations that increases in length as the number of violations increases) does not apply to a probationer on probation for a domestic violence violation of MCL 750.81, or an offense involving domestic violence as that term is defined in MCL 400.1501.[5] MCL 771.4b(6). There is a rebuttable presumption that no arrest warrant will issue for a technical probation violation. MCL 771.4b(7). Instead, the court will issue a summons or show-cause order to the probationer for the alleged technical probation violation. *Id*.

MCR 6.445(A) expressly provides that "[t]he court *must* issue a summons, rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation . . . ." (Emphasis added.) The court may overcome the presumption that a summons will issue (rather than a bench warrant) if "the court states on the record a specific reason to suspect that one or more of the following apply:

[5]See Section 1.1 for the definition of *domestic violence* found in MCL 400.1501. In addition, MCL 771.4b(1) does not apply to violations of MCL 750.81a, MCL 750.411h, or MCL 750.411i. These offenses are discussed in Section 2.2(B)(5), Section 2.3(A)(5), and Section 2.3(B)(5), respectively.

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A). See also MCL 771.4b(7)(a)-(c) (providing substantially the same information as does MCR 6.445(A)(1)-(3)).

At arraignment for the alleged violation, the court must "inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence." MCR 6.445(B)(2).[6] See also MCL 771.4b(8) (hearing on a technical probation violation must occur "as soon as is possible").

If, after the probation violation hearing, the court finds that the probation violation was proved, the court must inform the probationer "whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). If a probationer pleads guilty to a probation violation, the court must, among other things, "establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F)(4).

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A). The acknowledgment must be written[7] and must provide the probationer with the specific information stated in MCR 6.450(A).[8] *Id.* Specifically, and among other provisions, the acknowledgment must inform the probationer that acknowledging a technical violation could delay his or her eligibility for early discharge. MCR 6.450(A)(5); MCR 6.441. See also MCL 771.4b(2) (permitting written acknowledgment of a technical probation violation without a hearing).

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[6] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for more information about arraignments and other pretrial procedures.

[7] See SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[8] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for detailed information about probation and the requirements of a written acknowledgment of a technical probation violation.

5. Early Discharge From Probation

Except as provided in MCL 771.2(10), MCL 771.2a, and MCL 768.36, a probationer may be eligible for early discharge from probation if he or she completes half of the original felony or misdemeanor probation period. See MCL 771.2(2). Under MCL 771.2(10), early discharge is not available to a defendant who was convicted of a domestic violence related violation of MCL 750.81 or an offense involving domestic violence (as defined in MCL 400.1501).[9] MCL 771.2a addresses probation for individuals convicted of stalking under MCL 750.411h. MCL 768.36 addresses probation for individuals who were found guilty but mentally ill. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for more information on early discharge from probation.

B. Assault and Infliction of Serious or Aggravated Injury

1. Criminal Penalty

"Except as provided in subsection (3), an individual who assaults the individual's spouse or former spouse, an individual with whom the individual has or has had a dating relationship, an individual with whom the individual has had a child in common, or a resident or former resident of the same household without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.81a(2).

First-time offenders who are in violation of MCL 750.81a(2) may be eligible for deferred proceedings under MCL 769.4a. See Section 2.2(C) for a detailed discussion of deferred proceedings.

2. Mutually Exclusive Verdicts

The Michigan Supreme Court indicated that it is unclear if Michigan "jurisprudence recognizes the principle of mutually exclusive verdicts[.]" See *People v Williams*, 504 Mich 892 (2019), rev'g in part 323 Mich App 202 (2018). Regardless whether the principle exists, the *Williams* Court found that mutually exclusive verdicts were not presented in the circumstances of that case. See also *People v Davis*, 503 Mich 984, 985 (2019), where

[9] MCL 771.2(10) lists several other offenses that are not eligible for early discharge from probation, but they are irrelevant to this discussion.

"the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate [only] defendant's aggravated domestic assault conviction" after the defendant challenged his aggravated domestic violence and assault with intent to do great bodily harm (AWIGBH) convictions under double-jeopardy principles. Although "the statutory language of AWIGBH requires a defendant to commit assault *with* the specific intent to do great bodily harm, whereas the statutory language of aggravated domestic assault requires a defendant to commit assault *without* the intent to commit great bodily harm," "the jury was *not* instructed that it must find that defendant acted *without* the intent to inflict great bodily harm" relative to the aggravated domestic assault charge. *Id*. ("the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted 'with intent to do great bodily harm . . ."). Therefore, "the jury never found that defendant acted without the intent to inflict great bodily harm," and his "guilty verdict for [aggravated domestic violence] was not mutually exclusive to [his] guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm." *Id*. (remanded to address the merits of defendant's double-jeopardy argument).

See also *People v McKewen*, ___ Mich ___, ___ (2024), where the Michigan Supreme Court, for the same reasons as in *Davis*, 503 Mich 984, again declined to consider "whether to adopt the [mutually exclusive verdicts] doctrine" (in both *Davis* and *McKewen*, the mutually exclusive verdicts doctrine was not in play because the jury in each case was never instructed that felonious assault required a finding that defendant did *not* intend to commit murder or to inflict great bodily harm less than murder). In *McKewen*, defendant was convicted of AWIGBH and felonious assault based on the same conduct. *McKewen*, ___ Mich at ___. The *McKewen* Court stated that "[w]hile the offenses at issue in this case contain conflicting intent requirements, the Legislature has nonetheless explicitly indicated its intent to permit multiple punishments for a single instance of assaultive conduct in MCL 750.84(3) of the AWIGBH statute." *McKewen*, ___ Mich at ___.

But see *People v Gardner*, ___ Mich ___, ___ (2024),[10] where the Supreme Court decided in an order that plain error occurred following a bench trial when defendant was simultaneously convicted of assault with intent to murder (AWIM) under MCL

[10] "Supreme Court orders that include a decision with an understandable rationale establish binding precedent." *People v Giovanni*, 271 Mich App 409, 414 (2006), citing *People v Crall*, 444 Mich 463, 464 n 8 (1993).

750.83, and felonious assault under MCL 750.82. "[T]he Legislature specified that in order for a defendant to be convicted of AWIM, a defendant must have acted '*with* intent to commit the crime of murder[.]'" *Gardner*, ___ Mich at ___, quoting MCL 750.83 (second alteration in original). However, "[t]o be convicted of felonious assault, a defendant must have acted '*without* intending to commit murder.'" *Gardner*, ___ Mich at ___ (quoting MCL 750.82(1)). "As a purely textual matter, then, the language of the offenses is inconsistent, leading to the natural conclusion that the same person cannot be punished under both offenses for the same conduct." *Gardner*, ___ Mich at ___ (quotation marks and citation omitted). "Given this legislative intent, the trial court erred when it convicted defendant of AWIM and felonious assault for the same assault." *Id.* at ___.

3. Restitution

Victims of assault and infliction of serious or aggravated injury are entitled to restitution. See MCL 780.794(2) (juvenile offenders); MCL 780.826(2) (misdemeanor offense).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Right's Benchbook*.

4. Enhanced Penalties

MCL 750.81a(3) provides for enhanced penalties for repeat offenders:[11]

> "An individual who commits an assault and battery in violation of subsection (2), and who has 1 or more previous convictions for assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, in violation of any of the following, is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both:"

- A violation of MCL 750.81 (domestic assault, assault and battery);

[11] See Section 2.2(D) for the required procedures for seeking an enhanced sentence.

- A violation of MCL 750.81a (domestic assault and infliction of serious injury) or a local ordinance substantially corresponding to MCL 750.81a;
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation);
- A violation of MCL 750.86 (assault with intent to maim); and
- A violation of a law or local ordinance or another state substantially corresponding to MCL 750.81, MCL 750.82, MCL 750.83, MCL 750.84, or MCL 750.86.

  Note: There is no statutory requirement that the victim involved in the prior conviction be the same person as the victim of the current offense.

In addition, effective April 1, 2013, a discharge and dismissal of proceedings under MCL 769.4a (deferred proceedings for assaultive crimes and domestic violence crimes) constitutes "a prior conviction in a prosecution under [MCL 750.81(4)-(5) and MCL 750.81a(3)]." MCL 769.4a(5).

5. Technical Probation Violation

MCL 771.4b(1) (providing for a period of incarceration for technical probation violations that increases in length as the number of violations increases) does not apply to a probationer who is on probation for a domestic violence violation of MCL 750.81a, or an offense involving domestic violence as that term is defined in MCL 400.1501.[12] MCL 771.4b(6). There is a rebuttable presumption that no arrest warrant will issue for a technical probation violation. MCL 771.4b(7). Instead, the court will issue a summons or show-cause order to the probationer for the alleged technical probation violation. *Id*.

MCR 6.445(A) expressly provides that "[t]he court *must* issue a summons, rather than a bench warrant, upon finding probable

[12]See Section 1.1 for the definition of *domestic violence* found in MCL 400.1501. In addition, MCL 771.4b(1) does not apply to violations of MCL 750.81, MCL 750.411h, or MCL 750.411i. These offenses are discussed in Section 2.2(A)(4), Section 2.3(A)(5), and Section 2.3(B)(5), respectively.

cause to believe a probationer has committed a technical violation of probation . . . ." (Emphasis added.) The court may overcome the presumption that a summons will issue (rather than a bench warrant) if "the court states on the record a specific reason to suspect that one or more of the following apply:

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A). See also MCL 771.4b(7)(a)-(c) (providing substantially the same information as does MCR 6.445(A)(1)-(3)).

At arraignment for the alleged violation, the court must "inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence." MCR 6.445(B)(2).[13] See also MCL 771.4b(8) (hearing on a technical probation violation must occur "as soon as is possible").

If, after the probation violation hearing, the court finds that the probation violation was proved, the court must inform the probationer "whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). If a probationer pleads guilty to a probation violation, the court must, among other things, "establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F)(4).

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A). The acknowledgment must be written[14] and must provide the probationer with the specific information stated in MCR 6.450(A).[15] Specifically, and among other provisions, the

[13]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for more information about arraignments and other pretrial procedures.

[14]See SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[15]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for detailed information about probation and the requirements of a written acknowledgment of a technical probation violation.

acknowledgment must inform the probationer that acknowledging a technical violation could delay his or her eligibility for early discharge. MCR 6.450(A)(5); MCR 6.441. See also MCL 771.4b(2) (permitting written acknowledgment of a technical probation violation without a hearing).

6. Early Discharge From Probation

Except as provided in MCL 771.2(10), MCL 771.2a, and MCL 768.36, a probationer may be eligible for early discharge from probation if he or she completes half of the original felony or misdemeanor probation period. See MCL 771.2(2). Under MCL 771.2(10), early discharge is not available to a defendant who was convicted of a domestic violence related violation of MCL 750.81a, or an offense involving domestic violence (as defined in MCL 400.1501).[16] MCL 771.2a addresses probation for individuals convicted of stalking under MCL 750.411h. MCL 768.36 addresses probation for individuals who were found guilty but mentally ill. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for more information on early discharge from probation.

C. Deferred Sentencing for Domestic Assault Cases

An offender who is found guilty of, or pleads guilty to, a violation of MCL 750.81 or MCL 750.81a may be eligible for deferred proceedings under MCL 769.4a. MCL 769.4a allows the court to place the defendant on probation after a finding of guilt, without entering judgment:

> "When an individual who has not been convicted previously of an assaultive crime pleads guilty to, or is found guilty of, a violation of . . . MCL 750.81 [or MCL] 750.81a, and the victim of the assault is the offender's spouse or former spouse, an individual who has had a child in common with the offender, an individual who has or has had a dating relationship with the offender, or an individual residing or having resided in the same household as the offender, the court, without entering a judgment of guilt and with the consent of the accused and of the prosecuting attorney in consultation with the victim, may defer further proceedings and place the accused on probation as provided in this section." MCL 769.4a(1).

[16] MCL 771.2(10) lists several other offenses that are not eligible for early discharge from probation, but they are irrelevant to this discussion.

Committee Tip:

In domestic assault cases, it is important to note that the statutory language of MCL 769.4a(1) requires consent of the "prosecuting attorney in consultation with the victim" in order to defer sentencing.

"However, before deferring proceedings under [MCL 769.4a(1)], the court shall contact the department of state police and determine whether, according to the records of the department of state police, the accused has previously been convicted of an assaultive crime or has previously had proceedings deferred under [MCL 769.4a]." MCL 769.4a(1). "If the search of the records reveals an arrest for an assaultive crime but no disposition, the court shall contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of that arrest for purposes of [MCL 769.4a]." *Id.*

Until October 1, 2021 an individual who pleads guilty to a criminal offense not listed in MCL 762.11(3) or MCL 762.11(4), committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday, may be permitted to participate in deferred proceedings if he or she meets certain eligibility requirements as set out under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*[17] MCL 762.11(1). "If the offense was committed on or after the individual's twenty-first birthday but before his or her twenty-fourth birthday, the individual must not be assigned to youthful trainee status without the consent of the prosecuting attorney." *Id.*

"Beginning October 1, 2021 an individual who pleads guilty to a criminal offense not listed in MCL 762.11(3) or MCL 762.11(4), committed on or after the individual's eighteenth birthday but before his or her twenty-sixth birthday, may qualify for deferred proceedings as a youthful trainee if he or she meets certain eligibility requirements under the HYTA. MCL 762.11(2). If the individual committed the offense on or after his or her twenty-first birthday but before his or her twenty-sixth birthday, the prosecuting attorney must consent to the individual's assignment to the status of youthful trainee. *Id.*

Deferred proceedings are also available for offenders who have been admitted into certain problem solving courts:[18]

[17] For a thorough discussion of deferred proceedings under the Holmes Youthful Trainee Act, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

- Veterans charged with a domestic violence offense if he or she meets certain eligibility requirements for admission into veterans treatment court under MCL 600.1200 *et seq.*[19]

- Individuals charged with a domestic violence offense if he or she meets certain eligibility requirements for admission into mental health court under MCL 600.1090 *et seq.*,[20] and only if "[t]he individual has not previously had proceedings dismissed under . . . MCL 769.4a" and "[t]he domestic violence offense is eligible to be dismissed under . . . MCL 769.4a." MCL 600.1098(4).

1. Conditions of Probation in Deferred Proceedings

MCL 769.4a(3) provides that an order of probation entered under MCL 769.4a(1) may include any of the following conditions:

- any condition of probation under MCL 771.3, including, but not limited to, ordering the defendant to participate in a mandatory counseling program, and requiring the defendant to pay reasonable costs to participate in the program.

- ordering the defendant to participate in drug treatment court under MCL 600.1060 to MCL 600.1088.

- ordering the defendant to be imprisoned for not more than 12 months at the time or for consecutive or nonconsecutive intervals within the period of probation.[21]

  Note: The court may permit the defendant day parole,[22] or a work or school release from jail.[23] MCL 769.4a(3).

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[18] For additional information on problem-solving courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9, and problem-solving courts as they relate to juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1. For additional information on problem-solving court programs, including standards and best practice manuals, see Problem Solving Courts.

[19] For a thorough discussion of deferred proceedings under the Veterans Treatment Court Program, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

[20] For a thorough discussion of deferred proceedings under the Mental Health Court Program, see the *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

[21] "[T]he period of imprisonment must not exceed the maximum period of imprisonment authorized for the offense if the maximum period is less than 12 months." MCL 769.4a(3).

[22] See MCL 801.251 to MCL 801.258 for additional information on day paroles.

In addition, a veteran or an individual who is on probation under MCL 769.4a and whose proceedings have been deferred may be admitted into veterans treatment court or mental health court as a condition of probation. See MCL 600.1203(2)(b)(*ii*); MCL 600.1093(2)(b)(*ii*).

2. Court Records in Deferred Proceedings

MCL 769.4a(6) requires "[a]ll court proceedings under [MCL 769.4a] [to] be open to the public." However, if the sentence is deferred under MCL 769.4a, the record must be closed to public inspection during the deferral period "[e]xcept as provided in [MCL 769.4a](7)[.]" MCL 769.4a(6).

MCL 769.4a(7) provides that "[u]nless the court enters a judgment of guilt under [MCL 769.4a], the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition of the criminal charge under [MCL 769.4a]. However, the nonpublic record must be open to the following individuals and entities for the purposes noted:

> (a) The courts of this state, law enforcement personnel, the department of corrections, and prosecuting attorneys for use only in the performance of their duties or to determine whether an employee of the court, law enforcement agency, department of corrections, or prosecutor's office has violated the conditions of employment or whether an applicant meets criteria for employment with the court, law enforcement agency, department of corrections, or prosecutor's office.
>
> (b) The courts of this state, law enforcement personnel, and prosecuting attorneys for either of the following purposes:
>
> > (*i*) Showing that a defendant in a criminal action under . . . MCL 750.81 [or] [MCL] 750.81a, or a local ordinance substantially corresponding to [MCL 750.81] has already

[23] MCL 771.3 was amended, effective March 1, 2013, to require the court to take additional steps before issuing work or school release from jail. Under MCL 771.3(2)(a), "[t]he court may, subject to [MCL 771.3d] and [MCL 771.3e], permit [an] individual to be released from jail to work at his or her existing job or to attend a school in which he or she is enrolled as a student." MCL 771.3d requires the court to order the Department of Corrections to verify that a convicted felon is currently employed or enrolled in school before releasing him or her from jail, and MCL 771.3e requires the court to order a convicted felon to wear an electronic monitoring device if he or she is being released from jail for purposes of working or attending school.

> once had proceedings deferred under this section.
>
> (*ii*) Determining whether the defendant in a criminal action is eligible for discharge and dismissal of proceedings by a drug treatment court under [MCL 600.1076](5)[.]
>
> (c) The department of health and human services for enforcing child protection laws and vulnerable adult protection laws or ascertaining the preemployment criminal history of any individual who will be engaged in the enforcement of child protection laws or vulnerable adult protection laws."

3. Fulfilling Probation Terms or Conditions in Deferred Proceedings

If the defendant fulfills the terms or conditions of probation, the court must discharge the defendant and dismiss the proceedings against him or her. MCL 769.4a(5). A person is limited to only one discharge and dismissal under MCL 769.4a. MCL 769.4a(5).

> **Note:** "Discharge and dismissal under [MCL 769.4a] must be without adjudication of guilt and is not a conviction for purposes of [MCL 769.4a] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, but it is a prior conviction in a prosecution under [MCL 750.81(4)-(5) and MCL 750.81a(3)]." MCL 769.4a(5).

4. Violation of Term or Condition of Probation in Deferred Proceedings

If the defendant violates a term or condition of probation, the court *may* enter an adjudication of guilt and proceed to sentencing. MCL 769.4a(2). However, the court *must* enter an adjudication of guilt and proceed to sentencing if any of the following circumstances exist:

> "(a) The accused commits an assaultive crime during the period of probation.
>
> (b) The accused violates an order of the court that the accused receive counseling regarding the accused's violent behavior.

> (c) The accused violates an order of the court that the accused have no contact with a named individual." MCL 769.4a(4).

A discussion of probation revocation is beyond the scope of this benchbook. For additional information on probation revocation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

D. Enhanced Sentencing in Domestic Violence Cases

1. Procedures for Seeking an Enhanced Sentence

The prosecutor may seek an enhanced sentence where the defendant is convicted of MCL 750.81(4),[24] MCL 750.81(5),[25] or MCL 750.81a(3). MCL 750.81b. These three provisions require the defendant to have at least one previous conviction of certain offenses. See Sections 2.2(A) and (B) for a list of these offenses.

If the prosecutor seeks an enhanced sentence for domestic assault under MCL 750.81(4)-(5) (assault or assault and battery) or MCL 750.81a(3) (weaponless assault with infliction of serious injury and no intent to murder or inflict great bodily harm), the procedural requirements of MCL 750.81b apply:

> "(a) The charging document or amended charging document shall include a notice provision that states that the prosecuting attorney intends to seek an enhanced sentence under MCL 750.81(4) or MCL 750.81(5)] or [MCL 750.81a(3)] and lists the prior conviction or convictions that will be relied upon for that purpose. The notice shall be separate and distinct from the language charging the current offense, and shall not be read or otherwise disclosed to the jury if the case proceeds to trial before a jury.
>
> (b) The defendant's prior conviction or convictions shall be established at sentencing. The existence of a prior conviction and the factual circumstances establishing the required relationship between the defendant and the victim of the prior assault or assault and battery may be established by any

[24] Formerly MCL 750.81(3). See 2016 PA 87, effective July 25, 2016. MCL 750.81b has not been amended to reflect the renumbering.

[25] Formerly MCL 750.81(4). See 2016 PA 87, effective July 25, 2016. MCL 750.81b has not been amended to reflect the renumbering.

evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

(*i*) A copy of a judgment of conviction.

(*ii*) A transcript of a prior trial, plea-taking, or sentencing proceeding.

(*iii*) Information contained in a presentence report.

(*iv*) A statement by the defendant.

(c) The defendant or his or her attorney shall be given an opportunity to deny, explain, or refute any evidence or information relating to the defendant's prior conviction or convictions before the sentence is imposed, and shall be permitted to present evidence relevant for that purpose unless the court determines and states upon the record that the challenged evidence or information will not be considered as a basis for imposing an enhanced sentence under [MCL 750.81(4) or MCL 750.81(5)] or [MCL 750.81a(3)].

(d) A prior conviction may be considered as a basis for imposing an enhanced sentence under [MCL 750.81(4) or MCL 750.81(5)] or [MCL 750.81a(3)] if the court finds the existence of both of the following by a preponderance of the evidence:

(*i*) The prior conviction.

(*ii*) 1 or more of the required relationships between the defendant and the victim of the prior assault or assault and battery." MCL 750.81b.

2. Domestic Violence and Habitual Offender Enhancement

A sentence for a subsequent conviction under the domestic violence statute, MCL 750.81, "which elevates an offense from a misdemeanor to a felony and increases the penalty for repeat offenses," is subject to habitual offender enhancement. *People v Stricklin*, 322 Mich App 533, 541 (2018). "The domestic-violence statute does not impose mandatory determinate sentences for its violation[,] nor is it explicitly excepted from the habitual-offender act[; r]ather, the domestic-violence statute contains the

type of statutory scheme of commonly charged offenses that courts have repeatedly found to be subject to habitual-offender enhancement." *Stricklin*, 322 Mich App at 541-542 ("[t]he trial court . . . did not err by enhancing defendant's sentence for third-offense domestic violence[26] under the habitual offender act[, MCL 769.12 (fourth-offense habitual offender)]") (citations and quotation marks omitted). Because the "[d]efendant was convicted of violating MCL 750.81(4), not MCL 750.81 generally," and "[t]hird-offense domestic violence is . . . a separate offense, the first conviction of which is punishable by a maximum of 5 years imprisonment, . . . the trial court's application of MCL 769.12(1)(b) was appropriate, because the subsequent felony was punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life." *Stricklin*, 322 Mich App at 542 (holding that "[t]he trial court did not err by recognizing that it was authorized to enhance defendant's sentence to a maximum of life imprisonment") (citations and quotation marks omitted). Likewise, "the trial court [did not] err[] by basing [the defendant's] sentence for witness intimidation[, MCL 750.122(7)(b)] on an underlying offense of third-offense domestic violence . . . as enhanced by the habitual offender act." *Stricklin*, 322 Mich App at 543.

E. Warrantless Arrest in Domestic Assault Cases[27]

"A peace officer may arrest an individual for violating . . . MCL 750.81 [or MCL] 750.81a, or a local ordinance substantially corresponding to [MCL 750.81] . . . regardless of whether the peace officer has a warrant or whether the violation was committed in his or her presence if the peace officer has or receives positive information that another peace officer has reasonable cause to believe both of the following:

(a) The violation occurred or is occurring:

(b) The individual has had a child in common with the victim, resides or has resided in the same household as the victim, has or has had a dating relationship with the victim, or is a spouse or former spouse of the victim." MCL 764.15a.

Note: In OAG, 1994, No 6822 (November 23, 1994),[28] the Attorney General found that "a peace officer, in a domestic relations matter, may make a

[26] MCL 750.81(4) at the time of sentencing, now renumbered MCL 750.81(5).

[27] For more information on arrest, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 3.

> warrantless arrest for a misdemeanor of assault or assault and battery committed outside of the officer's presence [under MCL 764.15a], in the absence of physical evidence of domestic abuse, *when there is other corroborating evidence sufficient to constitute probable cause to believe that the person to be arrested committed the offense*." (Emphasis added).
>
> See also *Klein v Long*, 275 F3d 544, 551 (CA 6, 2001) (Sixth Circuit Court of Appeals held that police officers had probable cause to arrest the appellant-husband without a warrant for domestic assault under MCL 750.81(2) where "[t]he physical evidence of battery in the bleeding finger, combined with [the victim-wife's] description to the officers of [the appellant-husband's] grabbing and pushing and her immediate fear of [the appellant-husband], constitute[d] a sufficient basis for the finding of probable cause."

Generally, MCL 764.9c(1) permits "a police officer [who] has arrested a person without a warrant for a misdemeanor or ordinance violation . . . [to] issue [] and serve upon the person an appearance ticket . . . and release the person from custody." An appearance ticket issued under MCL 764.9c, or other requested documentation, "must be forwarded to the court, appropriate prosecuting authority, or both, for review without delay." MCL 764.9c(1). However, MCL 764.9c(3)(a) prohibits the issuance of an appearance ticket to "[a] person arrested for a domestic violence violation of . . . MCL 750.81 [or MCL] 750.81a, or a local ordinance substantially corresponding to a domestic violence violation of . . . MCL 750.81 [or MCL] 750.81a, or an offense involving domestic violence as that term is defined in . . . MCL 400.1501." In addition, an appearance ticket must not be issued to an individual arrested for violating a personal protection order, or committing a serious misdemeanor or any other assaultive crime. MCL 764.9c(3)(b); MCL 764.9c(3)(d)-(e).[29]

Appearance tickets must be issued and an individual released from custody pursuant to the conditions in MCL 764.9c(4), except as provided in MCL 764.9c(5). MCL 764.9c(4) requires a police officer to issue an appearance ticket for specified offenses, and under certain circumstances, to release from custody a person who has been issued an appearance ticket under MCL 764.9c(4). Appearance tickets

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[28] OAG, 1994, No 6822 (November 23, 1994), is available at http://www.ag.state.mi.us/opinion/datafiles/1990s/op06822.htm.

[29] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Volume 1*, for more information about appearance tickets.

prescribed by MCL 764.9c(4) do not apply to offenses expressly listed in MCL 764.9c(4), which include serious misdemeanors, assaultive crimes, domestic violence violations under MCL 750.81 or MCL 750.81a, local ordinances substantially corresponding to violations of MCL 750.81 or MCL 750.81a, offenses involving domestic violence (as defined in MCL 400.1501), and operating while intoxicated offenses. MCL 764.9c(4).[30]

F. Statute of Limitations

An indictment for domestic assault "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[31] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[32] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect."MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[33]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

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[30] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Volume 1*, for more information about appearance tickets.

[31] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[32] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[33] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

G. Other Remedies for Victims of Domestic Assault

Although criminal prosecution may succeed in holding offenders accountable under the criminal justice system, appropriately penalize them for their unlawful conduct, and result in the award of restitution to the victim of an offender's criminal conduct, a victim may wish to pursue a civil action against the offender with the possibility of better compensating him or her for the immediate and long-term physical and psychological injuries caused by the offender's conduct. For the period of limitations on commencement of an action to recover damages sustained because of domestic assault, see MCL 600.5805(4)-(5). For additional discussion on civil actions filed by crime victims, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 10.

Administrative remedies may also be available to victims through the Crime Victim Services Commission (CVSC). For additional discussion on administrative remedies available through the CVSC, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 9.

2.3 Stalking

Michigan provides for the following protections against stalking:

- **Criminal Penalties**
  - Stalking, MCL 750.411h.
  - Aggravated Stalking, MCL 750.411i.
  - Cyberstalking, MCL 750.411s.
- **Civil Remedies**
  - Personal Protection Orders (PPOs), MCL 600.2950 and MCL 600.2950a.
  - Civil Suit for Damages From Stalking, MCL 600.2954.
  - Recovery for Intentional Infliction of Emotional Distress.

A. Stalking

For purposes of MCL 750.411h, *stalking* is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(e). However, "MCL

750.411h does not require that an individual engage in the 'course of conduct' with the intent to bring about the harm"; "[t]he plain language of [MCL 750.411h(1)(e)] provides only that respondent willfully engage in the 'course of conduct.'" *SP v BEK*, 339 Mich App 171, 184 (2021). "'Willful' has been defined as '[p]roceeding from a conscious motion of the will; voluntary; knowingly; deliberate.'" *Id.* at 184, quoting *Jennings v Southwood*, 446 Mich 125, 140 (1994) (cleaned up).

"In a prosecution for a violation of [MCL 750.411h], evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[34] MCL 750.411h(4).

1. Criminal Penalty

A person convicted under the stalking statute is guilty of a:

- "misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both[,]" MCL 750.411h(2)(a); or
- "felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both" if "the victim was less than 18 years of age at any time during the individual's course of conduct and the individual is 5 or more years older than the victim," MCL 750.411h(2)(b); or
- "misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both" "[i]f the victim and the individual are spouses or former spouses, have or have had a dating relationship, have or have had a child in common, or are residents or former residents of the same household," MCL 750.411h(2)(c).

The court may also place a person convicted under MCL 750.411h on probation for a term of up to five years. MCL 750.411h(3); MCL 771.2a(1). "If a term of probation is ordered, the court may, in addition to any other lawful condition of probation,[35] order the defendant to do any of the following:

[34] See M Crim JI 17.25, *Stalking*.

> (a) Refrain from stalking any individual during the term of probation.
>
> (b) Refrain from having any contact with the victim of the offense.
>
> (c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense." MCL 750.411h(3).

A person on probation for violating MCL 750.411h is not eligible for early discharge from probation under MCL 771.2. See MCL 771.2(10)(c).

"A criminal penalty provided for under [MCL 750.411h] may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct." MCL 750.411h(5).

2. Restitution

Victims of stalking are entitled to restitution. See MCL 780.766(2) (felony offense); MCL 780.794(2) (juvenile offenders); MCL 780.826(2) (misdemeanor offense).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Right's Benchbook*.

3. Constitutional Issues

a. Constitutionally Protected Activity or Conduct Serving a Legitimate Purpose

"[C]onduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment or, derivatively, stalking." *Nastal v Henderson & Assoc Investigations, Inc.*, 471 Mich 712, 723 (2005). See also MCL 750.411h(1)(d), which provides that "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose."

[35] See MCL 771.3, which provides probation conditions that must be included in the sentence of probation as well as probation conditions that may be included.

In *Nastal*, 471 Mich at 723, the Michigan Supreme Court addressed the phrase "conduct that serves a legitimate purpose[:]

> MCL 750.411h does not itself define 'conduct that serves a legitimate purpose[.]' . . . Thus, given the plain and ordinary import of the terms used by the Legislature, we conclude that the phrase 'conduct that serves a legitimate purpose' means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute."[36]

See also *People v White* (*Carl*), 212 Mich App 298, 311 (1995) (The "[d]efendant's repeated telephone calls to the victim, sometimes fifty to sixty times a day whether the victim was at home or at work, and his verbal threats to kill her and her family do not constitute protected speech or conduct serving a legitimate purpose, even if that purpose is 'to attempt to reconcile.'").

b. Vagueness and Overbreadth

"When a vagueness challenge does not involve First Amendment freedoms it must be examined on the basis of the facts in the case at hand[;] . . . [i]n other words, when a defendant brings an as-applied vagueness challenge to a statute, the defendant is confined to the facts of the case at bar." *People v Loper*, 299 Mich App 451, 458 (2013). "[A] criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad when the defendant's conduct is fairly within the constitutional scope of the statute." *People v Rogers*, 249 Mich App 77, 95 (2001).

MCL 750.411h is not unconstitutionally vague because (1) it is not overbroad, nor does it infringe on a defendant's right of free speech under the United States and the Michigan Constitutions; (2) it provides fair notice of the prohibited conduct; and (3) it does not "'confer[]

[36] In *Nastal*, 471 Mich at 714, the Michigan Supreme Court found that "surveillance by licensed private investigators that contributes to the goal of obtaining information, as permitted by the [Professional Investigator] Licens[ur]e Act, MCL 338.822[(e)(*i*)-(*v*)], is conduct that serves a legitimate purpose." At the time *Nastal* was decided, former MCL 338.822(b) allowed an investigator to obtain only five types of information. However, the statute was subsequently amended and now contains three more types of information an investigation business may obtain. See 2008 PA 146. It is unclear whether the *Nastal* holding applies to the new types of information available for procurement.

unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.'" *White (Carl)*, 212 Mich App at 309-313, quoting *Michigan State AFL-CIO v Civil Svc Comm (After Remand)*, 208 Mich App 479, 492 (1995).[37]

c. Statutory Presumption

MCL 750.411h(4) does not unconstitutionally shift the burden of proof of an element of the offense to the defendant. See *People v Ballantyne*, 212 Mich App 628, 629 (1995) (adopting the reasoning of *White* (*Carl*), 212 Mich App at 313-315).[38] In *White* (*Carl*), 212 Mich App at 313-314, the Court of Appeals held that the language of MCL 750.411h(4) and MCL 750.411i(5) ("evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, *shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimated, threatened, harassed, or molested*") does not violate due process or equal protection because "there certainly exists a rational connection between such conduct and the presumption that the victim would feel harassed or frightened by its continuation[,]" which satisfies the constitutional requirement. *White* (*Carl*), 212 Mich App at 313-314. Additionally, "[MCL 750.411h(4) and MCL 750.411i(5)] must be read in connection with MRE 302(b), [wherein] . . . it is clear that the burden of proof on each and every element of the offense of stalking remains with the prosecution, and it is mandated that the jury be so instructed." *White*, 212 Mich App at 314-315.

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[37] This holding was also extended to apply to MCL 750.411i (aggravated stalking). See Section 2.3(B) for more information on aggravated stalking.

[38] In *Ballantyne*, 212 Mich App at 629, the Court of Appeals based its holding on the language of MCL 750.411i(5) (aggravated stalking). Presumably, this holding would extend to MCL 750.411h(4), which contains the exact same language. The Court rejected the defendant's argument that MCL 750.411i(5), "which creates a rebuttable presumption that [the] defendant's acts caused the victim to feel terrorized, impermissibly shift[ed] the burden of proof of an element of the offense to [the] defendant[;] [w]e reject [the defendant's] argument for the reasons set forth in this Court's opinion in *White [(Carl)]*, [212 Mich App at 313-315 (which discussed both MCL 750.411h(4) and MCL 750.411i(5)], where this identical issued was raised sua sponte by a panel of this Court. While the opinion in *White* is arguably dictum regarding this issue, we agree with both the reasoning and conclusion and adopt it as our own." *Ballantyne*, 212 Mich App at 629. See Section 2.3(B) for more information on aggravated stalking.

4. Statute of Limitations

An indictment for stalking "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[39] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[40] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[41]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

5. Technical Probation Violation

MCL 771.4b(1) (providing for a period of incarceration for technical probation violations that increases in length as the number of violations increases) does not apply to a probationer who is on probation for a violation of MCL 750.411h, or an offense involving domestic violence as that term is defined in MCL 400.1501.[42] MCL 771.4b(6). There is a rebuttable

[39] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[40] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]"*People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[41] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

presumption that no arrest warrant will issue for a technical probation violation. MCL 771.4b(7). Instead, the court will issue a summons or show-cause order to the probationer for the alleged technical probation violation. *Id*.

MCR 6.445(A) expressly provides that "[t]he court *must* issue a summons, rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation . . . ." (Emphasis added.) The court may overcome the presumption that a summons will issue (rather than a bench warrant) if "the court states on the record a specific reason to suspect that one or more of the following apply:

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A). See also MCL 771.4b(7)(a)-(c) (providing substantially the same information as does MCR 6.445(A)(1)-(3)).

At arraignment for the alleged violation, the court must "inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence." MCR 6.445(B)(2).[43] See also MCL 771.4b(8) (hearing on a technical probation violation must occur "as soon as is possible").

If, after the probation violation hearing, the court finds that the probation violation was proved, the court must inform the probationer "whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). If a probationer pleads guilty to a probation violation, the court must, among other things, "establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F)(4).

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[42]See Section 1.1 for the definition of *domestic violence* found in MCL 400.1501. In addition, MCL 771.4b(1) does not apply to violations of MCL 750.81, MCL 750.81a, or MCL 750.411i. These offenses are discussed in Section 2.2(A)(4), Section 2.2(B)(5), and Section 2.3(B)(5), respectively.

[43]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for more information about arraignments and other pretrial procedures.

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A). The acknowledgment must be written[44] and must provide the probationer with the specific information stated in MCR 6.450(A).[45] Specifically, and among other provisions, the acknowledgment must inform the probationer that acknowledging a technical violation could delay his or her eligibility for early discharge. MCR 6.450(A)(5); MCR 6.441. See also MCL 771.4b(2) (permitting written acknowledgment of a technical probation violation without a hearing).

B. Aggravated Stalking

"An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

> (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice[46] of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.
>
> (b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.
>
> (c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.
>
> (d) The individual has been previously convicted of a violation of [MCL 750.411i] or [MCL 750.411h]." MCL 750.411i(2).

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[44] See SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[45] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for detailed information about probation and the requirements of a written acknowledgment of a technical probation violation.

[46] In *People v Threatt*, 254 Mich App 504, 506-507 (2002), the Court of Appeals found that MCL 750.411i does not define *actual notice*, but because the term is not ambiguous, the Court refused "to construe the term in a manner that incorporate[d] the service requirements of MCL 600.2950a[;]" rather, the Court held that actual notice can be inferred from "evidence [that] is sufficient to enable a rational trier of fact to find beyond a reasonable doubt that [a] defendant [has] actual notice of the PPO." In *Threatt*, 254 Mich App at 507, "evidence [was] sufficient to establish that [the] defendant had 'actual notice' of the [restraining] order" where "[t]he complainant's testimony demonstrated that [the] defendant made several statements from which his knowledge of the [Personal Protection Order (PPO)] could reasonably be inferred, that he had evaded service, and that [the] defendant spoke with both the complainant and an investigator about the PPO."

For purposes of MCL 750.411i, *stalking* is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e). "In a prosecution for a violation of [MCL 750.411i], evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[47] MCL 750.411i(5).

1. Criminal Penalty

A person convicted under the aggravated stalking statute is guilty of either a:

- felony punishable "by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both[,]" MCL 750.411i(3)(a); or
- felony punishable "by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both" if "the victim was less than 18 years of age at any time during the individual's course of conduct and the individual is 5 or more years older than the victim," MCL 750.411i(3)(b).

The court may also place a person convicted under MCL 750.411i on probation "for any term of years, but not less than 5 years." MCL 750.411i(4); MCL 771.2a(2). "If a term of probation is ordered, the court may, in addition to any other lawful condition of probation,[48] order the defendant to do any of the following:

> (a) Refrain from stalking any individual during the term of probation.
>
> (b) Refrain from having any contact with the victim of the offense.

[47] See M Crim JI 17.25, *Stalking*.

[48] See MCL 771.3, which provides probation conditions that must be included in the sentence of probation as well as probation conditions that may be included.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense." MCL 750.411i(4).

Note: If a prisoner serving a sentence for aggravated stalking under MCL 750.411i is paroled and the victim has registered to receive notification about that prisoner, the prisoner's parole order must require that the prisoner's location be monitored by a global positioning monitoring system during the entire parole period. MCL 791.236(18).[49] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 5, for more information on victim notification.

A person on probation for violating MCL 750.411i is not eligible for early discharge from probation under MCL 771.2. See MCL 771.2(10)(d).

"A criminal penalty provided for under [MCL 750.411i] may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct." MCL 750.411i(6).

2. Restitution

Victims of aggravated stalking are entitled to restitution. See MCL 780.766(2) (felony offense); MCL 780.794(2) (juvenile offenders).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

[49] If, at the time the prisoner was paroled, no victim of that crime had registered to receive notification, but a victim registers to receive notification after the prisoner's parole, the parole order must *immediately* be modified to include the requirement that the prisoner's location be monitored by a global positioning system. MCL 791.236(18).

3. Constitutional Issues

a. Legitimate Purpose

MCL 750.411i(1)(d) expressly excludes from the definition of harassment "constitutionally protected activity or conduct that serves a legitimate purpose."

MCL 750.411i(1)(d) "cannot be read as excluding from its definition of 'harassment' conduct that is clearly illegitimate, notwithstanding an 'ends justifies the means' argument that the conduct serves a legitimate purpose." *People v Coones*, 216 Mich App 721, 726 (1996) (the defendant's conduct of forcibly entering his wife's home after she refused to let him in and repeatedly attempting to contact her in violation of a temporary restraining order and conditions of the defendant's bond, constituted harassment under MCL 750.411i(1)(d), despite the defendant's argument that he contacted his wife for the legitimate purpose of preserving their marriage).

See also *White* (*Carl*), 212 Mich App 298, 311 (1995) (the "[d]efendant's repeated telephone calls to the victim, sometimes fifty to sixty times a day whether the victim was at home or at work, and his verbal threats to kill her and her family do not constitute protected speech or conduct serving a legitimate purpose, even if that purpose is 'to attempt to reconcile'").

b. Vagueness and Overbreadth

"When a vagueness challenge does not involve First Amendment freedoms it must be examined on the basis of the facts in the case at hand[;] . . . [i]n other words, when a defendant brings an as-applied vagueness challenge to a statute, the defendant is confined to the facts of the case at bar." *People v Loper*, 299 Mich App 451, 458 (2013). "[A] criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad when the defendant's conduct is fairly within the constitutional scope of the statute." *People v Rogers*, 249 Mich App 77, 95 (2001).

MCL 750.411i is not unconstitutionally vague because (1) it is not overbroad, nor does it infringe on a defendant's right of free speech under the United States and the Michigan Constitutions; (2) it provides fair notice of the prohibited conduct; and (3) it does not "'confer[] unstructured and unlimited discretion on the trier of fact

to determine whether an offense has been committed.'" *White (Carl)*, 212 Mich App at 309-313, quoting *Michigan State AFL-CIO v Civil Svc Comm (After Remand)*, 208 Mich App 479, 492 (1995).[50]

c. Statutory Presumption

MCL 750.411i(5) does not unconstitutionally shift the burden of proof of an element of the offense to the defendant. *Ballantyne*, 212 Mich App at 629 (adopting the reasoning of *White* (*Carl*), 212 Mich App at 313-315).[51] In *id.* at 313-314, the Court of Appeals held that the language of MCL 750.411h(4) and MCL 750.411i(5) ("evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, *shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimated, threatened, harassed, or molested*") do not violate due process or equal protection where "there certainly exists a rational connection between such conduct and the presumption that the victim would feel harassed or frightened by its continuation[,]" which satisfies the constitutional requirement. *White* (*Carl*), 212 Mich App at 313-314. Additionally, "[MCL 750.411h(4) and MCL 750.411i(5)] must be read in connection with MRE 302(b), [wherein] . . . it is clear that the burden of proof on each and every element of the offense of stalking remains with the prosecution, and it is mandated that the jury be so instructed." *White* (*Carl*), 212 Mich App at 314-315.

d. Double Jeopardy

"The double jeopardy provision of the United States Constitution, US Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15, protect

[50] This holding was also extended to apply to MCL 750.411h (stalking). See Section 2.3(A) for more information on stalking.

[51] In *Ballantyne*, 212 Mich App at 629, the Court of Appeals rejected the defendant's argument that MCL 750.411i(5), "which creates a rebuttable presumption that [the] defendant's acts caused the victim to feel terrorized, impermissibly shift[ed] the burden of proof of an element of the offense to [the] defendant[;] [w]e reject [the defendant's] argument for the reasons set forth in this Court's opinion in *White [(Carl)]*, [212 Mich App at 313-315], where this identical issued was raised sua sponte by a panel of this Court. While the opinion in *White* is arguably dictum regarding this issue, we agree with both the reasoning and conclusion and adopt it as our own."

citizens from suffering multiple punishments and successive prosecutions for the same offense." *White* (*Carl*), 212 Mich App at 305.

No double jeopardy violation occurred when the defendant was separately charged with misdemeanor stalking under a township ordinance[52] and then subsequently charged with aggravated stalking under MCL 750.411i, because the two separate convictions "arose out of two distinct occurrences or episodes[.]"[53] *White* (*Carl*), 212 Mich App at 306-308 (as analyzed under the "successive prosecutions strand of the Double Jeopardy Clause"). Specifically,

> "As evidenced by [MCL 750.411i(2)(d)], the Legislature apparently intended that prosecutors may use . . . a misdemeanor conviction as one of several vehicles for establishing aggravated stalking where threats to kill or injure another have been made. We therefore conclude that [the] defendant's convictions of violating a township antistalking ordinance and attempted aggravated stalking did not violate double jeopardy principles because the incidents did not arise out of a single criminal act, occurrence, episode, or transaction." *White* (*Carl*), 212 Mich App at 308.
>
> **Note:** The *White* (*Carl*) Court also "reject[ed] [the] defendant's unsupported assertion that stalking is a continuous act or offense for which he could receive only one punishment." *White* (*Carl*), 212 Mich App at 306.

Similarly, the Double Jeopardy Clause of the Federal and Michigan Constitutions is not violated where "the Legislature intended to impose multiple punishments for both of [the] defendant's convictions of aggravated stalking and criminal contempt for violating the

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[52] "[M]isdemeanor stalking under [the] township ordinance parallel[s] [MCL 750.411h]." *White (Carl)*, 212 Mich App at 308.

[53] "[T]he August 6, 1993, felony stalking warrant specified that on June 9, 1993, [the] defendant repeatedly or continuously harassed the victim in violation of a restraining order and made a credible threat to kill her or inflict physical injury upon her, in violation of MCL 750.411i. The August 17, 1993, misdemeanor warrant noted, however, that on July 17, 1993, [the] defendant unlawfully stalked, pursued, or terrorized the victim by calling her place of employment at least ten times threatening to kill her, her children, and her father, in violation of the [township] antistalking ordinance." *White (Carl)*, 212 Mich App at 306.

temporary restraining order[]" when it enacted MCL 750.411i(6). *Coones*, 216 Mich App at 727-728 (stating that "the power to define crime and fix punishment is wholly legislative, [and] the Double Jeopardy Clause is not a limitation on the Legislature").

4. Statute of Limitations

An indictment for aggravated stalking "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[54] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[55] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[56]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

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[54] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[55] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[56] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

5. Technical Probation Violation

MCL 771.4b(1) (providing for a period of incarceration for technical probation violations that increases in length as the number of violations increases) does not apply to a probationer on probation for a violation of MCL 750.411i, or an offense involving domestic violence as that term is defined in MCL 400.1501.[57] MCL 771.4b(6). There is a rebuttable presumption that no arrest warrant will issue for a technical probation violation. MCL 771.4b(7). Instead, the court will issue a summons or show-cause order to the probationer for the alleged technical probation violation. *Id.*

MCR 6.445(A) expressly provides that "[t]he court *must* issue a summons, rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation . . . ." (Emphasis added.) The court may overcome the presumption that a summons will issue (rather than a bench warrant) if "the court states on the record a specific reason to suspect that one or more of the following apply:

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A). See also MCL 771.4b(7)(a)-(c) (providing substantially the same information as does MCR 6.445(A)(1)-(3)).

At arraignment for the alleged violation, the court must "inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence." MCR 6.445(B)(2).[58] See also MCL 771.4b(8) (hearing on a technical probation violation must occur "as soon as is possible").

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[57] See Section 1.1 for the definition of *domestic violence* found in MCL 400.1501. In addition, MCL 771.4b(1) does not apply to violations of MCL 750.81, MCL 750.81a, or MCL 750.411h. These offenses are discussed in Section 2.2(A)(4), Section 2.2(B)(5), and Section 2.3(A)(5), respectively.

[58] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for more information about arraignments and other pretrial procedures.

If, after the probation violation hearing, the court finds that the probation violation was proved, the court must inform the probationer "whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). If a probationer pleads guilty to a probation violation, the court must, among other things, "establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F)(4).

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A). The acknowledgment must be written[59] and must provide the probationer with the specific information stated in MCR 6.450(A).[60] Specifically, and among other provisions, the acknowledgment must inform the probationer that acknowledging a technical violation could delay his or her eligibility for early discharge. MCR 6.450(A)(5); MCR 6.441. See also MCL 771.4b(2) (permitting written acknowledgment of a technical probation violation without a hearing).

C. Cyberstalking

MCL 750.411s(1) provides that "[a] person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:

> (a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.
>
> (b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

[59] See SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[60] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for detailed information about probation and the requirements of a written acknowledgment of a technical probation violation.

> (d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[61]

Cyberstalking under MCL 750.411s does not include:

- "an internet or computer network service provider who in good faith, and without knowledge of the specific nature of the message posted, provides the medium for disseminating information or communication between persons." MCL 750.411s(3).
- "constitutionally protected speech or activity." MCL 750.411s(6).

See also MCL 750.145d(1)(b), which makes it unlawful for a person to use the internet, a computer, computer program, computer network, or computer system to communicate with another person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit stalking under MCL 750.411h or aggravated stalking under MCL 750.411i.

1. Jurisdictional Requirements for Prosecuting Crime in Michigan

MCL 750.411s(7) contains the following jurisdictional requirements:

> "A person may be prosecuted in this state for violating or attempting to violate [MCL 750.411s] only if 1 of the following applies:
>
> (a) The person posts the message while in this state.
>
> (b) Conduct arising from posting the message occurs in this state.
>
> (c) The victim is present in this state at the time the offense or any element of the offense occurs.
>
> (d) The person posting the message knows that the victim resides in this state."

[61] See MCL 750.540 for information on a person's willful and malicious disconnection, interruption, prevention, obstruction, and unauthorized reading, copying, or usage of telecommunication services.

2. Criminal Penalty

"A person who violates [MCL 750.411s(1)] is guilty of a crime as follows:

> (a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $5,000.00, or both.
>
> (b) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.
>
> > (*i*) Posting the message is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction.
> >
> > (*ii*) Posting the message is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.
> >
> > (*iii*) Posting the message results in a credible threat being communicated to the victim, a member of the victim's family, or another individual living in the same household as the victim.
> >
> > (*iv*) The person has been previously convicted of violating [MCL 750.411s] or [MCL 750.145d], [MCL 750.411h], or [MCL 750.411i], or . . . MCL 752.796, or a substantially similar law of another state, a political subdivision of another state, or of the United States.
> >
> > (*v*) The victim is less than 18 years of age when the violation is committed and the person committing the violation is 5 or more years older than the victim." MCL 750.411s(2).

A person charged under MCL 750.411s may also be "charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate [MCL 750.411s]." MCL 750.411s(5).

3. Restitution

Victims of cyberstalking are entitled to restitution. See MCL 780.766(2) (felony offense); MCL 780.794(2) (juvenile offenders).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Right's Benchbook*.

4. Constitutional Issues

"According to the language of MCL 750.411s(8)(i), posted messages can be prohibited even if they are truthful, but by the same token MCL 750.411s cannot be read to prohibit constitutionally protected speech, MCL 750.411s(6)." *TT v KL*, 334 Mich App 413, 442-443 (2020).

First Amendment. While the First Amendment protects the freedom of speech, its protections are not without limitations. See *TM v MZ (On Remand)*, 326 Mich App 227, 237-238 (2018). For example, the First Amendment does not protect defamatory speech. *Id*. at 240. "A defamatory statement is a statement asserting facts that are and can be proven false." *TT*, 334 Mich App at 443-444. Some statements are per se defamatory such as false accusations of criminal activity. *Id*. at 444. Similarly, "the speech-integral-to-criminal-conduct exception to the First Amendment . . . has been recognized in relation to criminal stalking statutes." *Id*. at 446. However, this exception is limited in Michigan because MCL 750.411s(6) indicates "that it does not prohibit constitutionally protected speech[.]" *TT*, 334 Mich App at 447. "[W]hen the argument is raised that MCL 750.411s is being used to prohibit constitutionally protected speech relating to a matter of public concern, it must be determined whether the postings are intended solely to cause conduct that will harass a private victim in connection with a private matter or whether the publication of the information relates to a public figure and an important public concern." *Buchanan v Crisler*, 323 Mich App 163, 188-189 (2018). The focus of the elements of MCL 750.411s "is on the conduct the actor intended to cause by posting the message and the effect of that conduct." *Id*. at 179.

"[T]he speech-integral-to-criminal-conduct exception cannot be triggered just by speech itself being a violation of a law, even a law that bans conduct as well as speech." *People v Dingee*, ___ Mich App ___, ___ (2025) (cleaned up). "Instead, for the exception to apply, the speech must be integral to some conduct or scheme that is illegal in nature and independent of the speech that might be used to facilitate or accomplish the conduct or scheme." *Id*. at ___ (quotation marks and citation omitted). "[P]osting a message in violation of MCL 750.411s would not

constitute protected speech because the message is integral to the harassment of the victim insofar as it leads to, and is intended to cause, unconsented contacts that terrorize, frighten, intimidate, threaten, harass, or molest the victim." *Id*. at ___ (quotation marks and citation omitted)." The speech-integral-to-criminal-conduct exception generally applies to stalking and cyberstalking statutes, and, on that basis, [the Court of Appeals] has rejected First Amendment challenges to those statutes." *Id*. at ___. However, the application of the speech-integral-to-criminal-conduct exception "must be examined on a case-by-case basis." *Id*. at ___.

In *Dingee*, the speech-integral-to-criminal-conduct exception to First Amendment protection applied to the website defendant created about the victim. See *id*. at ___. "The images and commentary posted on that website demonstrate that the purpose of the website was to demean and disparage the victim." *Id*. at ___. Thus, "[t]he trial court correctly determined that defendant's posts about the victim, which she posted on Facebook and her website, did not involve protected speech." *Id*. at ___.

See Section 5.3(C)(2) for more information about the interplay between MCL 750.411s and issuing a PPO to enjoin conduct that may be protected by the First Amendment.

5. Reimbursement of Expenses

"The court may order a person convicted of violating [MCL 750.411s] to reimburse this state or a local unit of government of this state for the expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under . . . MCL 769.1f." MCL 750.411s(4).

6. Statute of Limitations

An indictment for cyberstalking "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[62] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[63] MCL 767.24(11). "The extension or tolling, as applicable,

[62] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[64]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

D. Personal Protection Orders (PPOs)

Civil protection orders against domestic violence supplement the protections provided by criminal law. In Michigan, a civil protection order against domestic violence is known as a personal protection order (PPO). A brief discussion of PPOs is contained in this subsection. For a detailed discussion, see Chapter 5.

The Legislature created two types of PPOs, categorized according to the relationship between the parties. Because domestic abuse is not always confined to parties living in the same household, these two types of PPOs encompass a broad range of interpersonal contexts. The two types of PPOs are:

(1) *Domestic relationship PPOs* under MCL 600.2950 are available to enjoin behavior (including stalking) that interferes with the petitioner's personal liberty, or that causes a reasonable apprehension of violence if the respondent is involved in certain domestic relationships

[63] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[64] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

with the petitioner as defined by the statute. MCL 600.2950(1).

> **Note:** If the respondent falls into any one of the following categories described in MCL 600.2950(1), and engages in prohibited conduct, a domestic relationship PPO may be appropriate:

- The petitioner's spouse or former spouse.
- A person with whom the petitioner has had a child in common.
- A person who resides *or* who has resided in the same household as the petitioner.
- A person with whom the petitioner has *or* has had a dating relationship.

(2) *Non-domestic relationship PPOs* under MCL 600.2950a:

> (a) *Non-domestic stalking PPOs* under MCL 600.2950a(1) are available to enjoin a person, regardless of that person's relationship with the petitioner, from engaging in stalking (MCL 750.411h), aggravated stalking (MCL 750.411i), or cyberstalking (MCL 750.411s).
>
> (b) *Non-domestic sexual assault PPOs* under MCL 600.2950a(2) are available to victims of sexual assault, victims who have received obscene material under MCL 750.142, and petitioners who have been placed in reasonable apprehension of sexual assault by the respondent. The respondent may be enjoined from any of the conduct listed in MCL 600.2950a(3).

E. Civil Suit for Damages Resulting from Stalking

MCL 600.2954 provides a civil remedy for damages resulting from stalking:

> "(1) A victim may maintain a civil action against an individual who engages in conduct that is prohibited under [MCL 750.411h] or [MCL 750.411i], . . . for damages incurred by the victim as a result of that conduct. A victim may also seek and be awarded exemplary damages, costs of the action, and reasonable attorney fees in an action brought under this section.

> (2) A civil action may be maintained under subsection (1) whether or not the individual who is alleged to have engaged in conduct prohibited under [MCL 750.411h] or [MCL 750.411i] . . . has been charged or convicted under [MCL 750.411h] or [MCL 750.411i] . . . for the alleged violation."
>
> **Note:** "As used in this section, 'victim' means that term as defined in [MCL 750.411h]." MCL 600.2954(3).

F. Recovery for Intentional Infliction of Emotional Distress

The intentional infliction of emotional distress tort provides for a recovery in certain circumstances where a victim suffered from extreme emotional distress.

"The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Haverbush v Powelson*, 217 Mich App 228, 233-234 (1996), citing *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602 (1985); *Johnson v Wayne Co*, 213 Mich App 143, 161 (1995).

Liability for intentional infliction of emotional distress may be found "only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush*, 217 Mich App 234, citing *Johnson*, 213 Mich App 161. In *Haverbush*, 217 Mich App at 234-235, the Court of Appeals found that the defendant-perpetrator's "conduct could appropriately be determined sufficiently extreme and outrageous to justify recovery for intentional infliction of emotion distress" because "a rational trier of fact could find that [the defendant-perpetrator's] conduct was so outrageous in character and so extreme in degree that it went beyond all bounds of common decency in a civilized society[where] [the defendant-perpetrator] engaged in an escalating series of acts over a two-year period in which she: (1) sent a barrage of letters to [the victim], to [the victim's] daughter, and to [the victim's] future in-laws, in which [the defendant-perpetrator] called [the victim] a compulsive liar, threatened [the victim's] fiancee with physical harm, and threatened to tell [the victim's] colleagues that he had harassed [the defendant-perpetrator]; (2) left lingerie on [the victim's] vehicles and at his residence several times; (3) left an ax and a hatchet on [the victim's] vehicles, after having asked him how his fiancee would like to have an ax through her windshield; (4) told a co-worker several times that someone should 'ice' [the victim]; and (5) wrote several letters

threatening to move in with him even though he was engaged and would soon be married."

"[E]motional distress 'includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.' However[,] . . . '[t]he law intervenes only where the distress inflicted is so severe that no reasonable man [or woman] could be expected to endure it. . . . Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant[-perpetrator's] conduct is in itself important evidence that the distress has existed.'" *Haverbush*, 217 Mich App at 235, quoting 1 Restatement Torts, 2d, §46, Comment j, p 77-78. In *Haverbush*, 217 Mich App at 235-236, the victim established severe emotional distress where his testimony established that "(1) [] [the defendant-perpetrator's] letter accused [the victim] of harassment, (2) [] [the victim] was especially fearful after [the defendant-perpetrator] left the ax and the hatchet on his vehicles, (3) [] [the defendant-perpetrator's] letters caused [the victim] great concern that she was going to interfere with his wedding, (4) [] [the victim] was worried about his reputation because of what [the defendant-perpetrator] said about him to others, (5) [] [the victim] was concerned with his patient's safety, and (6) [] [the defendant-perpetrator's] actions affected the way he did his work."

> **Note:** "'The intensity and duration of the distress are factors to be considered in determining its severity.'" *Haverbush*, 217 Mich App at 235, quoting 1 Restatement Torts, 2d, §46, Comment j, p 77-78.
>
> "[S]eeking and receiving medical treatment is [not] a condition precedent to satisfying the element of extreme emotional distress." *McCahill v Commercial Union Ins Co*, 179 Mich App 761, 771 (1989) (nonstalking case).

2.4 Criminal Sexual Conduct

A brief discussion on criminal sexual conduct is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Sexual Assault Benchbook*.

The types of criminal sexual conduct are:

- First degree criminal sexual conduct (CSC-I), which involves sexual penetration coupled with any of the circumstances described in MCL 750.520b.

- Second degree criminal sexual conduct (CSC-II), which involves sexual contact coupled with any of the circumstances described in MCL 750.520c.

- Third degree criminal sexual conduct (CSC-III), which involves sexual penetration coupled with any of the circumstances described in MCL 750.520d.

- Fourth degree criminal sexual conduct (CSC-IV), which involves sexual contact coupled with any one of the circumstances described in MCL 750.520e.

- Assault with intent to commit criminal sexual conduct involving sexual penetration under MCL 750.520g(1).

- Assault with intent to commit second degree criminal sexual conduct under MCL 750.520g(2).

MCL 750.520*l* permits "[a] person [to] be charged and convicted under [MCL 750.520b] to [MCL 750.520g] even though the victim is his or her legal spouse."

A. Statute of Limitations for Criminal Sexual Conduct Charges

An indictment for CSC-I "may be found and filed at any time[.]" MCL 767.24(1)(a). An indictment for a violation or attempted violation of MCL 750.520e (CSC-IV), or assault with intent to commit criminal sexual conduct under MCL 750.520g "may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later," unless "evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual." MCL 767.24(3)(a)-(b). In that situation, "an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3)(b).

An indictment for a violation of MCL 750.520c (CSC-II) or MCL 750.520d (CSC-III) "may be found and filed within 15 years after the offense is committed or by the alleged victim's forty-second[65] birthday, whichever is later," unless "evidence of the offense is obtained and that evidence contains DNA that is determined to be

[65]Changes made to the limitation periods in MCL 767.24 by 2024 PA 268, effective April 2, 2025, "apply to offenses committed on or after [April 2, 2025] and do not apply retroactively to an offense committed before that date." MCL 767.24(13).

from an unidentified individual." MCL 767.24(4)(a)-(b). In that situation, "an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's forty-second[66] birthday, whichever is later." MCL 767.24(4)(b).

"Any period during which the party charged[67] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12). "The tolling provision [is] all-encompassing, . . . [and] any period during which a defendant d[oes] not reside in Michigan c[an]not be considered when calculating the time within which charges must be found and filed, i.e., the pertinent limitations period." *People v Kasben*, 324 Mich App 1, 10 (2018). "[C]harges not yet time-barred by an existing period of limitations are subject to a new period of limitations set forth in an amended statute." *Id*. at 11 (finding that even though the crime was committed under a six-year limitations period, which was later extended to a victim's 21st birthday, and the defendant left Michigan just before the victim turned 21 and after the limitations period had been extended, defendant's "CSC I charge was not time-barred under MCL 767.24" because the period of limitations was tolled when defendant left Michigan; "in light of the tolling, the 2001 amendment [to MCL 767.24] became applicable to the case, extending indefinitely the period of limitations on a charge of CSC I"), citing *People v Russo*, 439 Mich 584, 588 (1992). See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[68]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of

[66] Changes made to the limitation periods in MCL 767.24 by 2024 PA 268, effective April 2, 2025 "apply to offenses committed on or after [April 2, 2025] and do not apply retroactively to an offense committed before that date." MCL 767.24(13).

[67] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[68] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

"[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]"[69] *People v James (Joel)*, 326 Mich App 98, 103 (2018). "[T]he tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes." *James (Joel)*, 326 Mich App at 101, 104, 108, 112 (where the trial court dismissed a CSC-III charge against the defendant on the basis that "had defendant been a resident, the limitations period would have expired before the crime was reported," the Court of Appeals reversed and held that "it is not a violation of defendant's right to interstate travel or equal protection to charge him with CSC-III related to alleged criminal conduct not reported until after the untolled limitations periods had expired").

B. Other Remedies for Victims of Criminal Sexual Conduct

Although criminal prosecution may succeed in holding offenders accountable under the criminal justice system, appropriately penalize them for their unlawful conduct, and result in the award of restitution to the victim of an offender's criminal conduct, a victim may wish to pursue a civil action against the offender with the possibility of better compensating him or her for the immediate and long-term physical and psychological injuries caused by the offender's conduct. For the period of limitations on commencement of an action to recover damages sustained because of criminal sexual conduct, see MCL 600.5805(6) (in general) and MCL 600.5851b (minor victim).[70] MCL 600.5805(6) and MCL 600.5851b do not require "that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction

[69] Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[70] For purposes of MCL 600.5805 and MCL 600.5851b, *criminal sexual conduct* is "conduct prohibited under . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, and [MCL] 750.520g." MCL 600.5805(16)(b); MCL 600.5851b(5)(b).

or adjudication." MCL 600.5805(6); MCL 600.5851b(2). For additional discussion on civil actions filed by crime victims, including victims of criminal sexual conduct, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 10.

Administrative remedies may also be available to victims through the Crime Victim Services Commission (CVSC). For additional discussion on administrative remedies available through the CVSC, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 9.

2.5 Parental Kidnapping

MCL 750.350a(1) defines *parental kidnapping* as:

> "[a]n adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights under a lawful court order at the time of the taking or retention,[71] or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention."[72]

A person convicted under the parental kidnapping statute is subject to imprisonment for not more than one year and one day, and/or a maximum fine of $2,000.00. MCL 750.350a(2). The court may also order the convicted parent to "make restitution to the other parent, legal guardian, the person or persons who have adopted the child, or any other person having lawful charge of the child for any financial expense incurred as a result of attempting to locate and having the child returned." MCL 750.350a(3).

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[71] See *People v McBride*, 204 Mich App 678, 682 (1994), where the Court of Appeals held that MCL 750.350a(1) did not require a parent to be formally served with a custody order before being formally charged with parental kidnapping; rather, MCL 750.350a(1) "requires only that the party from whom the child is taken have 'custody or visitation rights pursuant to a lawful court order at the time of the taking or retention.'" In *McBride*, 204 Mich App at 682, the defendant-biological father was properly charged with parental kidnapping under MCL 750.350a(1), where he absconded with the children before being formally served with an ex parte order that granted sole custody to the children's mother.

[72] See *People v Reynolds*, 171 Mich App 349 (1988), where the Court of Appeals found that the defendant-father could not be charged with parental kidnapping under MCL 750.350a(1) from the child's mother where no custody or parenting time order existed, but the defendant-father could be charged with parental kidnapping under MCL 750.350a(1) where the grandparent, baby sitting the child at the time the defendant-father took the child and absconded, could be considered a person "having lawful charge of the child at the time of the taking or retention."

First-time offenders who are in violation of MCL 750.350a(1) may be eligible for deferred proceedings under MCL 750.350a(4). See Section 2.5(B) for a detailed discussion of deferred proceedings.

Retention of a child in another state that is contrary to a Michigan court's order and in violation of the parental kidnapping statute under MCL 750.350a(1), is subject to the jurisdiction of Michigan courts. *People v Harvey*, 174 Mich App 58, 61-62 (1989). In *id.* at 61, the Court of Appeals found:

> "In this case, [the] defendant[-father] had a legal duty to return his daughter to her mother. His failure to perform this duty, which was made criminal by the enactment of MCL 750.350a, should be considered a crime committed within the State of Michigan. Acts done outside a state which are intended to produce, and in fact do produce, detrimental effects within the state may properly be subject to the criminal jurisdiction of the courts of that state. The detrimental effects of [the] defendant[-father's] intentional retention of the girl in violation of the Michigan court's custody order occurred here, in Michigan, since it was the authority of a Michigan court that was thwarted and it was the custodial right of a Michigan resident that was infringed upon."

A. Defenses to Parental Kidnapping

MCL 750.350a(7) provides an affirmative defense to parents who prove that they acted to "protect[] the child from an immediate and actual threat of physical or mental harm, abuse, or neglect."

A provision within the Child Custody Act, MCL 722.27a(7)(h) provides that, for purposes of determining parenting time, "[a] custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent."

B. Deferred Sentencing in Parental Kidnapping Cases

Offenders with no prior kidnapping convictions may be eligible for deferred proceedings under MCL 750.350a(4). MCL 750.350a(4) allows the court to place the offender on probation after a finding of guilt, without entering judgment:

> "When a parent who has not been convicted previously of a violation of [MCL 750.349], [MCL 750.350], or [MCL 750.350a], or under any statute of the United States or of

> any state related to kidnapping, pleads guilty to, or is found guilty of, a violation of this section, the court, without entering a judgment of guilt and with the consent of the accused parent, may defer further proceedings and place the accused parent on probation with lawful terms and conditions." MCL 750.350a(4).

Until October 1, 2021 an individual who pleads guilty to a criminal offense not listed in MCL 762.11(3) or MCL 762.11(4), committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday, may be permitted to participate in deferred proceedings if he or she meets certain eligibility requirements as set out under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*[73] MCL 762.11(1). "If the offense was committed on or after the individual's twenty-first birthday but before his or her twenty-fourth birthday, the individual must not be assigned to youthful trainee status without the consent of the prosecuting attorney." *Id.*

"Beginning October 1, 2021 an individual who pleads guilty to a criminal offense not listed in MCL 762.11(3) or MCL 762.11(4), committed on or after the individual's eighteenth birthday but before his or her twenty-sixth birthday, may qualify for deferred proceedings as a youthful trainee if he or she meets certain eligibility requirements under the HYTA. MCL 762.11(2). If the individual committed the offense on or after his or her twenty-first birthday but before his or her twenty-sixth birthday, the prosecuting attorney must consent to the individual's assignment to the status of youthful trainee. *Id.*

Deferred proceedings are also available for offenders who have been admitted into certain problem solving courts:[74]

- Veterans charged with a domestic violence offense if he or she meets certain eligibility requirements for admission into veterans treatment court under MCL 600.1200 *et seq.*[75]

- Individuals charged with a domestic violence offense if he or she meets certain eligibility requirements for admission into mental health court under MCL

[73] For a thorough discussion of deferred proceedings under the Holmes Youthful Trainee Act, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

[74] For additional information on problem-solving courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9, and problem-solving courts as they relate to juveniles, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1. For additional information on problem-solving court programs, including standards and best practice manuals, see Problem Solving Courts.

[75] For a thorough discussion of deferred proceedings under the Veterans Treatment Court Program, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

600.1090 *et seq.*,[76] and only if "[t]he individual has not previously had proceedings dismissed under . . . MCL 769.4a" and "[t]he domestic violence offense is eligible to be dismissed under . . . MCL 769.4a." MCL 600.1098(4).

1. Conditions of Probation in Deferred Proceedings

"The terms and conditions of probation may include participation in a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084." MCL 750.350a(4).

In addition, a veteran or an individual who is on probation and whose proceedings have been deferred under MCL 750.350a may be admitted into veterans treatment court or mental health court as a condition of probation. See MCL 600.1203(2)(b)(*iii*); MCL 600.1093(2)(b)(*iii*).

See also MCL 771.3, which provides probation conditions that must be included in the sentence of probation as well as probation conditions that may be included.

2. Court Records in Deferred Proceedings

MCL 750.350a(5) requires "[a]ll court proceedings under [MCL 750.350a] [to] be open to the public." However, if the sentence is deferred under MCL 750.350a, the record must be closed to public inspection during the deferral period "[e]xcept as provided in [MCL 750.350a](6)[.]" MCL 750.350a(5).

MCL 750.350a(6) provides that "[u]nless the court enters a judgment of guilt under [MCL 750.350a], the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition of the criminal charge under this section. However, the nonpublic record shall be open to the following individuals and entities for the purposes noted:

> (a) The courts of this state, law enforcement personnel, the department of corrections, and prosecuting attorneys for use only in the performance of their duties or to determine whether an employee of the court, law enforcement agency, department of corrections, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, law

[76] For a thorough discussion of deferred proceedings under the Mental Health Court Program, see the *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

> enforcement agency, department of corrections, or prosecutor's office.
>
> (b) The courts of this state, law enforcement personnel, and prosecuting attorneys for the purpose of showing either of the following:
>
> > (*i*) That a defendant has already once availed himself or herself of this section.
> >
> > (*ii*) Determining whether the defendant in a criminal action is eligible for discharge and dismissal of proceedings by a drug treatment court under [MCL 600.1076](5)[.]
>
> (c) The department of human services for enforcing child protection laws and vulnerable adult protection laws or ascertaining the preemployment criminal history of any individual who will be engaged in the enforcement of child protection laws or vulnerable adult protection laws."

3. Fulfillment of Probation Terms or Conditions in Deferred Proceedings

If the defendant fulfills the terms or conditions of probation, the court must discharge the defendant from probation and dismiss the proceedings against him or her. MCL 750.350a(4). An individual is limited to only one discharge and dismissal under MCL 750.350a. MCL 750.350a(4).

> **Note:** "Discharge and dismissal under [MCL 750.350a] shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions." MCL 750.350a(4).

4. Violation of Term or Condition of Probation in Deferred Proceedings

If the defendant violates a term or condition of probation, the court may enter an adjudication of guilt and proceed to sentencing. MCL 750.350a(4).

C. Statute of Limitations

An indictment for parental kidnapping "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[77] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[78] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[79]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan," a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

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[77] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[78] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[79] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

2.6 Child Abuse

A. Statutory Authority; Degrees of Child Abuse

1. First-Degree Child Abuse

Under MCL 750.136b(2), a person is guilty of first-degree child abuse if "the person knowingly or intentionally causes serious physical harm or serious mental harm to a child."[80]

"Because the Legislature provided that the perpetrator must 'knowingly or intentionally' cause the serious physical harm[to be guilty of first-degree child abuse under MCL 750.136b(2)], it is not sufficient for the prosecutor to prove that the defendant intended to commit the act that caused the physical harm; the prosecutor must prove that the 'defendant intended to cause serious physical harm or knew that serious physical harm would be caused by [his or] her act.'" *People v McFarlane*, 325 Mich App 507, 513-514 (2018), quoting *People v Maynor*, 470 Mich 289, 291 (2004) (alteration in original). "Because it is difficult to prove an actor's state of mind, the prosecution may rely on minimal circumstantial evidence to prove that the defendant had the required mental state." *McFarlane*, 325 Mich App at 516. In *McFarlane*, "[t]he evidence that defendant shook [the infant-victim] and that his shaking caused her injuries was sufficient to establish that defendant acted intentionally and caused her serious physical harm." *Id*. at 516.

2. Second-Degree Child Abuse

Under MCL 750.136b(3), a person is guilty of second-degree child abuse "if any of the following apply:

> (a) [t]he person's omission causes serious physical harm or serious mental harm to a child[81] or if the person's reckless act causes serious physical harm or serious mental harm to a child.[82]
>
> (b) [t]he person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.[83]

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[80] See M Crim JI 17.18, *Child Abuse, First Degree*.

[81] See M Crim JI 17.19, *Child Abuse, Second Degree (Willful Failure to Provide, or Abandonment)*.

[82] See M Crim JI 17.20, *Child Abuse, Second Degree (Reckless Act)*.

[83] See M Crim JI 17.20a, *Child Abuse, Second Degree (Act Likely to Cause Serious Harm)*.

> (c) [t]he person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.[84]
>
> (d) [t]he person or a licensee as licensee is defined in . . . MCL 722.111, violates [MCL 722.125(2) (providing that an intentional violation of a licensing rule promulgated under the child care licensing act, MCL 722.111 *et seq.*, for family and group child care homes that causes the death of a child constitutes second-degree child abuse)]."

Omission, as it is defined in MCL 750.136b(1)(c), "does not include the failure to obtain medical care[.]" *People v Bryant*, 342 Mich App 29, 35 (2022). MCL 750.136b(1)(c) expressly defines *omission* as "'a willful failure to provide food, clothing, or shelter necessary for a child's welfare or willful abandonment of a child.'" *Bryant*, 342 Mich App at 35, quoting MCL 750.136b(1)(c). In *Bryant*, the child was injured when he was "toss[ed] or [thrown] . . . over the baby gate[.]" *Bryant*, 342 Mich App at 33. After the child was on the other side of the baby gate, he "cried for a long time but did not appear to have sustained a serious injury." *Id.* at 32. The child fell asleep, and defendant allowed him to sleep until the next morning when defendant "found [the child] unresponsive and cold." *Id.* at 32. Although the defendant "failed to check on [the child] during the night or to seek medical attention for him when he failed to awaken from sleep," the definition of omission does not include a defendant's "failure to more expeditiously obtain medical care for her son . . . ."*Id.* at 34, 35.

"[I]n order to constitute a 'reckless act' under [MCL 750.136b(3)(a)], the defendant must do something and do it recklessly. Simply failing to take an action does not constitute an act." *People v Murphy*, 321 Mich App 355, 358, 361 (2017) (the defendant's failure to clean her house and ensure that morphine pills were not within the reach of the child-victim did not constitute an *act* that led to the child's death; rather it was a reckless *inaction*, which is not contemplated by the statute). However, a defendant's inaction combined with affirmative acts may still constitute a reckless act. See *People v Head*, 323 Mich App 526, 536 (2018) (distinguishing the facts from those in *Murphy*, 321 Mich App at 355 where "[d]efendant committed reckless acts [under MCL 750.136b(3)(a)] by storing a loaded, short-barreled shotgun in his unlocked bedroom closet and then allowing his children to play in the room while unsupervised"

[84] See M Crim JI 17.20b, *Child Abuse, Second Degree (Cruel Act)*.

leading to the child-victim's death; "[t]he key evidence here consisted not only of defendant's inaction but of his *affirmative* acts of storing a loaded shotgun in an unlocked closet of defendant's bedroom and allowing his children to play in that bedroom while unsupervised").

3. Third-Degree Child Abuse

Under MCL 750.136b(5), a person is guilty of third-degree child abuse "if any of the following apply:

> (a) [t]he person knowingly or intentionally causes physical harm to a child.
>
> (b) [t]he person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child."[85]

4. Fourth-Degree Child Abuse

Under MCL 750.136b(7), a person is guilty of fourth-degree child abuse "if any of the following apply:

> (a) [t]he person's omission or reckless act causes physical harm to a child.[86]
>
> (b) [t]he person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results."[87]

Fourth-degree child abuse is a general-intent crime. *People v Isrow*, 339 Mich App 522, 528 (2021). Fourth-degree child abuse requires that a defendant knowingly or intentionally engage in the *action* that created an unreasonable risk of harm or injury to a child; a defendant need not knowingly or intentionally intend to create the *situation* that exposed a child to an unreasonable risk of harm or injury. *Isrow*, 339 Mich App at 526-528. In *Isrow*, the defendant's action—"[t]hrowing a set of keys knowing a child had been standing in the vicinity of the location in which the keys were thrown seconds before"—"pose[d] an unreasonable risk of harm or injury to a four-year-old child." *Isrow*, 339 Mich App at 528.

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[85] See M Crim JI 17.21, *Child Abuse, Third Degree*.

[86] See M Crim JI 17.22, *Child Abuse, Fourth Degree (Willful Failure to Provide, or Abandonment)*.

[87] See M Crim JI 17.23, *Child Abuse, Fourth Degree (Unreasonable Risk of Harm or Injury)*.

B. Penalties for a Conviction Under Child Abuse Statute

1. Criminal Penalties for Convicted Offense

a. First-Degree Child Abuse

Under MCL 750.136b(2), first-degree child abuse is "a felony punishable by imprisonment for life or any term of years." MCL 750.136b(2).

b. Second-Degree Child Abuse

Under MCL 750.136b(4), second-degree child abuse is "a felony punishable by imprisonment as follows:

> (a) For a first offense, not more than 10 years.
>
> (b) For an offense following a prior conviction, not more than 20 years."

A violation of MCL 722.125(2) (intentional violation of a licensing rule promulgated under the child care licensing act, MCL 722.111 *et seq.*, for family and group child care homes that causes the death of a child) constitutes second-degree child abuse and requires, in addition to any other penalty imposed, the permanent revocation of the person's, organization's, or agency's license. MCL 722.125(2); MCL 750.136b(3).

c. Third-Degree Child Abuse

Under MCL 750.136b(6), third-degree child abuse is "a felony punishable by imprisonment as follows:

> (a) For a first offense, not more than 2 years.
>
> (b) For an offense following a prior conviction, not more than 5 years."

d. Fourth-degree Child Abuse

Under MCL 750.136b(8), fourth-degree child abuse is "a crime punishable as follows:

> (a) For a first offense, a misdemeanor punishable by imprisonment for not more than 1 year.

(b) For an offense following a prior conviction, a felony punishable by imprisonment for not more than 2 years."

e. Enhanced Sentencing

"If the prosecuting attorney intends to seek an enhanced sentence based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information a statement listing the prior conviction or convictions. The existence of the defendant's prior conviction or convictions must be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of the judgment of conviction.

(b) A transcript of a prior trial, plea-taking, or sentencing.

(c) Information contained in a presentence report.

(d) The defendant's statement." MCL 750.136b(11).

2. Criminal Penalties if Convicted Offense Committed in Presence of Child Other Than The Victim

If a person commits child abuse "in the presence of a child other than the child who is the victim of the violation[, the person] is guilty of a felony punishable as follows:

(a) If the person [commits first-degree child abuse under MCL 750.136b(2)] in the presence of another child, by imprisonment for life or any term of years.

(b) Except as provided in subdivision (c), if the person [commits second-degree child abuse under MCL 750.136b(4)] in the presence of another child, by imprisonment for not more than 10 years.

(c) If the person [commits second-degree child abuse under MCL 750.136b(4)] in the presence of another child on a second or subsequent occasion, by imprisonment for not more than 20 years.

(d) If the person [commits third-degree child abuse under MCL 750.136b(6)] in the presence of another child, by imprisonment for not more than 2 years." MCL 750.136d(1).

Note: "A charge and conviction under [MCL 750.136d] do not prohibit a person from being charged with, convicted of, or sentenced for any other violation of law arising out of the same transaction as the violation of [MCL 750.136d]." MCL 750.136d(2).

3. Restitution

Victims of child abuse are entitled to restitution. See MCL 780.766(2) (felony offense); MCL 780.794(2) (juvenile offenders); MCL 780.826(2) (misdemeanor offense).

For additional information on restitution, see the Michigan Judicial Institute's *Crime Victim Right's Benchbook*.

C. Defenses to Child Abuse

"[MCL 750.136b] does not prohibit a parent or guardian, or other person permitted by law or authorized by the parent or guardian, from taking steps to reasonably discipline a child, including the use of reasonable force." MCL 750.136b(9).

MCL 750.136b(10) provides an affirmative defense to a charge of child abuse under MCL 750.136b where "the defendant's conduct involving the child was a reasonable response to an act of domestic violence[88] in light of all the facts and circumstances known to the defendant at that time."

Note: "The defendant has the burden of establishing the affirmative defense by a preponderance of the evidence." MCL 750.136b(10).

[88] "As used in this subsection, 'domestic violence' means that term as defined in . . . MCL 400.1501." MCL 750.136b(10).

D. Statute of Limitations

An indictment for child abuse "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[89] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[90] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect."MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) (finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[91]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

2.7 Witness Tampering

Abusers may use a variety of methods to avoid conviction, including tampering with witnesses. Attempts to influence a victim-witness may include the following:

- bribing a victim, MCL 750.122(1).
- threatening or intimidating a victim, MCL 750.122(3).

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[89] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[90] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 118, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[91] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

- interfering with a victim's ability to attend, testify, or provide information, MCL 750.122(6).

- retaliating against a victim for testifying, MCL 750.122(8).

The witness tampering statute, MCL 750.122, applies "regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding." MCL 750.122(9).

See also MCL 750.483a(5)(a), which provides that a person must not "[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding."[92]

A. Types of Witness Tampering

MCL 750.122 specifically prohibits tampering through bribery, threats, intimidation, interference, or retaliation.

1. Bribery

MCL 750.122(1) prohibits a person from "giv[ing], offer[ing] to give, or promis[ing] anything of value to an individual for any of the following purposes:

> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) To influence any individual's testimony at a present or future official proceeding.
>
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."[93]

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[92] A person in violation of MCL 750.483a(5) is guilty of: "(a) [e]xcept as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both[; or] (b) [i]f the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both." MCL 750.483a(6).

[93] See MCL 750.483a for information on influencing a person's statement or presentation of evidence "to a police officer conducting a lawful investigation of a crime" through bribery. MCL 750.483a(3)(a).

MCL 750.122(1) does not apply to:

- "the reimbursement or payment of reasonable costs for any witness to provide a statement to testify truthfully or provide truthful information in an official proceeding as provided for under . . . MCL 213.66, or . . . MCL 600.2164, or court rule."[94] MCL 750.122(2).

- "[t]he lawful conduct of an attorney in the performance of his or her duties, such as advising a client." MCL 750.122(5)(a).

- "[t]he lawful conduct or communications of a person as permitted by statute or other lawful privilege." MCL 750.122(5)(b).

"[C]onduct [that] consisted solely of lawful conduct and [with which] . . . the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully[,]" is an affirmative defense to MCL 750.122(1). MCL 750.122(4). The defendant has the burden of proving the affirmative defense by a preponderance of the evidence. *Id.*

2. Threats or Intimidation

MCL 750.122(3) prohibits a person from "do[ing] any of the following by threat or intimidation:[95]

> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."[96]

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[94] MCL 213.66 provides for witness fees in condemnation proceedings, and MCL 600.2164 regulates the payment of expert witness fees.

[95] "'Threaten or intimidate' does not mean a communication regarding the otherwise lawful access to courts or other branches of government, such as the otherwise lawful filing of any civil action or police report or which the purpose is not to harass the other person in violation of . . . MCL 600.2907." MCL 750.122(12)(b).

MCL 750.122(3) does not apply to:

- "[t]he lawful conduct of an attorney in the performance of his or her duties, such as advising a client." MCL 750.122(5)(a).
- "[t]he lawful conduct or communications of a person as permitted by statute or other lawful privilege." MCL 750.122(5)(b).

"[C]onduct [that] consisted solely of lawful conduct and [with which] . . . the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully[,]" is an affirmative defense to MCL 750.122(3). MCL 750.122(4). The defendant has the burden of proving the affirmative defense by a preponderance of the evidence. *Id.*

3. Interference

MCL 750.122(6) prohibits a person from "willfully imped[ing], interfer[ing] with, prevent[ing], or obstruct[ing] or attempt[ing] to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding."[97]

"[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully[98] (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability[99] (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we use the word

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[96] See MCL 750.483a for information on influencing a person's statement or presentation of evidence "to a police officer conducting a lawful investigation of a crime" through threats or intimidation. MCL 750.483a(3)(b).

[97] See also MCL 750.483a(1)(b), which provides that a person must not "[p]revent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person,"and MCL 750.483a(1)(c), which prohibits a person from "[i]ntentionally us[ing their] professional position of authority over another person to prevent or attempt to prevent the other person from reporting a crime listed in [MCL 750.136b (child abuse), MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), MCL 750.520d (CSC-III), MCL 750.520e (CSC-IV), or MCL 750.520g (assault with intent to commit CSC involving sexual penetration; assault with intent to commit CSC-II)], that is committed or attempted by another person."

[98] In *Greene*, 255 Mich App at 442, quoting *People v Lerma*, 66 Mich App 566, 570 (1976), the Court of Appeals found that willfulness "'implies knowledge and purpose to do wrong.'"

interference to include all types of conduct proscribed in subsection 6." *People v Greene*, 255 Mich App 426, 442-443 (2003).

4. Retaliation

MCL 750.122(8) defines *retaliate* as:

> "(a) Commit[ting] or attempt[ing] to commit a crime against a person.
>
> (b) Threaten[ing] to kill or injure any person or threaten[ing] to cause property damage."[100]

To determine whether a defendant's message to a witness constituted "retaliation" for purposes of MCL 750.122(8)(b) requires the prosecution to prove that the defendant "intend[ed] to threaten a witness with death or injury or intend[ed] to communicate such a threat." *People v Johnson*, 340 Mich App 531, 545 (2022). It is not necessary to prove that a defendant "actually intended to carry out the threat." *Id*.In addition, "[w]hether [a witness] suffered mental anguish or psychological injury as a result of [a] defendant's message [is] irrelevant to the prosecution's burden to prove the elements of the crime of witness retaliation." *Id*. at 549. In *Johnson*, the trial court answered a jury question in a manner that created "a real danger that the jury convicted defendant on the basis that [the witness] suffered mental anguish." *Id*. However, the Court determined that the language used in 750.122(8)(b) was plain and unambiguous and demonstrated that the Legislature "was addressing threats to kill or *physically* injure a witness." *Johnson*, 340 Mich App at 550. In *Johnson*, the defendant sent a message to the witness through Facebook Messenger that communicated, among other things, the defendant's hope that the witness would die "an extremely horrible death" and that the witness "deserve[d] to have his fkn tongue cut off[.]" *Id*. at 548. The Court concluded that "the evidence and reasonable inferences arising from the evidence were sufficient to establish beyond a

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[99] In analyzing the word "ability," the Court of Appeals in *Greene*, 255 Mich App at 441, determined that "[a]bility is the power or capacity to do or act physically, mentally, legally, morally, or financially[;] [t]his is a broad definition of the human facility to act, not at all limited to the logical ways in which a tamperer might try to interfere with a witness, including the witness's ability to travel, appear at the place designated for an 'official proceeding,' or biological ability to recall information or provide testimony, whether spoken, written, signed, or communicated in another manner. This breadth implies that [MCL 750.122(6)] makes illegal *any* act or attempt, no matter its form, to keep the witness from attend[ing], testify[ing], or proivd[ing] information in or for a present future official proceeding' by affecting the witness's ability to do so." (Internal quotation marks and citations omitted).

[100] See also MCL 750.483a(1)(d), which provides that a person shall not "[r]etaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person."

reasonable doubt that the message sent to [the witness] contained a threat to 'kill' or 'injure' [the witness]". *Id.* at 548-549.

B. Penalties for Witness Tampering

MCL 750.122 provides for the following penalties for witness tampering:

- "Except as provided in [MCL 750.122(7)(b)] and [MCL 750.122(7)(c)], the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both." MCL 750.122(7)(a).

- "If the violation is committed in a criminal case [involving an offense] for which the maximum term of imprisonment is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both." MCL 750.122(7)(b).

- "If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both." MCL 750.122(7)(c).

- If the violation involves a person "retaliat[ing], attempt[ing] to retaliate, or threaten]ing] to retaliate against another person for having been a witness in an official proceeding[, the person] is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both." MCL 750.122(8).

"[MCL 750.122] does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same transaction as the violation of [MCL 750.122]." MCL 750.122(10).

"The court may order a term of imprisonment imposed for violating [MCL 750.122] to be served consecutively to a term of imprisonment imposed for the commission of any other crime including any other violation of law arising out of the same transaction as the violation of [MCL 750.122]." MCL 750.122(11).

C. Statute of Limitations

An indictment for witness tampering "may be found and filed within 6 years after the offense is committed." See MCL 767.24(10). However, "[a]ny period during which the party charged[101] did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed."[102] MCL 767.24(11). "The extension or tolling, as applicable, of the limitations period provided in [MCL 767.24] applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect." MCL 767.24(12).

See *People v Blackmer*, 309 Mich App 199, 202 (2015) ((finding that because "the plain and unambiguous language of the . . . nonresident tolling provision [of MCL 767.24[103]] provides that the limitations period [is] tolled for any period in which a defendant [is] not customarily and openly living in Michigan[,]" a "[d]efendant's subjective intent [to return to Michigan following his or her term of incarceration in another state] is irrelevant[, and] . . . the statute of limitations [is] tolled from the time defendant [leaves] Michigan").

2.8 Tracking Device

A person "is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both" if he or she:

- "[w]hile being the restrained party under a protective order, tracks the location of a motor vehicle operated or

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[101] "The term 'party charged' simply refers to the party . . . who [is] charged with a crime to which the limitations and tolling provisions of MCL 767.24 apply." *People v James (Joel)*, 326 Mich App 98, 109 (2018) (the authority relied on by the trial court "for the proposition that, for the tolling provision to apply, defendant must have been a 'suspect' or an 'accused' prior to the expiration of the untolled limitations, [was] inapposite").

[102] "[T]he tolling provision in MCL 767.24 [does not] violate [a nonresident] defendant's constitutional right to interstate travel or . . . equal protection under the law[.]" *People v James*, 326 Mich App 98, 101, 103, 104, 108, 112 (2018) ("the tolling provision [in MCL 767.24] only applies when a party is not usually and publicly residing in Michigan and, therefore, it does not restrict in any way a person's right to travel within, across, or outside of Michigan's border"; "residents and nonresidents are not similarly situated for equal-protection purposes," and there are rational grounds for "[t]he Legislature [to] distinguish[] between Michigan residents and nonresidents for purposes of tolling the statute of limitations for certain crimes, . . . including the investigation, prosecution, and . . . the very discovery of previously unreported crimes"). Although the *James* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(8), MCL 767.24(8) contains substantially similar language as the current provision found in MCL 767.24(11).

[103] The *Blackmer* Court discussed the nonresident tolling provision that was formerly found in MCL 767.24(1). However, it contains substantially similar language as the current provision found in MCL 767.24(11).

occupied by an individual protected under that order with a tracking device." MCL 750.539*l*(1)(c).

- "[w]hile on probation or parole for an assaultive crime or a violation of [MCL 750.81(4)[104]] or [MCL 750.81(5)[105]], or [MCL 750.81a(2)] or [MCL 750.81a(3)],[106] tracks the location of a motor vehicle operated or occupied by a victim of that crime or by a family member of the victim of that crime without the knowledge and consent of that victim or family member." MCL 750.539*l*(1)(d).

  Note: MCL 750.539*l* also makes it a misdemeanor crime for a person to track, install, or place (or cause the installation or placement) of a tracking device on a vehicle without the owner's or lessee's knowledge and consent. MCL 750.539*l*(1)(a)-(b).

Several exceptions apply. See MCL 750.539*l*(2).

"A person who illegally installs or uses a tracking device . . . is liable for all damages incurred by the owner or lessee of the motor vehicle caused by the installation or use of the tracking device." MCL 750.539*l*(4).

2.9 Interstate Domestic Violence Crimes

The Violence Against Women Act (VAWA),[107] 18 USC 2261 *et seq.*, provides for protections against interstate domestic violence by making it a federal crime for:

- "[a] person who travels in interstate or foreign commerce or enters or leaves Indian country or is present[108] within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence,[109] commits or attempts to commit a crime of violence against

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[104] Formerly MCL 750.81(3). See 2016 PA 87, effective July 25, 2016. MCL 750.539*l*(1)(d) has not been amended to reflect the renumbering.

[105] Formerly MCL 750.81(4). See 2016 PA 87, effective July 25, 2016. MCL 750.539*l*(1)(d) has not been amended to reflect the renumbering.

[106] For a detailed discussion of domestic assaults under MCL 750.81 and MCL 750.81a, see Section 2.2.

[107] VAWA was reauthorized in 2022, effective October 1, 2022. For more information, see the United States Department of Justice website's discussion of the 2013 and 2022 Reauthorizations of the Violence Against Women Act (VAWA).

[108] The addition of the language "is present" is effective October 1, 2013. See 2013 PL 113-4.

[109] The addition of the language "or presence" is effective October 1, 2013. See 2013 PL 113-4.

that spouse, intimate partner, or dating partner[.]" 18 USC 2261(a)(1).

- "[a] person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner[.]" 18 USC 2261(a)(2).

VAWA also provides for protections against interstate stalking by making it a federal crime for a person who:

- as provided under 18 USC 2261A(1), "travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

  (A) places that person in reasonable fear of the death of, or serious bodily injury to—

    (i) that person;

    (ii) an immediate family member (as defined in [18 USC] 115) of that person;

    (iii) a spouse or intimate partner of that person; or

    (iv) the pet, service animal, emotional support animal, or horse of that person; or

  (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A);"[110] or

- as provided under 18 USC 2261A(2), "with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of

[110] 18 USC 2261A(1).

> interstate or foreign commerce to engage in a course of conduct that—
>
> > (A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or
> >
> > (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A)[.]"[111]

A person convicted under 18 USC 2261 or 18 USC 2261A must be punished as provided in 18 USC 2261(b). 18 USC 2261(1)-(2); 18 USC 2261A. 18 USC 2261(b) requires the imposition of the following punishments:

- a "fine[] under [Title 18]." 18 USC 2261(b).
- imprisonment "for life or any term of years, if death of the victim results[.]" 18 USC 2261(b)(1).
- imprisonment "for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results[.]" 18 USC 2261(b)(2).
- imprisonment "for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense[.]" 18 USC 2261(b)(3).
- imprisonment "for not more than 5 years, in any other case[.]" 18 USC 2261(b)(5).
- "both fine[] and imprison[ment]." 18 USC 2261(b).[112]

A person who "commits the crime of stalking [i.e. violates 18 USC 2261A] in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in [18 USC 2266], shall be punished by imprisonment for not less than 1 year."[113] 18 USC 2261(b)(6). 18 USC 2266 defines the scope of protection orders and the types of orders contemplated by 18 USC 2261(b)(6). For additional information on foreign protection orders, see Section 5.15.

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[111] 18 USC 2261A(2).

[112] 18 USC 2261(b) also contains a punishment for violation of 18 USC 2241 *et seq.* (sexual abuse). Discussion of that topic is beyond the scope of this section.

[113]The statutory language of 18 USC 2261(b) is ambiguous. The language in 18 USC 2261(b) requires a individual to be fined for a conviction of 18 USC 2261 or 18 USC 2261A (stalking), imprisoned for the term prescribed in 18 USC 2261(b)(1)-(5), depending on the circumstances involved in the violation of 18 USC 2261 or 18 USC 2261A, or "both fined and imprisoned." 18 USC 2261(b). However, there is no similar statement for violations described in 18 USC 2261(b)(6). Individuals convicted of 18 USC 2261A under the conditions stated in 18 USC 2261(b)(6) are subject to mandatory imprisonment; whether a fine may or must be imposed in addition to a term of imprisonment is not clear.

Chapter 3: Protective Measures in Investigation, Pretrial Release, and Probation

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3.1 Chapter Overview

Because pretrial release and release on probation may affect the safety of a victim of a domestic violence crime, the victim's family or friends, or to the public at large, this chapter contains information on statutory provisions and case management practices governing pretrial release and ordering probation. Police reporting requirements are also discussed.[1]

Committee Tip:

It is important to note that criminal cases involving allegations of domestic violence differ from other criminal cases due the increased risk for recidivism or obstruction of justice during periods when a defendant-abuser is not held in custody. Two reasons for the increased risk are:

- *The perpetrator of a domestic violence crime has greater access to the victim than does the perpetrator of stranger violence. Domestic violence perpetrators are likely to live with their victims, or to have regular contact with them for purposes such as child visitation.*
- *Domestic violence is motivated by the defendant-abuser's desire to control the victim. Accordingly, defendant-abusers may resort to violence to regain the control that is lost when their behavior leads to criminal charges.*

3.2 Investigating Cases Involving Domestic Violence

When police officers respond to a domestic dispute, they are obligated to investigate potential domestic violence. *City of Westland v Kodlowski*, 298 Mich App 647, 669 (2012), vacated in part on other grounds, rev'd in part on other grounds 495 Mich 871, 871-872 (2013).[2] "While a co-occupant may invalidate another co-occupant's consent in cases where the police are entering to search for evidence, a co-occupant's withdrawal of his [or her] consent to the presence of the police does not preclude officers from continuing to investigate cases of potential domestic violence." *Id.* at 667-

[1] The discussion in this chapter assumes that the defendant is an adult. For a discussion of pretrial release and probation of juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*. A discussion of crime victim safety generally appears in the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[2] For more information on the precedential value of an opinion with negative subsequent history, see our note.

668, citing *Randolph*, 547 US at 118-119. In *Kodlowski*, 298 Mich App at 668, the police arrived at the defendant's residence in response to a domestic dispute. After receiving consent from the defendant and the complainant, the police entered the residence to assist the complainant in locating her cellular telephone. *Id*. Later, the defendant revoked his consent by asking the police to leave the residence. *Id*. at 669. The defendant argued that the police officers violated his Fourth Amendment rights by staying at his residence after he revoked his consent to their presence. *Id*. The Court of Appeals held that the "defendant's decision to revoke his consent did not render the officers' presence unlawful" because the officers were there in response to a domestic dispute and not to search for evidence. *Id*.

A warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent.[3] *Georgia v Randolph*, 547 US 103, 120 (2006). *Randolph* is "limited to situations in which the objecting occupant is physically present" and does not apply "if the objecting occupant is absent when another occupant consents." *Fernandez v California*, 571 US 292, 294 (2014). "[A]n occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason." *Id*. at 294, 303 (motion to suppress incriminating evidence found in apartment properly denied where "consent [to search] was provided by an abused woman well after [the defendant,] her male partner[,] had been removed from the apartment they shared"). Moreover, the United States Supreme Court specifically emphasized that its ruling in *Randolph*, 547 US at 118, regarding a co-occupant's ability to invalidate the consent of a co-occupant "has no bearing on the capacity of the police to protect domestic victims." Specifically, the Court noted:

> "[T]h[e] [*Randolph*] case has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect

[3] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for a detailed discussion of the federal and state constitutional protections against unreasonable searches and seizures, and for a discussion of exceptions that validate an otherwise unreasonable search and seizure, which includes voluntary consent.

> belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes." *Randolph*, 547 US at 118.

3.3 Police Report in Cases Involving Domestic Violence

MCL 764.15c(4) requires a police officer who investigates or intervenes in a domestic violence incident to prepare a standard domestic violence incident report form describing the incident.[4]

The police officer must also provide the victim with written notice following the intervention or investigation of a domestic violence incident. MCL 764.15c(1). Among other things, the notice must inform the victim of his or her legal right to "go to court and file a petition requesting a personal protection order [(PPO)] to protect you or other members of your household from domestic abuse which could include restraining or enjoining the abuser from doing the following:

> (a) Entering onto premises.
>
> (b) Assaulting, attacking, beating, molesting, or wounding you.
>
> (c) Threatening to kill or physically injure you or another person.
>
> (d) Removing minor children from [the victim], except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.
>
> (e) Engaging in stalking behavior.
>
> (f) Purchasing or possessing a firearm.
>
> (g) Interfering with [the victim's] efforts to remove [the victim's] children or personal property from premises that are solely owned or leased by the abuser.
>
> (h) Interfering with [the victim] at [his or her] place of employment or education or engaging in conduct that

[4] See MCL 764.15c(4) for a list of information that must be included in the domestic violence report. MCL 764.15c(5) also requires "[t]he law enforcement agency [to] retain the completed domestic violence report in its files[, and] . . . file a copy of the completed domestic violence report with the prosecuting attorney within 48 hours after the domestic violence incident is reported to the law enforcement agency."

impairs [his or her] employment relationship or [his or her] employment or educational environment.

(i) Engaging in any other specific act or conduct that imposes upon or interferes with [the victim's] personal liberty or that causes a reasonable apprehension of violence.

(j) Having access to information in records concerning any minor child [the victim has] with the abuser that would inform the abuser about [the victim's] address or telephone number, the child's address or telephone number, or [the victim's] employment address.

(k) Injuring, killing, torturing, neglecting, removing, or retaining an animal in which [the victim has] an ownership interest to cause [the victim] mental distress or to exert control over [the victim].

(*l*) Threatening to injure, kill, torture, or neglect an animal in which [the victim has] an ownership interest to cause [the victim] mental distress or to exert control over [the victim].

[The victim's] legal rights also include the right to go to court and file a motion for an order to show cause and a hearing if the abuser is violating or has violated a personal protection order and has not been arrested." MCL 764.15c(2).

3.4 Committee Tips for Promoting Pretrial Safety

Domestic violence is a pattern of behavior perpetrated with the intent to control an intimate partner, which may escalate after initiation of court proceedings, or extend to situations in the courtroom. To that end, the editorial advisory committee advises courts to warn the defendant that coercion and abuse will not influence the outcome of the case. The editorial advisory committee offers the following additional suggestions for promoting pretrial safety in cases involving allegations of domestic violence:

- **Emphasize that the proceedings are between the defendant and the People, not the defendant and his or her intimate partner.**

A defendant who realizes that witnesses do not control court proceedings may be discouraged from making efforts to obstruct justice. To that end, courts should not ask the complaining witness to approve of or agree to release conditions because it may endanger the witness.

- **Violation of pretrial release conditions will result in a warrantless arrest, revocation or forfeiture of bond, and**

possible further prosecution for obstruction of justice or criminal contempt.

Domestic abusers may engage in certain tactics to maintain control or deter criminal proceedings. These tactics may include witness intimidation or financial abuse or failure to support the abuser's family.[5] MCR 6.106(D)(1) authorizes a court to order that the defendant "will not commit any crime while released[.]" Thus a court may inform the defendant that these types of actions may constitute a crime and a violation of his or her release conditions. See Section 3.5(H) for more information on a defendant's failure to comply with pretrial release conditions.

- **Consider issuing a "no contact" order that clearly prohibits *all* contact with persons who may be in danger.**

Note that court does not have jurisdiction over the witnesses and, therefore, cannot issue a mutual "no contact" order. However, by limiting the defendant's access to certain endangered individuals, there may be a decreased risk of coercion or re-assault.

- **Inquire into the safety of the children in the home.**

Children who live in an environment involving domestic violence are often exploited by the abuser and may be in danger, as well.

- **Inquire whether the defendant is subject to a PPO or a prior domestic relations order.**

Conflicting court orders may cause confusion for the parties who are subject to the court orders, and may also cause confusion for the police officers who have to enforce the conflicting orders. Thus, it is important for the court to issue a conditional release order that is consistent with any other existing court orders involving the defendant. In the event that the court must issue an inconsistent order, it should communicate with the court issuing a prior order to prevent confusion.

- **To protect the defendant's right against self-incrimination, do not order *pretrial* participation in a batterer intervention service.**

Batterer intervention services typically require participants to admit responsibility for their abusive acts and required participation is, thus, an inappropriate pretrial release condition.

[5] These acts may constitute crimes under MCL 750.122 (witness tampering); MCL 750.136b; MCL 750.161; MCL 750.165; MCL 750.167; MCL 750.168.

- **Require the defendant to post a cash bond.**

Requiring cash bond, as opposed to being released on recognizance, may help ensure the defendant's appearance at subsequent proceedings and the safety of witnesses.

- **Consider the need to preserve the confidentiality of witnesses' identifying information.**

See Section 7.4 for more information on this topic.

3.5 Pretrial Release

A brief discussion on pretrial release is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8.

Committee Tip:

This section discusses various ways in which a court may order pretrial release for a defendant accused of committing a crime involving domestic violence. In these cases, it may be safest to issue pretrial release orders under MCL 765.6b (conditional release) because the statute expedites enforcement of pretrial release orders by authorizing their entry into the Law Enforcement Information Network (LEIN) system and permits law enforcement officers to make a warrantless arrest upon reasonable cause to believe that a pretrial release order has been violated.

Unless a pretrial release order has already been issued, at a defendant's arraignment on the complaint and/or warrant, "the court must order that, pending trial, the defendant be: (1) held in custody as provided in [MCR 6.106(B)]; (2) released on personal recognizance or an unsecured appearance bond; or (3) released conditionally, with or without money bail (ten percent, cash or surety)." MCR 6.106(A).

"In deciding which [pretrial] release to use and what terms and conditions to impose, the court is to consider relevant information, including

> (a) [the] defendant's prior criminal record, including juvenile offenses;

(b) [the] defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(c) [the] defendant's history of substance abuse or addiction;

(d) [the] defendant's mental condition, including character and reputation for dangerousness;

(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

(f) [the] defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

(i) any other facts bearing on the risk of nonappearance or danger to the public."[6, 7] MCR 6.106(F)(1).

Committee Tip:

In domestic violence cases, a court should assess the presence of circumstances indicating whether the defendant is likely to kill or seriously injure an intimate partner or other person. This is known as assessing any present "lethality factors." For additional information on lethality indicators, see the Batterer Intervention Standards for the State of Michigan, Section 5.2, at http://www.biscmi.org/aboutus/docs/michigan_standards_final.html.

MCR 6.106(F)(2) requires the court to state the reasons for its decision on the record if it orders that the defendant be held in custody under MCR

[6] "Nothing in [MCR 6.106(C)] through [MCR 6.106(F)] may be construed to sanction pretrial detention nor to sanction the determination of pretrial release on the basis of race, religion, gender, economic status, or other impermissible criteria." MCR 6.106(F)(3).

[7] See *Maryland v King*, 569 US 435, 453 (2013), noting that "DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness[,]" and will thus "inform a court's determination whether the individual should be released on bail."

6.106(B)[8] or released on conditions under MCR 6.106(D) that include money bail.[9] However, "[t]he court need not make a finding on each of the enumerated factors." MCR 6.106(F)(2).

The rules of evidence do not apply to "proceedings for release on bail or otherwise." MRE 1101(b)(3).

A. Denial of Pretrial Release

Because some domestic violence crimes may involve the type of serious conduct for which a pretrial release may be denied, this subsection briefly discusses the circumstances under which a court may deny a defendant a pretrial release under MCR 6.106(B).

Under MCR 6.106(B)(1), "[t]he court may deny pretrial release to

> (a) a defendant charged with
>
> (i) murder or treason, or
>
> (ii) committing a violent felony and
>
> [A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> [B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents,
>
> if the court finds that proof of the defendant's guilt is evident or the presumption great;
>
> (b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is

[8] See Section 3.5(A) for a discussion of denying the defendant a pretrial release under MCR 6.106(B).

[9] See Section 3.5(C) for a discussion of conditional releases under MCR 6.106(D), and Section 3.5(D) for a discussion of money bail under MCR 6.106(E).

> not likely to flee or present a danger to any other person."

"If the court determines as provided in [MCR 6.106(B)(1)] that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail." MCR 6.106(B)(3).

MCR 6.106(B)(4) requires the court to "state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled 'Custody Order[,]'"[10] and place the completed order in the court file.

1. Protective Conditions in Custody Order

> "The court may, in its custody order, place conditions on the defendant, including but not limited to restricting or prohibiting [the] defendant's contact with any other named person or persons, if the court determines the conditions are reasonably necessary to maintain the integrity of the judicial proceedings or are reasonably necessary for the protection of one or more named persons. If an order under this paragraph is in conflict with another court order, the most restrictive provisions of the orders shall take precedence until the conflict is resolved." MCR 6.106(B)(5).
>
> "Nothing in [MCR 6.106] limits the ability of a jail to impose restrictions on detainee contact as an appropriate means of furthering penological goals." MCR 6.106(B)(6).

2. Custody Hearing

The defendant or the prosecutor may request a custody hearing "if the defendant is being held in custody pursuant to MCR 6.106(B)[;]" the court has discretion whether to conduct the hearing.[11] MCR 6.106(G)(1).

> **Note:** If the court grants a request for a custody hearing, MCR 6.106(G)(2) provides the following hearing procedures:

[10] See SCAO form MC 240, *Order for Pretrial Release, Custody, Amended*.

[11] "The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision pursuant to [MCR 6.106(B)]." MCR 6.106(G)(1).

> "(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> (b) The rules of evidence, except those pertaining to privilege, are not applicable. Unless the court makes the findings required to enter an order under [MCR 6.106(B)(1)], the defendant must be ordered released under [MCR 6.106(C)] or [MCR 6.106(D)]. A verbatim record of the hearing must be made."

B. Release on Interim Bond or Personal Recognizance

Except as provided in MCL 780.582a, a person arrested with or without a warrant for a misdemeanor or a violation of a city, village, or township ordinance punishable by imprisonment for not more than one year and/or a fine may be eligible for an interim bond "if a magistrate is not available or immediate trial cannot be had[.]" MCL 780.581(1)-(2); MCL 780.582. MCL 780.583a also permits an arresting officer to release an arrested person on his or her own recognizance if the arrest is made on a misdemeanor warrant from another county and MCL 780.582a does not apply.

Under MCL 780.582a individuals arrested for certain domestic violence offenses are ineligible for release on interim bond or personal recognizance. MCL 780.582a states that "[a] person shall not be released on an interim bond as provided in [MCL 780.581] or on his or her own recognizance as provided in [MCL 780.583a], but shall be held until he or she can be arraigned or have [an] interim bond set by a judge or district court magistrate[,] if either of the following applies:

> (a) The person is arrested without a warrant under . . . MCL 764.15a,[12] or a local ordinance substantially corresponding to that section.

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[12] MCL 764.15a provides for the warrantless arrest of an individual believed to have violated MCL 750.81 (assault and battery) or MCL 750.81a (assault with infliction of serious or aggravated injury) against a person with whom "[t]he individual has had a child in common with the victim, resides or has resided in the same household as the victim, has or has had a dating relationship with the victim, or is a spouse or former spouse of the victim. As used in this subdivision, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

> (b) The person is arrested with a warrant for a violation of . . . MCL 750.81 [(assault and battery)] and [MCL] 750.81a [(assault with infliction of serious or aggravated injury)], or a local ordinance substantially corresponding to [MCL 750.81] of that act and the person is a spouse or former spouse of the victim of the violation, has or has had a dating relationship[13] with the victim of the violation, has had a child in common with the victim of the violation, or is a person who resides or has resided in the same household as the victim of the violation." MCL 780.582a(1).
>
> > **Note:** See also MCR 6.106(C), which requires the court to release a defendant, not held in custody under MCR 6.106(B), "on personal recognizance, or on an unsecured appearance bond, subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public."

"If a judge or district court magistrate sets [an] interim bond under [MCL 780.582a], the judge or magistrate shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim." MCL 780.582a(2).

1. Release Subject to Protective or other Release Conditions

"If a judge or district court magistrate releases under [MCL 780.582a] a person subject to protective conditions,[14] the judge or district court magistrate shall inform the person on the record, either orally or by a writing that is personally delivered to the person, of the specific conditions imposed and that if the person violates a condition of release, he or she will be subject to arrest without a warrant and may have his or her bond forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if he or she is found in contempt of court." MCL 780.582a(3).

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[13] For purposes of MCL 780.582a, "'dating relationship' means that term as defined in MCL 600.2950." MCL 780.582a(1)(b).

[14] See Section 3.5(B) for a detailed discussion of releasing a defendant subject to protective conditions.

"[MCL 780.582a] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules." MCL 780.582a(7).

2. Content Requirements for Order or Amended Order

If a court orders a person released subject to protective conditions, the order must contain specified information. MCL 780.582a(4) requires "[a]n order or amended order issued under [MCL 780.582a(3)] [to] contain all of the following:

> (a) A statement of the person's full name.
>
> (b) A statement of the person's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate.
>
> (c) A statement of the date the conditions become effective.
>
> (d) A statement of the date on which the order will expire.
>
> (e) A statement of the conditions imposed, including, but not limited to, the condition prescribed in [MCL 780.582a(3)]."

3. Entry of Order or Amended Order into Law Enforcement Information Network (LEIN)

MCL 780.582a(5) requires "[t]he judge or district court magistrate [to] immediately direct a law enforcement agency within the jurisdiction of the court, in writing, to enter an order or amended order issued under [MCL 780.582a(3)] into the law enforcement information network [(LEIN)] as provided by . . . MCL 28.211 to [MCL] 28.216." At the judge's or district court magistrate's direction, the law enforcement agency must immediately enter the order or amended order into the LEIN. MCL 780.582a(6).

"If the order or amended order is rescinded, the judge or district court magistrate shall immediately order the law enforcement agency to remove the order or amended order from the [LEIN]." MCL 780.582a(5). At the judge's or district court magistrate's direction or if the order or amended order expires, the law enforcement agency must immediately

remove the order or amended order from the LEIN. MCL 780.582a(6).

C. Ordering Conditional Release

"If the court determines that [a release on personal recognizance] will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate[.]" MCR 6.106(D). See also MCL 765.6b.

"Under Michigan law, a court's decision in setting bond is a court order[,]" and "a bail decision is an interlocutory order." *People v Mysliwiec*, 315 Mich App 414, 417 (2016) (noting that "[b]ond conditions necessarily 'command, direct, or instruct'" a defendant and are thus, "court orders within the term's plain and ordinary meaning[, and] finding a "defendant's bond condition prohibiting the use of alcohol was a court order punishable by contempt[]" under MCL 600.1701(g) where the trial court orally ordered that a condition of the defendant's bond was to abstain from possession or consumption of any alcohol and then "issued written mittimuses requiring that [the] defendant have no alcohol[]").[15]

1. Content Requirements for Order or Amended Order

"An order or amended order[16] issued under [MCL 765.6b(1)] shall contain all of the following:

> (a) A statement of the defendant's full name.
>
> (b) A statement of the defendant's height, weight, race, sex, date of birth, hair color, eye color, and any other identifying information the judge or district court magistrate considers appropriate.
>
> (c) A statement of the date the conditions become effective.
>
> (d) A statement of the date on which the order will expire.
>
> (e) A statement of the conditions imposed." MCL 765.6b(2).

[15] For additional information on criminal contempt of court for violation of a court order, see Section 3.5(H)(3).

[16] See SCAO form MC 240, *Pretrial Reletase Order, Amended Conditions, Amended LEIN Expiration Date*.

MCR 6.106(D) provides for possible conditions the court may order with the defendant's pretrial release, which include:

> "(1) that the defendant will appear as required, will not leave the state without permission of the court,[17] and will not commit any crime while released, and
>
> (2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to
>
> (a) make reports to a court agency as are specified by the court or the agency;
>
> (b) not use alcohol or illicitly use any controlled substance;
>
> (c) participate in a substance abuse testing or monitoring program;
>
> (d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> (e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> (f) surrender driver's license or passport;
>
> (g) comply with a specified curfew;
>
> (h) continue to seek employment;
>
> (i) continue or begin an educational program;
>
> (j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;
>
> (k) not possess a firearm or other dangerous weapon;

[17] Conditional release orders issued under MCL 765.6b are entitled to full faith and credit in other United States Jurisdictions. 18 USC 2265; 18 USC 2266. See Section 5.15(C) for additional information.

> (*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> (m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of the orders shall take precedence until the conflict is resolved. The court may make this condition effective immediately on entry of a pretrial release order and while [the] defendant remains in custody if the court determines it is reasonably necessary to maintain the integrity of the judicial proceedings or it is reasonably necessary for the protection of one or more named persons.
>
> (n) satisfy any injunctive order made a condition of release; or
>
> (*o*) comply with any other condition, including the requirement of money bail as described in subrule (E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

See also MCL 765.6b(1), permitting "[a] judge or district court magistrate [to] release a defendant under [MCL 765.6b(1)] subject to conditions reasonably necessary for the protection of 1 or more named persons."[18] "If a judge or district court magistrate releases a defendant under [MCL 765.6b(1)] subject to protective conditions, the judge or district court magistrate shall make a finding of the need for protective conditions and inform the defendant on the record, either orally or by a writing that is personally delivered to the defendant, of the specific conditions imposed and that if the defendant violates a condition of release, he or she will be subject to arrest without

[18] "[MCL 765.6b] does not limit the authority of judges or district court magistrates to impose protective or other release conditions under other applicable statutes or court rules, including ordering a defendant to wear an electronic monitoring device." MCL 765.6b(10). See also *People v Mysliwiec*, 315 Mich App 414, 420 (2016) (finding that, contrary to the defendant's argument, "MCL 765.6b does not provide that a defendant may only be held in contempt of court for violating conditions necessary to protect named persons and not for violating other conditions[]"). For additional information on holding the defendant in criminal contempt of court for violation of a court order, see Section 3.5(H)(3).

a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to the penalty provided under [MCL 771.3f] and any other penalties that may be imposed if the defendant is found in contempt of court." MCL 765.6b(1).

a. Purchase or Possession of a Firearm

The judge or district court magistrate "may impose a condition that the defendant not purchase or possess a firearm." MCL 765.6b(3). See also MCR 6.106(D)(2)(k), which provides that the court may impose a condition on the defendant's pretrial release that requires the defendant "not possess a firearm or other dangerous weapon[.]"

However, the judge or district court magistrate must impose a condition that the defendant not purchase or possess a firearm where the judge or district court magistrate "orders the defendant to carry[19] or wear an electronic monitoring device as a condition of release as described in [MCL 765.6b(6).]" MCL 765.6b(3).

For additional information on firearm restrictions in domestic violence cases, see Chapter 6.

b. Electronic Monitoring Device Requirements

MCL 765.6b(6) permits "the judge or district court magistrate [to] order the defendant to wear an electronic monitoring device as a condition of release" where "[the] defendant [] is charged with a crime involving domestic violence, or any other assaultive crime, [and] is released under [MCL 765.6b(1) and MCL 765.6b(6).]"

The court must consider certain factors when deciding "whether to order a defendant to wear an electronic monitoring device[.]" MCL 765.6b(6). "In determining whether to order a defendant to wear an electronic monitoring device, the court shall consider the likelihood that the defendant's participation in electronic monitoring will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the victim prior to trial." *Id*. If the judge or district court magistrate orders the defendant's participation in electronic monitoring, the

[19] MCL 765.6b(3) still contemplates an order to *carry* an electronic monitoring device, but see MCL 765.6b(6), which was amended effective June 11, 2013, to no longer authorize a court to order a defendant to *carry* an electronic monitoring device. See 2013 PA 54.

defendant "shall only be released if he or she agrees to pay the cost of the device and any monitoring as a condition of release or to perform community service work in lieu of paying that cost." MCL 765.6b(6). "An electronic monitoring device ordered to be worn under [MCL 765.6b(6)] shall provide reliable notification of removal or tampering." MCL 765.6b(6).

"The court shall instruct the entity monitoring the defendant's position to notify the proper authorities if the defendant violates the order." MCL 765.6b(6). "With the informed consent of the victim, the court may also order the defendant to provide the victim of the charged crime with an electronic receptor device capable of receiving the global positioning system information from the electronic monitoring device worn by the defendant that notifies the victim if the defendant is located within a proximity to the victim as determined by the judge or district court magistrate in consultation with the victim." MCL 765.6b(6).

"The victim shall also be furnished with a telephone contact with the local law enforcement agency to request immediate assistance if the defendant is located within that proximity to the victim." MCL 765.6b(6). "In addition, the victim may provide the court with a list of areas from which he or she would like the defendant excluded[, and] [t]he court shall consider the victim's request and shall determine which areas the defendant shall be prohibited from accessing." *Id.*

MCL 765.6b(6) permits the victim to make a request for termination of his or her participation in the defendant's monitoring at any time. The court cannot impose sanctions against the victim for refusing to participate in the monitoring. MCL 765.6b(6).

2. Entry of Order or Amended Order into Law Enforcement Information Network (LEIN)

MCL 765.6b(4) requires the court to immediately provide written direction to the issuing court or a law enforcement agency within the court's jurisdiction "to enter an order or amended order issued under [MCL 765.6b(1)] or [MCL 765.6b(1)] and [MCL 765.6b(3)] into LEIN." At the judge's or district court magistrate's direction, the issuing court or the law enforcement agency must immediately enter the order or amended order into LEIN. MCL 765.6b(5).

> **Note:** "[C]ourts that enter [pretrial release orders under MCL 765.6b subject to] protective conditions into LEIN [on behalf of a law enforcement agency] must first execute an agreement with the law enforcement agency for which it enters these records[, and] . . . [the] courts must ensure these orders and their conditions are able to be confirmed 24 hours a day, seven days a week."[20] State Court Administrative Office (SCAO) Memorandum, *Protective Conditions – MCL 765.6b*.

"If the order or amended order is rescinded, the judge or district court magistrate shall immediately order the issuing court or law enforcement agency to remove the order or amended order from LEIN." MCL 765.6b(4). At the judge's or district court magistrate's direction or if the order or amended order expires, the issuing court or the law enforcement agency must immediately remove the order or amended order from LEIN.[21] MCL 765.6b(5).

D. Money Bail

"If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot otherwise be assured, money bail, with or without conditions described in [MCR 6.106(D)], may be required." MCR 6.106(E).

MCL 765.6(1) also provides that "[e]xcept as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive[, and] [t]he court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:

> (a) The seriousness of the offense charged.
>
> (b) The protection of the public.
>
> (c) The previous criminal record and the dangerousness of the person accused.
>
> (d) The probability or improbability of the person accused appearing at the trial of the cause." MCL 765.6(1).

[20] "Th[e] confirmation can be accomplished by providing a copy of the order to the law enforcement agency, or by anther method approved by [the Michigan State Police (MSP)] LEIN."

[21] See SCAO form MC 239, *Removal of Entry From Lein*.

"If the court fixes a bail amount under [MCL 765.6(1)] and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under [MCL 765.6(1)] and executed by a surety approved by the court."[22] MCL 765.6(2). See also MCR 6.106(E), which details the requirements a court may place on the defendant when posting bail.

E. Appealing a Release Decision

A party may appeal a release decision by "fil[ing] a motion in the court having appellate jurisdiction over the court that made the release decision." MCR 6.106(H)(1). There is no fee for the appeal, and the appellate court cannot stay, vacate, modify, or reverse the trial court's release decision absent a finding that the trial court abused its discretion. *Id*.

F. Modification of Pretrial Release

A court, on its own or on the request of either party, may modify a prior release decision after "finding that there is a substantial reason for doing so[.]" MCR 6.106(H)(2)(a). "The party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c). Specifically, MCR 6.106(H)(2) provides, in part:

> "(a) Prior to Arraignment on the Information. Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may, on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing.
>
> (b) Arraignment on Information and Afterwards. At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing."

"Based upon any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's

[22] "Before granting an application for bail, a court shall require a cash bond or surety other than the applicant if the applicant[:] (1) Is charged with a crime alleged to have occurred while on bail pursuant to a bond personally executed by him [or her]; or (2) Has been twice convicted of a felony within the preceding 5 years." MCL 765.6a.

direction against the victim or the victim's immediate family, the prosecuting attorney may move that the bond . . . of a defendant be revoked." MCL 780.755(2) (applicable to felony offenses); MCL 780.813a (applicable to misdemeanor offenses). See also MCL 780.785(2) (applicable to juvenile offenses), which permits the prosecuting attorney to "move that the juvenile be detained in a juvenile facility" if there exists "any credible evidence of acts or threats of physical violence or intimidation by the juvenile or at the juvenile's direction against the victim or the victim's immediate family."

G. Emergency Pretrial Release

A defendant may be released from custody in an effort to "relieve jail conditions[.]" See MCR 6.106(H)(3). "If a defendant being held in pretrial custody under [MCR 6.106] is ordered released from custody as a result of a court order or law requiring the release of prisoners to relieve jail conditions, the court ordering the defendant's release may, if appropriate, impose conditions of release in accordance with this rule to ensure the appearance of the defendant as required and to protect the public. If such conditions of release are imposed, the court must inform the defendant of the conditions on the record or by furnishing to the defendant or the defendant's lawyer a copy of the release order setting forth the conditions." MCR 6.106(H)(3).

H. Failure to Comply with Conditions of Pretrial Release

If the defendant fails to comply with the conditions of release,

- "[a] peace officer, without a warrant, may arrest and take into custody a defendant whom the peace officer has or receives positive information that another peace officer has reasonable cause to believe is violating or has violated a condition of release imposed under [MCL 765.6b] or . . . MCL 780.582a."[23] MCL 764.15e(1).

- "the court may, pursuant to MCR 6.103,[24] issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited." MCR 6.106(I)(2).

[23] See also MCL 764.15(1)(g), which permits "[a] peace officer, without a warrant, [to] arrest a person" where "[t]he peace officer has reasonable cause to believe the person . . . has violated 1 or more conditions of a conditional release order or probation order imposed by a court of this state, another state, Indian tribe, or United States territory."

[24] "[MCR 6.103] does not apply if the case is for an assaultive crime or domestic violence offense, as defined in MCL 764.3, or if the defendant previously failed to appear in the case." MCR 6.103(A)(1).

- the defendant may be held in criminal contempt of court. See *People v Mysliwiec*, 315 Mich App 414, 418 (2016).

In addition, law enforcement officers, prosecutors, and courts may enforce out-of-state conditional release orders or probation orders that protect a named person and meet the definition of foreign protection order under MCL 600.2950h(a). MCL 600.2950*l*(2) (requiring enforcement pursuant to MCL 600.2950m, MCL 764.15(1)(g), MCL 780.1–MCL 780.31, or MCL 780.41–MCL 780.45. Violation of such an order is a 93-day/$500 misdemeanor. MCL 600.2950m.

1. Warrantless Arrest

"A peace officer, without a warrant, may arrest and take into custody a defendant whom the peace officer has or receives positive information that another peace officer has reasonable cause to believe is violating or has violated a condition of release imposed [under MCL 765.6b or MCL 780.582a]." MCL 764.15e(1). But see *People v Mysliwiec*, 315 Mich App 414, 421 (2016) (finding "MCL 764.15e and its procedural requirements [did] not apply" because "MCL 764.15e outlines the procedures that apply when a defendant is arrested for violating bond conditions imposed under MCL 765.6b or MCL 780.582a[, and the d]efendant [in this case] was arrested for violating a bond condition involving alcohol, which was not imposed under MCL 765.6b or MCL 780.582a[]").[25]

If a defendant has been arrested without a warrant under MCL 764.15e(1) for an alleged violation of a condition of his or her pretrial release, the arresting officer must "[p]repare a complaint of violation of conditional release substantially in the . . . format [prescribed by MCL 764.15e(2)(a).]" MCL 764.15e(2)(a). The procedure after preparing the complaint differs slightly depending on whether the defendant was arrested in or out of the judicial district where the pretrial release conditions were imposed. See MCL 764.15e(2)(b)-(c). Hearing and revocation procedures for cases under MCL 764.15e are governed by the Michigan Court Rules. MCL 764.15e(5).

> **Note:** Generally, MCL 764.9c(1) permits "a police officer [who] has arrested a person without a

[25] The defendant's bond condition prohibiting the use of alcohol was a court order punishable by contempt. *Mysliwiec*, 315 Mich App at 418. For additional information on criminal contempt of court for violation of a court order, see Section 3.5(H)(3).

warrant for a misdemeanor or ordinance violation . . . [to] issue to and serve upon the person an appearance ticket . . . and release the person from custody." However, MCL 764.9c(3)(c) prohibits the issuance of an appearance ticket to "[a] person subject to a mandatory period of confinement, condition of bond, or other condition of release until he or she has served that period of confinement or meets that requirement of bond or other condition of release."[26]

a. Same Judicial District

If the defendant was arrested **in the same judicial district** of the court that imposed the conditions of his or her pretrial release, the arresting officer must immediately provide copies of the complaint as follows:

- one copy of the complaint must be provided to the defendant.
- the original complaint and one copy of it must be provided to the court in the judicial district where the conditional release order originated.
- one copy of the complaint must be provided to the prosecuting attorney involved in the case in which the conditional release was granted.
- one copy of the complaint must be kept by the law enforcement agency. MCL 764.15e(2)(b)(*i*).

In addition, within one business day after his or her arrest, the defendant must be brought before the court that issued the pretrial release to answer the alleged violation unless he or she is released on interim bond under MCL 764.15e(3). MCL 764.15e(2)(b)(*ii*).

b. Different Judicial District

If the arrest occurred **outside the judicial district** of the court that imposed the pretrial release conditions, the arresting officer must immediately provide copies of the complaint as follows:

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[26] MCL 764.9c(3)(a) also prohibits the issuance of an appearance ticket to "[a] person arrested for a domestic violence violation of . . . MCL 750.81 [or MCL] 750.81a, or an offense involving domestic violence as that term is defined in . . . MCL 400.1501.".See Section 2.2(C) for more information about appearance tickets.

- one copy of the complaint must be provided to the defendant.
- the original complaint and one copy of it must be provided to the district court or municipal court in the judicial district where the violation occurred.
- one copy of the complaint must be kept by the law enforcement agency. MCL 764.15e(2)(c)(*i*).

In addition, within one business day of the defendant's arrest, he or she must be brought before the district or municipal court in which the violation occurred unless he or she is released on interim bond under MCL 764.15e(3). MCL 764.15e(2)(c)(*ii*). That court must "determine conditions of release and promptly transfer the case to the court that released the defendant subject to conditions." *Id*. "The court to which the case is transferred shall notify the prosecuting attorney in writing of the alleged violation." *Id*.

c. Release on Interim Bond

If the arresting agency or officer in charge of the jail determines that it is safe to release the defendant before he or she is brought before the court under MCL 764.15e(2), the agency or officer may release the defendant on interim bond of not more than $500.00 and require that the defendant appear at the opening of court the next business day. MCL 764.15e(3). "If the defendant is held for more than 24 hours without being brought before the court under [MCL 764.15e(2)], the officer in charge of the jail shall note in the jail records why it was not safe to release the defendant on interim bond under [MCL 764.15e(3)]." MCL 764.15e(3).

> **Note:** The interim bond statutes (MCL 780.581–MCL 780.588) do not apply to certain domestic violence offenses. See MCL 780.582a. If the conditional release violation also constitutes one of these offenses, the defendant should not be released on an interim bond. *Id*. See Section 3.5(B) for a discussion of restrictions on interim bonds.

MCL 764.15e(4) requires the court to "give priority to cases brought under [MCL 764.15e] in which the defendant is in custody or in which the defendant's

release would present an unusual risk to the safety of any person."

2. Issuance of a Bench Warrant and Forfeiture of Bond

"[T]he court may, pursuant to MCR 6.103,[27] issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited." MCR 6.106(I)(2).

"Upon issuing the bench warrant, the court should set a show cause date, prepare SCAO form MC-218, Order Revoking Release and Forfeiting Bond, Notice of Intent to Enter Judgment,[28] and sign and mail the form to the defendant, the surety agent, anyone who posted bond, and the prosecutor." SCAO Memorandum, *Surety Bond Process*. See also MCR 6.106(I)(2)(a), which requires the court to "mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bail or bond has been ordered, to anyone who posted bail or bond."

"If the defendant does not appear and surrender to the court within 28 days after the revocation date, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bail or bond for an amount not to exceed the full amount of the bail, and costs of the court proceedings, or if a surety bond was posted, an amount not to exceed the full amount of the surety bond."[29] MCR 6.106(I)(2)(b). "If the defendant does not within [28 days after the revocation date] satisfy the court that there was compliance with the conditions of release other than appearance or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant alone for an amount not to exceed the full amount of the bond, and costs of the court proceedings."[30] MCR 6.106(I)(2)(b).

> **Note:** "MCL 600.8511 does not confer the authority to sign an Order Revoking Release and Forfeiting

[27] "[MCR 6.103] does not apply if the case is for an assaultive crime or domestic violence offense, as defined in MCL 764.3, or if the defendant previously failed to appear in the case." MCR 6.103(A)(1).

[28] SCAO form MC 218, *Order Revoking Release and Forfeiting Bond, Notice of Intent to Enter Judgment*.

[29] "If the amount of a forfeited surety bond is less than the full amount of the bail, the defendant shall continue to be liable to the court for the difference, unless otherwise ordered by the court." MCR 6.106(I)(2)(b).

> Bond to a district court magistrate." *Amendment to Surety Bond Process*, *supra* at p 3.

Any bail or bond money deposited and executed by the defendant must first be applied to any fine, costs, or statutory assessments imposed; any balance remaining must be returned to the defendant, subject to MCR 6.106(I)(1). MCR 6.106(I)(3).

3. Criminal Contempt of Court

A court may find persons who have violated a court order guilty of criminal contempt. See MCL 600.1701(g) (providing the court with statutory authority to punish a person for contempt if he or she disobeys "any lawful order, decree, or process of the court[]"). For a detailed discussion on contempt of court in general, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

Violation of a bond condition is punishable by criminal contempt because "a court's decision in setting bond is a court order[,]" and "a bail decision is an interlocutory order." *People v Mysliwiec*, 315 Mich App 414, 417, 418 (2016) (finding a "bond condition prohibiting defendant's use of alcohol was a court order punishable by contempt[]" under MCL 600.1701(g) where "[t]he trial court . . . issued written mittimuses which required [the] defendant have no alcohol[]" following the defendant's arraignment on a charge of operating a motor vehicle while under the influence of alcohol).

I. Revocation of Pretrial Release Based on DNA Identification

"[I]f an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past can and should lead to the revocation of his [or her] conditional release. . . . It is reasonable in all respects for the State to use an accepted [DNA] database to determine if an arrestee is the object of suspicion in other serious crimes, suspicion that may provide a strong incentive for the arrestee to escape and flee." *Maryland v King*, 569 US 435, 440, 455, 465-466 (2013) (holding that the collection and

[30] "The 10 percent bail deposit made under [MCR 6.106](E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case." MCR 6.106(I)(2)(c).

analysis of an arrestee's DNA according to Combined DNA Index System (CODIS)[31] procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape).

J. Termination of Release Order

The court must vacate a defendant's release order and discharge any person who has posted bail or bond once the release order's conditions are met and the defendant is discharged from all obligations of the case. MCR 6.106(I)(1). If cash or its equivalent was posted in the full amount of the bail, the court must return the cash or its equivalent. *Id*. If there was a 10 percent deposit of the full bail amount, the court must return 90 percent of the amount of money deposited and keep 10 percent. *Id*.

Any bail or bond money deposited and executed by the defendant must first be applied to any fine, costs, or statutory assessments imposed; any balance remaining must be returned to the defendant, subject to MCR 6.106(I)(1). MCR 6.106(I)(3).

3.6 Probation

A brief discussion on probation is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

A court may place a defendant[32] on probation under the charge and supervision of a probation officer, if the court determines that a defendant convicted of any crime other than murder, treason, first-degree criminal sexual conduct, third-degree criminal sexual conduct, armed robbery, or major controlled substance offenses, is unlikely to engage in an offensive or criminal course of conduct again, and that the public good does not require that the defendant suffer the penalty imposed by law.[33] MCL 771.1(1).

> **Note**: An offender who is found guilty of, or pleads guilty to, a violation of assault under MCL 750.81 or aggravated assault under MCL 750.81a may be eligible for deferred

[31] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 8, for discussion of CODIS.

[32] "[MCL 771.1] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.1(4).

[33] "It is the intent of the legislature that the granting of probation is a matter of grace requiring the agreement of the probationer to its granting and continuance." MCL 771.4(1).

> proceedings under MCL 769.4a. MCL 769.4a allows the court to place the defendant on probation after a finding of guilt, without entering judgment. See Section 2.2(C) for more information on deferred sentencing for domestic assault cases.[34]
>
> MCL 771.1(2) also provides "[i]n an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1088."[35]

If a court sentences a defendant to probation, it must, in a court order entered in the case and made a part of the record, "determine the period, conditions, and rehabilitation goals of probation." MCL 771.2(11); MCL 771.2a(5).[36]

A. Length of Probationary Period

> Except as provided in MCL 771.2a and MCL 768.36,[37] the term of probation imposed on a defendant must not exceed 2 years in a misdemeanor offense or 3 years in a felony offense.[38] MCL 771.2(1).
>
> Under MCL 771.2a,
>
> > "(1) [t]he court may place an individual convicted of [stalking under] MCL 750.411h, on probation for not

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[34] For additional information on deferred proceedings in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

[35] "When sentencing is delayed, the court shall enter an order stating the reason for the delay upon the court's record." MCL 771.1(2). "The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay." *Id.* See also *People v Smith (Ryan)*, 496 Mich 133, 144 (2014) (holding that "MCL 771.1(2) does not deprive a sentencing judge of jurisdiction if a defendant is not sentenced within one year after the imposition of a delayed sentence," and overruling several Court of Appeals decisions "to the extent they hold otherwise"). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9, for additional information.

[36] "[MCL 771.2(1)] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.2(14). "[MCL 771.2a(1)-(5)] do not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act . . . MCL 803.301 to [MCL] 803.309," MCL 771.2a(6).

[37] MCL 768.36(4) requires a period of probation for not less than five years for a defendant who is found guilty but mentally ill and placed on probation; the probation period "shall not be shortened without receipt and consideration of a forensic psychiatric report by the sentencing court."

[38] For purposes of the Code of Criminal Procedure's probation statute, "felony" includes two-year misdemeanors. MCL 761.1(f); *People v Smith (Timothy)*, 423 Mich 427, 434 (1985).

more than 5 years. The sentence is subject to the conditions of probation set forth in [MCL 750.411h(3)], and [MCL 771.3]. The probation is subject to revocation for any violation of a condition of that probation.[39]

(2) [t]he court may place an individual convicted of [aggravated stalking under] MCL 750.411i, on probation for any term of years, but not less than 5 years. The sentence is subject to the conditions of probation set forth in [MCL 750.411i(4)], and [MCL 771.3]. The probation is subject to revocation for any violation of a condition of that probation.[40]

(3) [t]he court may place an individual convicted of [child abuse under] MCL 750.136b, that is designated as a misdemeanor on probation for not more than 5 years.[41]

(4) [e]xcept as provided in [MCL 771.2a(2)] and [MCL 771.2a(6)], the court may place an individual convicted of a violent felony on probation for not more than 5 years.

* * *

(7) [e]xcept as otherwise provided by law, the court may place an individual convicted of a listed offense on probation subject to the requirements of [MCL 771.2a(7)] and [MCL 771.2a(8)-(13)] for any term of years but not less than 5 years."

> **Note:** "[MCL 771.2a(1)-(5)] do not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.2a(6).

B. Conditions of Probation

1. Mandatory Conditions of Probation

MCL 771.3(1) provides a list of probation conditions that must be included in the sentence of probation:

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[39] For additional information on stalking under MCL 750.411h, see Section 2.3(A).

[40] For additional information on aggravated stalking under MCL 750.411i, see Section 2.3(B).

[41] For additional information on child abuse under MCL 750.136b, see Section 2.6.

- the probationer must not violate any criminal law of this state, the United States, or another state, or any ordinance of any municipality in this state or another state. MCL 771.3(1)(a).

- the probationer must not leave Michigan without the court's consent. MCL 771.3(1)(b).

- the probationer must report (in person, virtually, or in writing) to his or her probation officer each month, or as often as the probation officer requires.[42] MCL 771.3(1)(c).

- if the probationer is sentenced in circuit court, he or she must pay a probation supervision fee as set out in MCL 771.3c. MCL 771.3(1)(d).

- the probationer must pay restitution to the victim of the probationer's course of conduct leading to the conviction, or to the victim's estate. The order to pay restitution may be modified and must be enforced. MCL 771.3(1)(e).

- the probationer must pay a crime victim assessment as set out in MCL 780.905. MCL 771.3(1)(f).

- the probationer must pay the minimum state cost as set out in MCL 769.1j.[43] MCL 771.3(1)(g).

- if required, the probationer must be registered under and comply with the sex offenders registration act (MCL 28.721 to MCL 28.736).[44] MCL 771.3(1)(h).

In addition, subject to the exceptions listed in MCL 771.2a(9)-(13), the court must order an individual who has been placed on probation under MCL 771.2a(7) (for committing a listed offense) not to reside, work, or loiter within a student safety zone. MCL 771.2a(8).

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[42] "[MCL 771.3(1)(c)] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.3(1)(c).

[43] MCL 769.1k(1)(a) requires a court to impose the minimum state cost (set out in MCL 769.1j) on a defendant at the time the defendant is sentenced, at the time entry of judgment of guilt is deferred, or at the time sentence is delayed. The court may also order the defendant to pay any additional costs incurred in compelling his or her appearance. MCL 769.1k(2). MCL 769.1k(1) and MCL 769.1k(2) "apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

[44] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10, for detailed information concerning the Sex Offenders Registration Act.

2. Discretionary Conditions of Probation

Subject to MCL 771.3(11),[45] MCL 771.3(2) provides a list of probation conditions the court may include in the sentence of probation:

> "(a) Be imprisoned in the county jail for not more than 12 months at the time or intervals that may be consecutive or nonconsecutive, within the probation as the court determines. However, the period of confinement must not exceed the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months. The court may permit day parole as authorized under . . . MCL 801.251 to [MCL] 801.258. The court may, subject to [MCL 771.3d] and [MCL 771.3e],[46] permit the individual to be released from jail to work at his or her existing job or to attend a school in which he or she is enrolled as a student. This subdivision does not apply to a juvenile placed on probation and committed under . . . [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309.
>
> (b) Pay immediately or within the period of his or her probation a fine imposed when placed on probation.
>
> (c) Pay costs pursuant to [MCL 771.3(5)[47]].
>
> (d) Pay any assessment ordered by the court other than an assessment described in [MCL 771.3(1)(f)].

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[45] MCL 771.3(11) states that the conditions of probation imposed "must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." Further, when imposing the conditions of probation on a probationer, "[t]he court shall also consider the input of the victim and shall specifically address the harm caused to the victim, as well as the victim's safety needs and other concerns, including, but not limited to, any request for protective conditions or restitution." *Id.*

[46] MCL 771.3d requires the court to order the Department of Corrections to verify that a convicted felon is currently employed or enrolled in school before releasing him or her from jail, and MCL 771.3e requires the court to order a convicted felon to wear an electronic monitoring device if he or she is being released from jail for purposes of working or attending school.

[47] MCL 771.3(5) provides that "[i]f the court requires the probationer to pay costs under [MCL 771.3(2)], the costs must be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." See also the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9, for information on additional requirements under MCL 771.3 when the court imposes costs on the probationer under MCL 771.3(2) as part of a sentence of probation.

> (e) Engage in community service.
>
> (f) Agree to pay by wage assignment any restitution, assessment, fine, or cost imposed by the court.
>
> (g) Participate in inpatient or outpatient drug treatment, or a drug treatment court under . . . MCL 600.1060 to [MCL] 600.1084.
>
> (h) Participate in mental health treatment.
>
> (i) Participate in mental health or substance abuse counseling.
>
> (j) Participate in a community corrections program.
>
> (k) Be under house arrest.
>
> (*l*) Be subject to electronic monitoring.
>
> (m) Participate in a residential probation program.
>
> (n) Satisfactorily complete a program of incarceration in a special alternative incarceration unit as provided in [MCL 771.3b].
>
> (o) Be subject to conditions reasonably necessary for the protection of 1 or more named persons.[48]
>
> (p) Reimburse the county for expenses incurred by the county in connection with the conviction for which probation was ordered as provided in the prisoner reimbursement to the county act, . . . MCL 801.81 to [MCL] 801.93.
>
> (q) Complete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate."

"Subject to [MCL 771.3(11)], [t]he court may impose other lawful conditions of probation as the circumstances of the case

[48] "If an order or amended order of probation contains a condition for the protection of 1 or more named persons as provided in [MCL 771.3(2)(o)], the court or a law enforcement agency within the court's jurisdiction shall enter the order or amended order into the law enforcement information network [(LEIN)]." MCL 771.3(4). "If the court rescinds the order or amended order or the condition, the court shall remove the order or amended order or the condition from the [LEIN] or notify that law enforcement agency and the law enforcement agency shall remove the order or amended order or the condition from the [LEIN]." *Id.*

require or warrant or as in its judgment are proper." MCL 771.3(3).[49]

For a defendant convicted of stalking under MCL 750.411h or aggravated stalking under MCL 750.411i, a court may also include in the probation order that the defendant:

> "(a) [r]efrain from stalking any individual during the term of probation.
>
> (b) [r]efrain from having any contact with the victim of the offense.
>
> (c) [b]e evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at the individual's own expense."[50] MCL 750.411h(3); MCL 750.411i(4).

C. Monitoring Compliance with Conditions of Probation

1. Mandatory Reporting As Condition of Probation

As part of the sentence of probation, MCL 771.3(1)(c) requires the probationer to report (in person, virtually, or in writing) to his or her probation officer each month, or as often as the probation officer requires.

Committee Tip:

The court can promote safety in cases involving domestic violence by implementing procedures that ensure the court receives timely reports from treatment programs and batterer intervention programs about the probationer's attendance and participation.

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[49] MCL 771.3(11) states that the conditions of probation imposed "must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." Further, when imposing the conditions of probation on a probationer, "[t]he court shall also consider the input of the victim and shall specifically address the harm caused to the victim, as well as the victim's safety needs and other concerns, including, but not limited to, any request for protective conditions or restitution." MCL 771.3(11).

[50] For additional information on stalking under MCL 750.81 and aggravated stalking under MCL 750.81a, see Section 2.3.

Note, however, that "[MCL 771.3(1)(c)] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.3(1)(c).

2. Probation Swift and Sure Sanctions Act

The Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, established a voluntary, grant-funded "state swift and sure sanctions program" for the supervision of participating offenders who have been placed on probation for committing a felony. MCL 771A.3; see also MCL 771A.2(b). Under the Probation Swift and Sure Sanctions Act, a circuit court may apply to the State Court Administrative Office (SCAO) for a grant to fund a swift and sure probation supervision program. MCL 771A.4(3).[51] A probationer participating in such a program is subject to close monitoring and to prompt arrest and the immediate imposition of sanctions following a probation violation. See MCL 771A.3; MCL 771A.5(1).

"The circuit court in any judicial circuit may adopt or institute a swift and sure sanctions court, by statute or court rule." MCL 600.1086(1). "A swift and sure sanctions court shall carry out the purposes of the swift and sure sanctions act[.]" MCL 600.1086(2). "A circuit court that has adopted a swift and sure sanctions court may accept participants from any other jurisdiction in this state based upon either the residence of the participant in the receiving jurisdiction or the unavailability of a swift and sure sanctions court in the jurisdiction where the participant is charged. The transfer is not valid unless it is agreed to by all of the following individuals:

> (a) The defendant or respondent.
>
> (b) The attorney representing the defendant or respondent.
>
> (c) The judge of the transferring court and the prosecutor of the case.
>
> (d) The judge of the receiving swift and sure sanctions court and the prosecutor of a court

[51] "The funding of all grants under [Chapter XIA of the code of criminal procedure] is subject to appropriation." MCL 771A.4(3).

> funding unit of the swift and sure sanctions court." MCL 600.1086(3). See also MCL 771A.4(4).

"A judge shall do all of the following if swift and sure probation applies to a probationer:[52]

> (a) Inform the probationer in person of the requirements of his or her probation and the sanctions and remedies that may apply to probation violations.
>
> (b) Adhere to and not depart from the prescribed list of sanctions and remedies imposed on the probationer.
>
> (c) Require the probationer to initially meet in person with a probation agent or probation officer and as otherwise required by the court.
>
> (d) Provide for an appearance before the judge or another judge for any probation violation as soon as possible but within 72 hours after the violation is reported to the court unless a departure from the 72-hour requirement is authorized for good cause as determined by criteria established by the state court administrative office.
>
> (e) Provide for the immediate imposition of sanctions and remedies approved by the state court administrative office to effectively address probation violations. The sanctions and remedies approved under this subdivision may include, but are not limited to, 1 or more of the following:
>
> > (*i*) Temporary incarceration in a jail or other facility authorized by law to hold probation violators.
> >
> > (*ii*) Extension of the period of supervision within the period provided by law.
> >
> > (*iii*) Additional reporting and compliance requirements.
> >
> > (*iv*) Testing for the use of drugs and alcohol.

[52] The State Court Administrative Office (SCAO) may also add additional requirements as set out under MCL 771A.5(2).

> (*v*) Counseling and treatment for emotional or other mental health problems, including for substance abuse.
>
> (*vi*) Probation revocation.
>
> (*vii*) Any other sanction approved by the [SCAO]." MCL 771A.5(1).

"An individual is eligible for the swift and sure probation supervision program if he or she receives a risk score of other than low on a validated risk assessment[,]" and is not charged with a crime under one or more of the following sections:

- MCL 750.316 (first degree murder),
- MCL 750.317 (second degree murder),
- MCL 750.520b (CSC-I),
- MCL 750.520d (CSC-III),
- MCL 750.529 (armed robbery)],
- MCL 750.544 (treason), and
- a major controlled substance offense.[53] MCL 771A.6(2)-(3).

For a detailed discussion of the Probation Swift and Sure Sanctions Act, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 2.

D. Amending an Order of Probation

A court may amend a probation order in form or substance at any time. MCL 771.2(11); MCL 771.2a(5).[54]

1. Reduction in Probation Term

> "Except as provided in [MCL 771.2(10)], [MCL 771.2a], and [MCL 768.36], after the defendant has

[53] A defendant charged with a violation of MCL 333.7403(2)(a)(*v*) is still eligible to participate in a swift and sure probation supervision program if he or she receives a qualifying risk score. MCL 771A.6(3)(b).

[54] "[MCL 771.2(1)] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.2(14). Similarly, MCL 771.2a(1)-(5) "do not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act . . . .MCL 803.301 to [MCL] 803.309."MCL 771.2a(6).

> completed 1/2 of the original felony or misdemeanor probation period, he or she may be eligible for early discharge as provided in [MCL 771.2]. The defendant must be notified at sentencing of his or her eligibility and the requirements for early discharge from probation, and the procedure provided under [MCL 771.2(3)] to notify the court of his or her eligibility." MCL 771.2(2).

MCL 771.2(10) prohibits certain defendants from benefiting from reduced probation. "A defendant who was convicted of 1 or more of the following crimes is not eligible for reduced probation under [MCL 771.2]:

> (a) A domestic violence related violation of [MCL 750.81] or [MCL 750.81a], or an offense involving domestic violence as that term is defined in . . . MCL 400.1501.
>
> (b) A violation of . . . MCL 750.84.
>
> (c) A violation of . . . MCL 750.411h.
>
> (d) A violation of . . . MCL 750.411i.
>
> (e) A violation of . . . MCL 750.520c.
>
> (f) A violation of . . . MCL 750.520e.
>
> (g) A listed offense.
>
> (h) An offense for which a defense was asserted under [MCL 768.36].
>
> (i) A violation of . . . MCL 750.462a to [MCL] 750.462h, or former [MCL 750.462i or MCL 750.462j]." MCL 771.2(10).

MCL 771.2a addresses probation for individuals convicted of stalking under MCL 750.411h. MCL 768.36 addresses probation for individuals who were found guilty but mentally ill.

"If the court reduces a defendant's probationary term under [MCL 771.2], the period by which that term was reduced must be reported to the department of corrections." MCL 771.2(11).

2. Due Process

A defendant is not entitled to notice or an opportunity to be heard regarding an amendment of a probation order, unless the amendment would result in a fundamental change in his or her liberty interest, such as confinement. *People v Britt*, 202 Mich App 714, 716 (1993) (placement in an electronic tether program is not the equivalent of confinement; accordingly, due process protections do not attach before amendment of a probation order to include placement in an electronic tether program). But see MCL 771.2(2)-(14), for detailed provisions governing eligibility for early discharge from probation, procedural matters concerning early discharge or other amendments to the terms of probation, and when a hearing must be held to review or modify a probationer's probation.

E. Revoking Probation

"All probation orders are revocable subject to the requirements of [MCL 771.4b], but revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in [MCL 771.4b], or upon request of the probationer. Hearings on the revocation must be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials." MCL 771.4(2).[55]

"In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition." MCL 771.4(3).

If the defendant fails to comply with the conditions of probation,

- "[a] peace officer, without a warrant, may arrest a person" where "[t]he peace officer has reasonable cause to believe the person . . . has violated 1 or more conditions of a conditional release order or probation order imposed by a court of this state, another state, Indian tribe, or United States territory." MCL 764.15(1)(g).

- "The court may issue a bench warrant or summons upon finding probable cause to believe a probationer has committed a non-technical violation of probation." MCR 6.445(A).

[55] "[MCL 771.4] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.4(6).

- "The court must issue a summons,[56] rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation unless the court states on the record a specific reason to suspect that one or more of the following apply:

  (1) The probationer presents an immediate danger to himself or herself, another person, or the public.

  (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.

  (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A).

A trial court's jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment is limited to the duration of the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408-409 (2010).

"If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4(5).

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2, for more information on probation revocation.

F. Technical Probation Violation

MCL 771.4b(1) (providing for a period of incarceration for technical probation violations that increases in length as the number of violations increases) does not apply to a probationer on probation for a domestic violence violation of MCL 750.81, or an offense involving domestic violence as that term is defined in MCL 400.1501.[57] MCL 771.4b(6). There is a rebuttable presumption that no arrest warrant will issue for a technical probation violation. MCL 771.4b(7). Instead, the court will issue a summons or show-cause order to the probationer for the alleged technical probation violation. *Id.*

[56] See MCR 6.102 for information about issuing a summons.

[57] See Section 1.1 for the definition of *domestic violence* found in MCL 400.1501. In addition, MCL 771.4b(1) does not apply to violations of MCL 750.81a, MCL 750.411h, or MCL 750.411i.

MCR 6.445(A) expressly provides that "[t]he court *must* issue a summons, rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation . . . ." (Emphasis added.) The court may overcome the presumption that a summons will issue (rather than a bench warrant) if "the court states on the record a specific reason to suspect that one or more of the following apply:

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A). See also MCL 771.4b(7)(a)-(c) (providing substantially the same information as does MCR 6.445(A)(1)-(3)).

At arraignment for the alleged violation, the court must "inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence." MCR 6.445(B)(2).[58] See also MCL 771.4b(8) (hearing on a technical probation violation must occur "as soon as is possible").

If, after the probation violation hearing, the court finds that the probation violation was proved, the court must inform the probationer "whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). If a probationer pleads guilty to a probation violation, the court must, among other things, "establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F)(4).

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A). The acknowledgment must be written[59] and must provide the probationer with the specific information stated in MCR 6.450(A).[60] *Id*. Specifically, and among other provisions, the acknowledgment

[58]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, for more information about arraignments and other pretrial procedures.

[59]See SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[60]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for detailed information about probation and the requirements of a written acknowledgment of a technical probation violation.

must inform the probationer that acknowledging a technical violation could delay his or her eligibility for early discharge. MCR 6.450(A)(5); MCR 6.441. See also MCL 771.4b(2) (permitting written acknowledgment of a technical probation violation without a hearing).

MCL 771.4b(9)(b) exempts specific conduct from the definition of a technical probation violation (i.e., nontechnical probation violations). "Technical probation violations do not include the following:

> (*i*) A violation of an order of the court requiring that the probationer have no contact with a named individual.
>
> (*ii*) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.
>
> (*iii*) The consumption of alcohol by a probationer who is on probation for a felony violation of . . . MCL 257.625.
>
> (*iv*) Absconding." MCL 771.4b(9)(b).

See, e.g., *People v Smith*, ___ Mich App ___, ___ (2024) (holding that "MCL 771.4b(9)(b)(*i*) unambiguously provides that a violation of a no-contact provision in a probation order is nontechnical only when the no-contact order pertains to *a named individual*, [and] it was error for the trial court to conclude that the Legislature intended defendant's violation of the probation order prohibiting contact with a broad class of persons [under the age of 17] to be 'nontechnical'") (emphasis added).

G. Termination of the Probation Period

When a probationer's term of probation terminates, the probation officer must report to the court that the probation period has ended. MCL 771.5(1).[61] The officer must also inform the court of the probationer's conduct during the probation period. *Id.* "Upon receiving the report, the court may discharge the probationer from further supervision and enter a judgment of suspended sentence or extend the probation period as the circumstances require, so long as the maximum probation period is not exceeded." *Id.*

[61] "[MCL 771.5] does not apply to a juvenile placed on probation and committed under [MCL 769.1(3)] or [MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.5(2).

H. Early Discharge From Probation[62]

Except for a statute providing otherwise, "a probationer is eligible for early discharge from probation when the probationer has completed half of the original probationary period and all required programming." MCR 6.441(A). At sentencing, in writing or orally, the court must inform the probationer about his or her eligibility for early discharge and the notice process set forth in MCR 6.441(B). MCR 6.441(A).

When a court receives notice of a probationer's eligibility for early discharge, the court must review the case and consider the probationer's conduct and the amount of restitution he or she owes the victim. MCR 6.441(C). Specific facts about the case affect whether a probationer may be discharged early and whether a hearing is required before the court may order early discharge. MCR 6.441(D)-(E).

A hearing *must* be held, after the court's review of the case and before early discharge is granted, if a circumstance described in MCL 771.2(7) applies.[63] MCR 6.441(E)(2). Specifically, a hearing must be held when the probationer is serving a term of probation for a felony offense eligible for early discharge when the offense involved a victim who requested notice of a change in the probationer's status, including the probationer's probation status. MCL 771.2(7); MCR 6.441(E)(2). In addition to a hearing for felony offenses eligible for early discharge, a hearing is also required when a probationer is serving a term of probation for a misdemeanor domestic violence offense, aggravated domestic violence offense, or child abuse if the offense is eligible for early discharge. MCL 771.2(7).

If a hearing is held to determine whether early discharge is appropriate, the prosecuting attorney must notify the victim of the date and time of the hearing. MCR 6.441(E). The probationer, and the victim, if applicable, are entitled to be heard. *Id.*

See MCR 6.441(F)-(H) for the remaining content of the early discharge rule regarding the possible outcome of a hearing, the prohibition against allowing early discharge eligibility to influence the original term of probation imposed, and the additional methods

[62]For detailed information about early discharge from probation, see MCR 6.441(A)-(H). For a discussion of MCR 6.441 and its application, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*.

[63]A hearing under MCR 6.441(E) is required if, after the required case review, (1) the prosecutor timely objects to a probationer's early discharge, (2) the case involves a circumstance appearing in MCL 771.2(7)—domestic assault, aggravated domestic assault, or child abuse, or (3) the court does not order an early discharge and does not continue the probationer's probation subject solely to payment of restitution. MCR 6.441(E)(1)-(3).

by which a probationer might gain early discharge. MCR 6.441(F)-(H).

3.7 Advising Defendant of the Right to Counsel

During criminal proceedings, defendants are afforded a constitutional right to retained or appointed counsel. See US Const, Am VI; Const 1963, art 1, § 20; *Coleman v Alabama*, 399 US 1, 7 (1970).[64] To that end, Michigan Court Rules require courts to advise defendants of their right to counsel, and to appoint counsel for indigent defendants. MCR 6.005(A); MCR 6.104(E)(2); MCR 6.610(D). A defendant's right to proceed in propria persona is discussed in *People v Adkins (After Remand)*, 452 Mich 702, 720-727 (1996), overruled in part on other grounds by *People v Williams (Rodney)*, 470 Mich 634, 641 n 7 (2004) (standard of review issue: trial court decisions regarding Sixth Amendment waivers are reviewed de novo).

A. Felony Cases

MCR 6.005 details a defendant's right to an attorney at arraignment in felony cases. At a defendant's arraignment on a warrant or complaint, the court must advise the defendant that he or she is entitled to the assistance of an attorney at all proceedings, and that if the defendant cannot afford an attorney's assistance but wishes to have the assistance of a lawyer, one will be appointed at public expense. MCR 6.005(A)(1)-(2). See also MCR 6.104(E)(2)-(3), which requires the court to advise the defendant of his or her right to an attorney during the felony arraignment.

In felony cases, the court must promptly refer the defendant to the local appointing authority for the appointment of an attorney if the court finds that the defendant is financially unable to retain an attorney. MCR 6.005(D). Defendants who appear without an attorney should be encouraged by the court to be screened for indigency and possible appointment of counsel. MCR 6.005(D). A defendant who is able to contribute to the cost of an appointed attorney may be required to do so. MCR 6.005(C).[65]

> **Note:** The order of contribution permitted under MCR 6.005(C) pertains to "an on-going obligation during the term of the appointment" to contribute to the cost of an

[64] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4, for more information on a defendant's right to counsel.

[65] See MCR 6.005(B) for factors to consider when determining a defendant's indigency, and MCR 6.005(D)-(E) for information about a defendant's waiver of the assistance of an attorney and the court's duty to continue advising the defendant of his or her right to counsel at all subsequent proceedings.

> attorney and is distinct from reimbursement for attorney fees, "which suggests an obligation arising after the term of appointment has ended[.]" *People v Jose*, 318 Mich App 290, 298 (2016). MCR 6.005(C) "'pertains to contribution and should not be construed as authorizing subsequent reimbursement.'" *Jose*, 319 Mich App at 298, quoting *People v Nowicki*, 213 Mich App 383, 386-387, n 3 (1995). However, MCR 6.005(C) "does not preclude trial courts from ordering subsequent reimbursement of expenses paid for court-appointed counsel." *Jose*, 318Mich App at 298, quoting *Nowicki*, 213 Mich App at 386-387, n 3.

For a detailed discussion of the defendant's right to counsel, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4.

B. Misdemeanor Cases

In misdemeanor cases cognizable by the district court, at arraignment, the court must inform the defendant of his or her right "to the assistance of an attorney at all court proceedings, including arraignment," and if eligible under MCR 6.610(D)(2), the right to an appointed attorney. MCR 6.610(D)(1).[66] An indigent defendant has the right to appointed counsel only if (1) the offense with which the defendant is charged requires a minimum term in jail upon conviction, or (2) the court determines, should the defendant be convicted, that it might sentence the defendant to a term of incarceration, even if suspended. MCR 6.610(D)(2). The court must inform a defendant of his or her right to an attorney (appointed or retained), and the defendant must waive the right in writing or on the record before there is an effective waiver of counsel. MCR 6.610(D)(3). "If the defendant has not waived the right to counsel, the court must refer the matter to the appointing authority for the assignment of counsel." MCR 6.610(D)(3).

For a detailed discussion of the defendant's right to counsel, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4.

[66] For felony or misdemeanor cases not cognizable by the district court, at arraignment, the court must inform the defendant of his or her right to an attorney if not represented at arraignment and the right to an appointed attorney if he or she is indigent. MCR 6.610(I).

3.8 Notice to Victim Regarding Arrest and Pretrial Release

Under the Crime Victim's Rights Act (CVRA), the law enforcement agency investigating the offense must provide the victim, in writing, with the opportunity to *request notice* of the defendant's (or juvenile's) arrest, subsequent release, or both.[67] See MCL 780.753(d) (felonies), MCL 780.782(d) (juvenile offenses), and MCL 780.813(1)(d) (misdemeanors). Upon such request, MCL 780.755(1) (felonies) requires the law enforcement agency to "promptly provide" this and other information, as follows:

> "Not later than 24 hours after the arraignment of the defendant for a crime, the law enforcement agency having responsibility for investigating the crime shall give to the victim notice of the availability of pretrial release for the defendant, the telephone number of the sheriff or juvenile facility, and notice that the victim may contact the sheriff or juvenile facility to determine whether the defendant has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the defendant, or both, if the victim requests or has requested that information. If the defendant is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime."

Substantially similar provisions exist for cases involving a juvenile released from a juvenile facility or cases involving a serious misdemeanor. MCL 780.785(1) (time requirement for notice to victim of juvenile is within 48 hours of juvenile's preliminary hearing); MCL 780.815 (time requirement for notice to victim of serious misdemeanor[68] is within 72 hours of arrest).

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[67] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for detailed information on a crime victim's right to information.

[68] Serious misdemeanors, as defined in MCL 780.811(1)(a), include, among other crimes, a crime of assault and assault and battery under MCL 750.81, assault and infliction of serious or aggravated injury under MCL 750.81a, fourth-degree child abuse under MCL 750.136b(7), internet or computer usage to make prohibited contact under MCL 750.145d, and stalking under MCL 750.411h. For additional information on domestic violence crimes, see Chapter 2.

Chapter 4: Evidence in Criminal Domestic Violence Cases

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4.1 Chapter Overview

This chapter addresses evidentiary issues that are likely to arise in criminal cases involving allegations of domestic violence, including the admission of character evidence under Michigan's rape-shield law and the admission of evidence of other crimes, wrongs, or acts. Also discussed are select hearsay rules and exceptions, evidentiary rules applicable to audiotaped and photographic evidence, expert testimony, and various privileges that arise from marital relationships and relationships with service providers.

4.2 Exclusions From and Exceptions to Hearsay Rules

This section discusses hearsay issues that may arise in cases involving domestic violence. For a more detailed discussion of hearsay issues, including evidence excluded from the definition of hearsay, as well as exceptions to the rule against the admission of hearsay, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

MRE 801(c) defines *hearsay* as "a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

"'Statement' means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." MRE 801(a).

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Some statutory provisions also establish hearsay exceptions for cases involving domestic violence. See MCL 768.26 and MCL 768.27c.[1] The following exclusions from and exceptions to the hearsay rule appear in MCL 768.27c, MRE 803, MRE 804, and MRE 807:

- testimonial evidence of threats (i.e., statements not offered to prove the truth of the matter asserted or admissions by a party-opponent), MCL 768.27c;
- present sense impressions, MRE 803(1).
- excited utterances, MRE 803(2);

[1] Threats made in offenses involving domestic violence may be admissible under MCL 768.27c. See Section 4.2(A)(2). An unavailable witness's former "testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant" may be admissible under MCL 768.26. See also MRE 804(b)(1).

- statements of existing mental, emotional, or physical condition, MRE 803(3);
- statements made for purposes of medical treatment or diagnosis, MRE 803(4);
- recorded recollections, MRE 803(5);
- records of regularly conducted activity, MRE 803(6);
- public records, MRE 803(8);
- certain former testimony or statements of an unavailable witness, MRE 804(b)(1), MRE 804(b)(3); MRE 804(b)(6); and
- residual hearsay exceptions, MRE 807.

"Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992). However, evidence that falls within a hearsay exception may still be inadmissible if it violates the Confrontation Clause.[2] *People v Dendel (On Second Remand)*, 289 Mich App 445, 472 (2010) ("[U]nder *Crawford*,[3] out-of-court statements are not exempt from confrontation merely because they come within a hearsay exception, including hearsay exceptions traditionally considered to be imbued with indicia of reliability.").

A. Testimonial Evidence of Threats

1. Threats That Are Not Hearsay

A threat may be a non-assertive verbal act and, thus, not hearsay if it is not offered to prove the truth of the matter asserted. Such a threat may, for example, be circumstantial evidence of the declarant's state of mind, including consciousness of guilt, or it may explain a witness's inability to identify the defendant in court. See MRE 801(a).

A threat may be non-hearsay if it is an admission by a party opponent under MRE 801(d)(2).

In the following cases, a threat against a crime victim or witness was ruled admissible either as an admission by a party-

[2] An in depth discussion of confrontation issues is outside the scope of this benchbook. For more information on the Confrontation Clause, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[3] *Crawford v Washington*, 541 US 36 (2004).

opponent or as evidence offered for a purpose other than to show the truth of the matter asserted (i.e. non-hearsay).

- *People v Sholl*, 453 Mich 730 (1996) (statements showed consciousness of guilt):

  The defendant was convicted of CSC-III against a woman with whom he was in a dating relationship. *Sholl*, 453 Mich at 731-732. At trial, the investigating officer testified outside the presence of the jury that, after the trial started, the complainant called him to report that a third party had told her that the defendant had threatened her. *Id.* at 738-739. The officer further testified outside the jury's presence that he asked the defendant if he had talked about killing the complainant, in response to which the defendant "acknowledged that, while intoxicated, he 'probably did say something like that.'" *Id*. at 739. The trial court ruled that the officer could testify as to statements made to him by the defendant. *Id*. The officer then testified in the presence of the jury that he asked the defendant if he had threatened to shoot the complainant and that the defendant responded that he "'probably would have said something like that.'" *Id.* at 740. The Supreme Court found no error in admission of this evidence, holding:

  > "A defendant's threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt.
  >
  > As the circuit court observed, a threatening remark (while never proper) might in some instances simply reflect the understandable exasperation of a person accused of a crime that the person did not commit. However, it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case." *Sholl*, 453 Mich at 740 (internal citations omitted).

- *People v Kowalak (On Remand)*, 215 Mich App 554 (1996) (admission by party-opponent):

  The defendant was charged with first-degree murder for killing his 82-year-old mother. *Kowalak*, 215 Mich App at 555. At the defendant's preliminary examination, a witness testified that she had spoken with the victim both by telephone and in person shortly before her death. *Id.* at 555-556. During these conversations, the victim told the witness that the

defendant had threatened to kill the victim. *Id*. at 556. Applying MRE 801(d)(2), the Court of Appeals concluded that the defendant's threat to his mother was an admission by a party opponent and thus not hearsay.[4] *Kowalak*, 215 Mich App at 556-557.

2. Threats Falling Under Hearsay Exception

MCL 768.27c establishes an exception to the hearsay rule for statements purporting "to narrate, describe, or explain the infliction or threat of physical injury upon the declarant."[5] MCL 768.27c(1)(a). This exception applies only to offenses involving domestic violence, prostitution, and human trafficking. See MCL 768.27c(1)(b). However, "[n]othing in [MCL 768.27c] shall be construed to abrogate any privilege conferred by law."[6] MCL 768.27c(4).

A declarant's statement may be admitted under MCL 768.27c if all of the following circumstances exist:

> "(a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.

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[4] In the *Kowalak* case, there were two statements being analyzed: (1) the defendant's statement to the victim threatening to kill her, and (2) the witness's testimony recounting the victim's statement concerning the threat made by the defendant. See *Kowalak*, 215 Mich App at 556-557. Only the defendant's statement was considered nonhearsay under MRE 801(d)(2); the Court concluded that the other statement (the witness's testimony) was admissible hearsay under the excited utterance exception. *Kowalak*, 215 Mich App at 556-557.

[5] "[MCL 768.27c] applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006." MCL 768.27c(6). "[A] preliminary examination is a type of evidentiary hearing" to which MCL 768.27c applies. *People v Olney (On Remand)*, 333 Mich App 575, 587 (2020).

[6] See Section 4.6 for additional information on privileges.

> (e) The statement was made to a law enforcement officer." MCL 768.27c(1).

"MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirements." *People v Olney*, 327 Mich App 319, 326 (2019) ("[t]he circuit court erred as a matter of law in holding that there is an 'unavailability' requirement under MCL 768.27c," and "consequently abused its discretion when it granted defendant's motion to quash on that basis").

MCL 768.27c(1)(a) "places a factual limitation on the admissibility of statements[,]" and MCL 768.27c(1)(c) "places a temporal limitation on admissibility." *People v Meissner*, 294 Mich App 438, 446 (2011). Together, these provisions "indicate that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury." *Id.* at 446-447. In *Meissner*, the victim gave a verbal statement and prepared a written statement for the police that she had been threatened by the defendant (1) on previous occasions, (2) that morning at her home, and (3) again that same day, via text message, after telling the defendant she had contacted the police. *Id.* at 442-443. The Court of Appeals found that "[t]he [trial] court could . . . determine that [the victim's] statements met [MCL 768.27c](1)(a) because the statements described text messages that threatened physical injury, and met [MCL 768.27c](1)(c) because [the victim] made the statements at or very near the time she received one or more of the threatening text messages." *Meissner*, 294 Mich App at 447.

For purposes of MCL 768.27c(1)(d), "circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation[7] in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

[7] Statements made in contemplation of the "pending or anticipated litigation" referenced in MCL 768.27c(2)(a) "pertain[] to litigation in which the declarant could gain a property, financial, or similar advantage, such as divorce, child custody, or tort litigation." *Meissner*, 294 Mich App at 450. In cases where the declarant is an alleged victim of domestic violence, that provision "does not pertain to the victim's report of the charged offense." *Id.* at 450 (rejecting the defendant's contention that the trial court was required "to disregard or discredit [the alleged domestic violence victim's] statements [to police] on the ground they were made in contemplation of litigation").

> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section." MCL 768.27c(2).

MCL 768.27c(2) expressly states that the court is not limited to the listed factors when determining "circumstances relevant to the issue of trustworthiness[;]" the listed factors are merely "a nonexclusive list of possible circumstances that may demonstrate trustworthiness." *Meissner*, 294 Mich App at 448-449.

Notice requirements apply if a prosecutor intends to introduce evidence of a declarant's statement under MCL 768.27c:

> "(3) If the prosecuting attorney intends to offer evidence under [MCL 768.27c], the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

B. Present Sense Impression

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while or immediately after the declarant perceived it." MRE 803(1). A present sense impression is admissible even though the declarant is available as a witness. MRE 803.

The following three conditions must be met for evidence to be admissible under the present sense impression exception to the hearsay rule:

> "(1) [T]he statement must provide an explanation or description of the perceived event[.]
>
> (2) [T]he declarant must personally perceive the event[.]
> . . .
>
> (3) [T]he explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236 (1998).

A slight lapse in time between the event and the description may still satisfy the *substantially contemporaneous* requirement. *Hendrickson*, 459 Mich at 236. In *Hendrickson*, the victim called 911 and explained that she had just been beaten by her husband. *Id.* at 232. The Court concluded that her phone call satisfied the *substantially*

contemporaneous requirement because the victim's statement "was that the beating had just taken place" and "the defendant was in the process of leaving the house as the victim spoke."[8] *Id.* at 237. See also *People v Chelmicki*, 305 Mich App 58, 63 (2014) ("statements [contained in the victim's police statement] were admissible [] as a present sense impression" where the "statement provided a description of the events that took place inside the apartment[,] [] the victim perceived the event personally[, and] [] the statement was 'substantially contemporaneous' with the event, as the evidence showed, at most, a lapse of 15 minutes between the time police entered the apartment and the time the victim wrote the statement").

Corroboration (independent evidence of the event) is required. *Hendrickson*, 459 Mich at 237-238. Sufficient corroboration exists if it "assures the reliability of the statement." *Id.* at 237-238. "[T]he sufficiency of the corroboration depends on the particular circumstances of each case." *Id.* In *Hendrickson*, the prosecution sought to introduce photographs of the victim's injuries as independent evidence of the beating. *Id.* at 233. The Court concluded that the photographs provided sufficient corroborating evidence of the event because the "photographs show[ed] the victim's injuries [and] were taken near the time the beating [was] alleged to have occurred. In addition, the injuries depicted in the photographs were consistent with the type of injuries sustained after a beating." *Id.* at 239.

C. Excited Utterances

An excited utterance is defined as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." MRE 803(2). An excited utterance is admissible even though the declarant is available as a witness. MRE 803.

"To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion." *People v Skippergosh*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). See also *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996).

"There is no express time limit for excited utterances." *People v Walker (Walker I)*, 265 Mich App 530, 534 (2005), vacated in part on other grounds *People v Walker (Walker II)*, 477 Mich 856 (2006)[9] (victim's

[8] See Section 4.3 for additional information on audiotaped evidence.

statements made to a neighbor two hours after the final assault were admissible as excited utterances where the evidence showed that the victim was beaten throughout the night, escaped two hours after the final assault, and was visibly upset, crying, shaking, and hysterical). See also *Skippergosh*, ___ Mich App at ___ ("[T]estimony indicated that [complainant] was actively bleeding when she made the statements, which suggested that the statements were made shortly after the assault . . . .").

"[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *People v Smith*, 456 Mich 543, 551-553 (1998) (victim's statement made ten hours after sexual assault was admissible as an excited utterance where the victim's uncharacteristic actions during the time between the event and the statement "describe[d] a continuing level of stress arising from the assault that precluded any possibility of fabrication"). See also *People v Layher*, 238 Mich App 573, 584 (1999) (5-year-old victim's statements made during therapy one week after the alleged assault were admissible as excited utterances where "[t]he[] circumstances, combined with [the] complainant's young age, mental deficiency, and the relatively short interval between the assault and the statement, militate against the possibility of fabrication and support an inference that the statement was made out of a continuing state of emotional shock precipitated by the assault"); *Skippergosh*, ___ Mich App at ___ (witness testified that the complainant appeared "scared" at the time she made the utterance, and "[t]he fact that [she] was 'scared' suggest[ed] that she did not have sufficient time after the assault to gather her thoughts to create a misrepresentation").

Admission of an excited utterance under MRE 803(2) "does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a) instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established." *People v Barrett*, 480 Mich 125, 139 (2008).

A statement that identifies the perpetrator of an assault relates to the circumstances of the startling occasion and, therefore, satisfies the third criterion of the excited-utterance hearsay exception under MRE 803(2). See *Skippergosh*, ___ Mich App at ___ ("[T]he statements

[9] For more information on the precedential value of an opinion with negative subsequent history, see our note.

made by [the victim] related to the circumstances of the startling occasion, as they noted the perpetrator of the assault.").

D. Statements of Existing Mental, Emotional, or Physical Condition

MRE 803(3) allows admission of statements "of the declarant's then-existing state of mind or emotional, sensory, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of declarant's will." Such statements are admissible even though the declarant is available as a witness. MRE 803.

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey* (*On Remand*), 273 Mich App 26, 36 (2006).

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *In re Utrera*, the Michigan Court of Appeals affirmed the trial court's decision to admit statements the declarant (a child) made to her therapist regarding the fear the child felt towards her mother. The Court of Appeals concluded that these hearsay statements were admissible because they were relevant to the case and pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18.

E. Statements Made for Purposes of Medical Treatment or Diagnosis in Connection With Treatment

MRE 803(4) allows admission of statements made for purposes of medical treatment or diagnosis. A statement is admissible under MRE 803(4) if it:

> "(A) is made for—and is reasonably necessary to—medical treatment or diagnosis in connection [with] treatment; and
>
> (B) describes medical history, past or present symptoms or sensations, their inception, or their general cause."

Such statements are admissible even though the declarant is available as a witness. MRE 803.

The rationales for admitting statements under MRE 803(4) are "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable

necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding*, 458 Mich 617, 629 (1998), quoting *Meeboer (After Remand)*, 439 Mich at 322 (declarant's statement that his self-inflicted wound occurred after a "fight with his girlfriend" was inadmissible under MRE 803(4) because it was not reasonably necessary for diagnosis and treatment).

1. Trustworthiness: Age of Declarant

In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based on the declarant's age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Garland*, 286 Mich App 1, 9 (2009). For declarants ten years of age and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *Meeboer (After Remand)*, 439 Mich at 326; *People v Van Tassel (On Remand)*, 197 Mich App 653, 662 (1992). "'While the inquiry into the trustworthiness of the declarant's statement is just one prong of the analysis under MRE 803(4), it is very important that the understanding to tell the truth to the physician be established.'" *People v Jones*, ___ Mich App ___, ___ (2025), quoting *Meeboer*, 439 Mich at 324. The *Jones* Court held that the admissibility of a three-year old's prior statement to an ER nurse about abuse by defendant under MRE 803(4)[10] was a close evidentiary question; even though the trial court did not consider if the child understood the importance of being truthful to the nurse, "the trial court's decision regarding a close evidentiary question generally does not constitute an abuse of discretion." *Jones*, ___ Mich App at ___.

The inquiry into trustworthiness requires a trial court to "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Id.* at 324. In *id.* at 324-326, the Michigan Supreme Court established ten factors to address when considering the totality of the circumstances in cases involving victims under the age of ten:

- The age and maturity of the declarant.

[10] MRE 803(4) was amended effective January 1, 2024. *Jones*, ___ Mich App at ___ n 3. At the time of the *Jones* trial, the medical treatment exception in the former version of MRE 803(4) read:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment. [*Jones*, ___ Mich App at ___, quoting the former MRE 803(4).]

- The manner in which the statement was elicited.
- The manner in which the statement was phrased.
- The use of terminology unexpected of a child of similar age.
- The circumstances surrounding initiation of the examination.
- The timing of the examination in relation to the assault or trial.
- The type of examination.
- The relation of the declarant to the person identified as the assailant.
- The existence of or lack of motive to fabricate.
- The corroborative evidence relating to the truth of the child's statement.

The Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving a complainant over age ten. *Van Tassel (On Remand)*, 157 Mich App at 662. However, to comply with the Michigan Supreme Court remand order, the Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court. *Van Tassel (On Remand)*, 157 Mich App at 663-664.

For a hearsay exception on statements about sexual acts made by children under age ten, see MRE 803A. For a detailed discussion of MRE 803A, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

2. Trustworthiness: Statements to Psychologists

Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. *Meeboer (After Remand)*, 439 Mich at 327; *People v LaLone*, 432 Mich 103, 109-110 (1989).

In *LaLone*, 432 Mich at 116, a first-degree criminal sexual conduct case, the Michigan Supreme Court overturned the trial court's decision to admit a psychologist's testimony regarding statements made by her 14-year-old patient who was the complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id*. at 109-110. The Michigan Supreme Court revisited this

question in *Meeboer* (*After Remand*), 439 Mich at 329, reiterating that statements to psychologists may be less reliable than those to physicians. However, the *Meeboer* Court stated *LaLone* "does not preclude admission of statements where an analysis of the totality of the circumstances surrounding the declaration of the hearsay statement supports the underlying requirements of MRE 803(4)." *Meeboer (After Remand)*, 439 Mich at 328.

3. Reasonable Necessity: Statements Identifying Assailant

When a victim of domestic violence seeks medical treatment for an injury, it is possible that the victim's statements to the treating medical professional may identify the assailant as the "general cause" of "past or present symptoms or sensations, [or] their inception[.]" MRE 803(4). If this occurs, trial courts may be called upon to determine whether the assailant's identity is reasonably necessary to medical diagnosis or treatment.

The following cases set forth some general principles for determining whether an assailant's identity is medically relevant.

- ***People v Meeboer (After Remand)*, 439 Mich 310 (1992):**

In three consolidated cases, all involving criminal sexual conduct against children aged seven and under, the Michigan Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4) under the following circumstances:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .
>
> Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the

> exact type of trauma the child recently experienced.
>
> In addition to the medical aspect . . . , the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *Meeboer (After Remand)*, 439 Mich at 328-330.

- *People v Van Tassel (On Remand)*, **197 Mich App 653 (1992):**

In this first-degree criminal sexual conduct case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the trial court in a separate abuse and neglect proceeding. *Van Tassel* (*On Remand*), 197 Mich App at 656.The Court held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment:

> "The fact that child protective services were alerted [after the victim identified her assailant] does not turn the question of the assailant's identity into an issue of social disposition. The victim was removed from her home and allowed to physically heal. She began psychological therapy, and was at the time of trial receiving therapy. Treatment and removal from an abusive environment is medically

> beneficial to the victim of a sexual abuse crime and resulted from the victim's identification of the assailant to her doctor. The questions and answers regarding the identity of her assailant can therefore be regarded as reasonably necessary to this victim's medical diagnosis and treatment." *Van Tassel*, 157 Mich App at 660-661.

- *People v Jones*, ___ Mich App ___, ___ (2025):

A deceased four-year-old child's prior statement to an ER nurse that defendant (her father) hit her was properly admitted under MRE 803(4) as a statement made for the purpose of obtaining medical treatment at defendant's trial for first-degree felony murder and first-degree child abuse."[A] child's identification of an abuser can be relevant to obtaining medical treatment because the physician can assess and treat any pregnancy or sexually transmitted disease, make referrals for other treatment, including counseling, and structure the examination to the exact type of trauma the child recently experienced."*Jones*, ___ Mich App at ___ (quotation marks and citation omitted). Additionally, identifying the assailant allows the doctor to "assess whether the child will be returning to an abusive home," which is relevant whether the abuse is sexual or nonsexual. *Id*. at ___.

F. Recorded Recollection

MRE 803(5) allows admission of "[a] record that:

> (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
>
> (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
>
> (C) accurately reflects the witness's knowledge."

"If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." *Id*.

The following three conditions must be met for evidence to be admissible under the recorded recollection exception to the hearsay rule:

> "'(1) The document must pertain to matters about which the declarant once had knowledge;
>
> (2) The declarant must now have an insufficient recollection as to such matters; and

> (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his [or her] memory.'" *People v Daniels*, 192 Mich App 658, 667-668 (1992), quoting *People v J D Williams (After Remand)*, 117 Mich App 505, 508-509 (1982).

See *People v Chelmicki*, 305 Mich App 58, 61-62 (2014), where the victim prepared a written police statement shortly after a domestic violence incident, and at trial, the victim "recalled certain events after reading [her written statement], but otherwise testified that the statement did not refresh her recollection." The "statements were admissible . . . as a past recollection recorded" because "[t]he police statement pertained to a matter about which the declarant had sufficient personal knowledge, she demonstrated an inability to sufficiently recall those matters at trial, and the police statement was made by the victim while the matter was still fresh in her memory." *Id*. at 63-64.

G. Records of a Regularly Conducted Activity

MRE 803(6) allows for the admission of records of regularly conducted activity.[11] MRE 803(6) specifically indicates that the following records are not excluded by the hearsay rule, even though the declarant is available as a witness:

> "A record of an act, transaction, occurrence, event, condition, opinion, or diagnosis [is not excluded by the rule against hearsay] if:
>
> > (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
> >
> > (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> >
> > (C) making the record was a regular practice of that activity;
> >
> > (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule prescribed

[11] Police reports may be admissible under this rule, or under MRE 803(8), as public records. See Section 4.2(H).

> by the Supreme Court or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

See *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998) (part of plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business); *People v Jobson*, 205 Mich App 708, 713 (1994) (police activity log sheet was properly admitted into evidence under MRE 803(6)).

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *People v Huyser*, 221 Mich App 293, 296-299 (1997) (expert's report lacked trustworthiness of a report generated exclusively for business purposes when the expert prepared the report in contemplation of trial).

A business record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. See MRE 805.

A document that is admissible under MRE 803(6) may be properly authenticated without the introduction of extrinsic evidence. See MRE 902, governing the authentication of a business record by the written certification of the custodian or other qualified person, which provides in part:

> "The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> * * *
>
> (11) Certified Domestic or Foreign Record of a Regularly Conducted Activity. The original or a copy of a domestic or foreign record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a Michigan statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—

> so that the party has a fair opportunity to challenge them." MRE 902.

The trial court did not abuse its discretion when it allowed a prosecutor to admit Facebook records under MRE 902(11) without providing "a separate, formal notice to the defense in which she related that she intended to admit the Facebook records as self-authenticating documents under MRE 902(11) . . . ." *People v Dingee*, ___ Mich App ___, ___ (2025). The prosecutor did the following: listed the Facebook records in the notice of evidence that she intended to admit, *id*. at ___; "provided the defense with all 'written or recorded statements' by lay witnesses and had already provided the defense with copies of all 'documents, photographs or other papers that the People may introduce,'" *id*. at __; and "made it amply clear that the Facebook records were the social media posts that were certified" at the defendant's preliminary examination. *Id*. at ___. The Court held that the prosecutor's actions met "the minimum requirements" of MRE 902(11), even though the prosecutor did not provide the separate, formal, and written notice prescribed by the rule. *Dingee*, ___ Mich App at ___.

H. Public Records

MRE 803(8) allows the admission of public records.

"A record or statement of a public office [is not excluded by the rule against hearsay] if it sets out:

> (A) the office's activities; or
>
> (B) a matter observed while under a legal duty to report, but not including:
>
> > (i) in a criminal case, a matter observed by law-enforcement personnel; and
> >
> > (ii) information to which the limitations in MCL 257.624 apply."[12] MRE 803(8).

Due to Confrontation Clause concerns, MRE 803(8) precludes the admission of certain police reports in criminal cases. See *People v Stacy*, 193 Mich App 19, 34-35 (1992), where the Court found that "[MRE] 803(8)(B)'s prohibition of the use, in criminal cases, of writings reflecting certain matters observed by law enforcement officers is premised upon the concern for a criminal defendant's confrontation rights." In *Stacy*, 193 Mich App at 34-35, the police

[12] MCL 257.624 prohibits the use of an accident report required by Chapter VI of the Michigan Vehicle Code, MCL 257.601–MCL 257.624b, in a court action.

report was admissible under MRE 803(8) and did not infringe on the defendant's right of confrontation where "[t]here [was] no indication that the police and [the] defendant were in an adversarial position at [the time the police report was made][,] [a]nd it has not been suggested, nor [was] it plausible [to find] on the[] facts,[13] that the preparer of the report had a motivation to misrepresent"). For a detailed discussion of the admissibility of evidence in the context of an individual's Sixth Amendment right to confrontation, see the Michigan Judicial Institutes's *Evidence Benchbook*, Chapter 3.

In addition, MRE 803(8)(B) does not allow the introduction of evaluative or investigative reports. *Bradbury v Ford Motor Co*, 419 Mich 550, 553-554 (1984). The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Id.* at 554. See also *People v Shipp*, 175 Mich App 332, 334-335, 339-340 (1989) (portions of an autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8); however, the medical examiner's recorded observations about the decedent's body were admissible).

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. See MRE 805.

I. Statements Made by Unavailable Declarant

In cases involving allegations of domestic violence, the complaining witness is sometimes unavailable to testify at trial or other court proceedings. In such cases, the prosecutor may seek admission of the witness's earlier testimony or other statement as substantive evidence at trial under MRE 804(b)(1), MRE 804(b)(3),and MRE 804(b)(6).

A declarant is *unavailable* when the declarant:

> "(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
>
> (2) refuses to testify about the subject matter despite a court order to do so;

[13] In *Stacy*, 193 Mich App at 34-35, "[t]he facts . . . present[ed] a situation where the material at issue in the police report (the whereabouts of [a potential suspect to the arson in this case]) was gathered in a routine response to a call from a [homeowner] . . . who wanted [the suspect] to leave her home. This contact was made before the ignition of the fire . . . . The crime [the] defendant is said to have committed could only have been in the earliest stages of investigation at the time [the officer] made his police report."

> (3) testifies to not remembering the subject matter;
>
> (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
>
> (5) is absent from the trial or hearing, and
>
> > (A) the statement's proponent has not been able, by process or other reasonable means, to procure;
> >
> > > (*i*) the declarant's attendance, in the case of a hearsay exception under [MRE 804(b)(1) or (6)]; or
> > >
> > > (*ii*) the declarant's attendance or testimony, in the case of a hearsay exception under [MRE 804(b)(2), (3), or (4)]; and
> >
> > (B) in a criminal case, the proponent shows due diligence.
> >
> > But [MRE 804(a)] does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." MRE 804(a).

"A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." MRE 804(a). The plain language of MRE 804(a) "mandates that the court consider whether the conduct of the proponent of the statement was *for the purpose of* causing the declarant to be unavailable." *People v Lopez*, 501 Mich 1044, 1044 (2018) (although the trial court "found that the witness was unavailable because he felt threatened by the prosecutor," it "did not consider whether the prosecutor *intended* to cause the declarant to refuse to testify when engaging in that conduct") (emphasis added).

When declaring a declarant unavailable as a witness under MRE 804(a), the court should "make a record of [the declarant's] unavailability[.]" *People v Garay*, 320 Mich App 29, 37 (2017), rev'd in part and vacated in part on other grounds 506 Mich 936 (2020)[14] (while "the trial court's decision to declare [two child-witnesses] unavailable was within the range of reasonable and principled

[14]For more information on the precedential value of an opinion with negative subsequent history, see our note.

outcomes[under MRE 804(a)]" following "testimony at trial regarding the dangerous character of the [witnesses'] neighborhood, [a] Facebook threat [they received], and the [witnesses'] father's refusal to allow [them] to testify out of fear for their safety show[ed] that the reason for the refusal to testify was self-preservation[,] . . . the better practice would have been to make a record of their unavailability by examining each [witness] as to any threats received and the factors that influenced their refusal to testify[]").

The following cases set out examples when a declarant has been found to be unavailable:

- *People v Garay*, **320 Mich App 29 (2017),** rev'd in part and vacated in part on other grounds 506 Mich 936 (2020)[15]

  "The trial court did not abuse its discretion in declaring [two child-witnesses] to be unavailable[]" where the witnesses' father refused to allow them to testify after they were threatened. *Garay*, 320 Mich App at 36-37. Although this situation "is not expressly addressed under MRE 804(a), . . . it is of the same character as other situations outlined in the rule." *Garay*, 320 Mich App at 36-37 (finding that "[g]iven [the witnesses'] father's refusal to allow them to testify and his refusal to respond to the trial court's attempts for contact, [the witnesses] were certainly unavailable according to the ordinary meaning of the word[]").

- *People v Garland*, **286 Mich App 1 (2009)**

  The trial court properly found that the victim was unavailable as defined in MRE 804(a)(4), where "the victim was experiencing a high-risk pregnancy, . . . lived in Virginia, and . . . was unable to fly or travel to Michigan to testify[.]" *Garland*, 286 Mich App at 7.

  - *People v Adams*, **233 Mich App 652 (1999)**

    "[A]ll too often, the victims of domestic assault and abuse are fearful and reluctant to assist in the prosecution of their assailants, often as a result of a defendant's or his [or her] family's intimidation tactics or out of fear of future reprisals. These fears are too often justified." *Adams*, 233 Mich App at 658-659 (holding that the declarant-complainant was unavailable for purposes of MRE 804(a)(2) where she had been previously

[15]For more information on the precedential value of an opinion with negative subsequent history, see our note.

threatened by individuals connected to the defendant and she abruptly left the courthouse before testifying).

1. Former Testimony

"The following [is] not excluded by the rule against hearsay if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony that:
>
> > (A) was given as a witness at a trial or hearing whether given during the current proceeding or a different one; and
> >
> > (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, or cross, or redirect examination.[16] MRE 804(b).

"Former testimony is admissible at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *Garland*, 286 Mich App at 6-7 (2009), citing MRE 804(b)(1); *Crawford v Washington*, 541 US 36, 68 (2004). See also *People v Garay*, 320 Mich App 29, 37, 39 (2017), rev'd in part and vacated in part on other grounds 506 Mich 936(2020)[17] ("[b]ecause [the witnesses] were unavailable for trial and [the] defendant cross-examined them at the preliminary examination, the admission of their preliminary examination testimony did not violate defendant's right of confrontation[;]" similarly, admission of the testimony was not an abuse of discretion under MRE 804(b)(1)). For a detailed discussion of the admissibility of evidence in the context of a defendant's right of confrontation, see the Michigan Judicial Institutes's *Evidence Benchbook*, Chapter 3.

For former testimony to be admissible under MRE 804(b)(1), two requirements must be met: (1) the proffered testimony must have been made at "another hearing," and (2) the party against whom the testimony is offered must have "had an opportunity and similar motive to develop the testimony." *People v*

[16] See also MCL 768.26, which permits "[t]estimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, [to] be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

[17] For more information on the precedential value of an opinion with negative subsequent history, see our note.

Farquharson, 274 Mich App 268, 272, 275 (2007). See also MRE 804(b)(1). In *Farquharson*, 247 Mich App at 272-275, the Court concluded that an investigative subpoena hearing is similar to a grand jury proceeding and thus, constitutes "another hearing" under MRE 804(b)(1). "Whether a party had a similar motive to develop the testimony depends on the similarity of the issues for which the testimony is presented at each proceeding." *Farquharson*, 247 Mich App at 275. In remanding the case for a determination on the "similar motive" prong, the Court adopted a nonexhaustive list of factors that courts should use in determining whether a similar motive exists under MRE 804(b)(1):

> "(1) whether the party opposing the testimony 'had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue';
>
> (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and
>
> (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities)." *Farquharson*, 274 Mich App at 278.

See *Garay*, 320 Mich App at 38 ("[t]he trial court did not abuse its discretion by admitting the preliminary-examination testimony of [the unavailable witnesses] under MRE 804(b)(1)[]" where "there [was] no dispute that the preliminary-examination testimony was given 'at another hearing of the same or a different proceeding[,]' . . . [the] defendant had 'an opportunity and similar motive to develop the testimony' at the preliminary examination[in addition to] . . . an 'interest of substantially similar intensity' in proving or disproving the testimony of [the witnesses, and] . . . although the burden of proof was lower at the preliminary examination, [the] defendant had a similar motive to cross-examine [the witnesses] at both proceedings . . . to show that their testimony . . . lacked credibility or was not accurate[, a]nd [where the] defendant did, in fact, cross-examine [the witnesses] with regard to their credibility[]") (internal citations omitted).

2. Statement Under Belief of Impending Death

"The following [is] not excluded by the rule against hearsay if the declarant is unavailable as a witness:

* * *

> (2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances." MRE 804(b)(3).

MRE 804(b)(2)[18] permits the admission of statements made by a declarant at a time when the declarant believed his or her death was imminent. The rule does not require that the declarant actually die in order for the statements to be admissible; the declarant needs only to have believed that his or her death was imminent. *People v Orr*, 275 Mich App 587, 594-596 (2007).

"A declarant's age alone does not preclude the admission of a dying declaration." *People v Stamper*, 480 Mich 1, 5 (2007). In *Stamper*, the declarant was a four-year-old child who stated that he was dead and identified the defendant as the person who inflicted his fatal injuries. *Id.* at 3. The Court affirmed admission of the child's statement, rejecting the defendant's argument that a four-year-old could not be aware of impending death. *Id.* at 5. "Whether a child was conscious of his [or her] own impending death must be determined on a case-by-case basis. As with an adult, if the fact show . . . that the child believed that he [or she] was about to die, statements he [or she] made may be proffered as dying declarations." *Id.*

3. Statements Made by Declarant Made Unavailable by Opponent

"The following [is] not excluded by the rule against hearsay if the declarant is unavailable as a witness:

* * *

> (6) Statement Offered Against a Party That Wrongfully Caused or Encouraged the Declarant's Unavailability. A statement offered against a party that wrongfully caused—or encouraged[—]the declarant's unavailability as a witness, and did so intending that result." MRE 804(b).

[18]The provisions previously found in MRE 804(b)(2) appear in MRE 804(b)(3). See ADM File No. 2021-10, effective January 1, 2024.

"[A d]efendant's constitutional right to confrontation[19] is waived under the doctrine of forfeiture by wrongdoing[20] if hearsay testimony is properly admitted because the declarant's unavailability was procured by [the] defendant's wrongdoing." *Jones (Kyle)*, 270 Mich App at 212-214. However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial. See *Giles v California*, 554 US 353 (2008). The doctrine applies only when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Id.* at 361 (concluding that admission of the murder victim's unconfronted statements violated the defendant's right to confrontation and that the defendant's act of murdering the victim was not committed for the purpose of preventing her testimony; thus the doctrine of forfeiture by wrongdoing did not apply).

J. Residual Hearsay Exception[21]

A party may seek admission under MRE 807 of hearsay statements not covered under one of the firmly established exceptions in MRE 803 or MRE 804.

MRE 807 provides:

> "(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

[19] For more information on a defendant's right to confrontation, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[20] MRE 804(b)(6) is "a codification of the common-law equitable doctrine of forfeiture by wrongdoing[.]" *People v Jones (Kyle)*, 270 Mich App 208, 212 (2006).

[21] The *residual hearsay exception* was previously referred to as the "catch-all" exception and found in MRE 803(24) and MRE 804(b)(7). This exception to the hearsay rule now appears in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

> (4) admitting it will serve the purposes of these rules and the interests of justice.
>
> (b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name and address—so that the party has a fair opportunity to meet it."

A statement is admissible under MRE 803(24) or MRE 804(b)(7)[22] upon a showing of (1) circumstantial guarantees of trustworthiness equivalent to those of the established hearsay exceptions, (2) materiality, (3) probative value greater than that of other reasonably available evidence, (4) serving the interests of justice, and (5) sufficient notice. *People v Katt (Katt II)*, 468 Mich 272, 279, 290, 297 (2003) (child victim's statements to her social worker that the defendant sexually abused her were not admissible under MRE 803A, but were under MRE 803(24)[23]). See *People v Geno*, 261 Mich App 624, 625, 631-635 (2004) (child's statement to an interviewer conducting an assessment of the child that the defendant hurts her "here" and pointed to her vaginal area was properly admitted under MRE 803(24)[24]).

4.3 Audiotaped Evidence

The admissibility of audiotaped evidence, which includes 911 tapes, concerns three issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Hearsay objections and exceptions (MRE 801-MRE 807).
- Relevancy questions (MRE 401 and MRE 403).

A. Authentication

Authentication of audiotaped evidence is governed by MRE 901(a), which states:

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[22] Provisions previously appearing in MRE 803(24) and MRE 804(b)(7) are found in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[23] Provisions previously found in MRE 803(24) appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[24] *Id.*

> "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is."

"[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, "is reserved solely for the trial judge." *Mitchell*, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 155 (quotation marks and citation omitted). The proponent is not required "to sustain this burden in any particular fashion[,]" and "evidence supporting authentication may be direct or circumstantial and need not be free of all doubt." *Id.* at 155. The proponent is required "only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Id.* at 155. "Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. *Mitchell*, 321 Mich App at 155. Authentication may be opposed "by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be[;]" however, "this argument must be made on the basis of the proponent's proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage." *Id.* at 155.

"[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]" *Mitchell*, 321 Mich App at 156. "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court." *Id.* at 156. "Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable." *Id.* at 156.

MRE 901(b)(1)-(10) provide a nonexhaustive list of examples of evidence that satisfies the authentication or identification requirement of MRE 901(a).

"[A] tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape." *People v Berkey*, 437 Mich 40, 46, 50, 52 (1991) (by identifying the voices on

audiotaped recordings, the victim's neighbor authenticated audiotape recordings that contained conversations between the victim and the defendant).

B. Hearsay Objections to Audiotaped Evidence

In some cases, information on an audiotape does not constitute hearsay, either because the statement was not offered to prove the truth of the matter asserted or because the information was not a statement. See *City of Westland v Okopski*, 208 Mich App 66, 77 (1994) (admission of a tape-recorded 911 call was not prohibited by the hearsay rule because it was offered to show why the police responded rather than to prove the truth of the matter asserted); *People v Slaton*, 135 Mich App 328, 335 (1984) (background noises in a 911 tape were not statements and thus did not constitute hearsay).

In cases where audiotaped evidence falls within the definition of hearsay, Michigan appellate courts have upheld the admission of 911 tapes under the present sense impression, excited utterance, and dying declaration exceptions to the hearsay rule.[25] See *People v Hendrickson*, 459 Mich 229 (1998) (911 tape admitted as present sense impression); *People v Siler*, 171 Mich App 246, 251-253 (1988), superseded on other grounds by *People v Orr*, 275 Mich App 587, 594 n 13 (2007)[26] (911 tape admitted as dying declaration); *Slaton*, 135 Mich App at 334-335 (edited 911 tape admitted as present sense impression and excited utterance).

C. Relevance

A brief discussion of relevant evidence is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

"Evidence is relevant if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action." MRE 401.

[25] See Section 4.2 for more information on hearsay and hearsay exceptions as they relate to domestic violence cases. For a comprehensive discussion of hearsay, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

[26] For more information on the precedential value of an opinion with negative subsequent history, see our note.

Generally, relevant evidence is admissible. MRE 402. However, exceptions may exist in the federal and state constitutions, the Michigan Rules of Evidence, and the Michigan Court Rules. See *id.* For example, MRE 403 sets out exceptions to this general rule:

> "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

"Irrelevant evidence is not admissible." MRE 402.

4.4 Photographic Evidence

A brief discussion on admissibility of photographic evidence is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 6.

The admissibility of photographic evidence, which includes digital and analog images, concerns two issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Relevancy questions (MRE 401 and MRE 403).

A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

> "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is."

To lay a proper foundation for the admission in evidence of a photograph, a person familiar with the scene or object photographed must testify that the photograph accurately reflects the scene or object photographed. *People v Riley* (*Montgomery*), 67 Mich App 320, 322 (1976), rev'd on other grounds 406 Mich 1016 (1979).[27] See also *Werthman v Gen Motors Corp*, 187 Mich App 238, 241-242 (1990). The

[27] For more information on the precedential value of an opinion with negative subsequent history, see our note.

photographer need not testify. *Riley* (*Montgomery*), 67 Mich App at 322. "All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it accurately reflects the scene photographed." *Id.* (photograph of the victim's "bruised backside" was properly authenticated by the victim's testimony that the photograph accurately reflected the condition of her body at the time the picture was taken). See also *People v Hack*, 219 Mich App 299, 308-310 (1996) (a videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question).

"[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, "is reserved solely for the trial judge." *Mitchell*, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 155 (quotation marks and citation omitted). The proponent is not required "to sustain this burden in any particular fashion[,]" and "evidence supporting authentication may be direct or circumstantial and need not be free of all doubt." *Id.* at 155. The proponent is required "only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Id.* at 155. "Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. *Mitchell*, 321 Mich App at 155. Authentication may be opposed "by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be[;]" however, "this argument must be made on the basis of the proponent's proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage." *Id.* at 155.

"[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]" *Mitchell*, 321 Mich App at 156. "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court." *Id.* at 156. "Accordingly, the parties may submit evidence and argument,

pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable." *Id.* at 156.

MRE 901(b)(1)-(10) provide a nonexhaustive list of examples of evidence that satisfies the authentication or identification requirement of MRE 901(a).

B. Relevance

A brief discussion of relevant evidence is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

"Evidence is relevant if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action." MRE 401.

In general, "[r]elevant evidence is admissible," and "[i]rrelevant evidence is not admissible." MRE 402. However, exceptions to the admissibility of relevant evidence may exist in the federal and state constitutions, the Michigan Rules of Evidence, and the Michigan Court Rules. See MRE 402. For example, MRE 403 sets out an exception to this general rule of admissibility:

> "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (1995).

> "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness'[s] testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76 (internal citations omitted).

In *Mills*, the victim was intentionally set on fire by the defendants, and the prosecution sought to introduce color slides depicting the

extent of the victim's injuries. *Mills*, 450 Mich at 63, 66. The Michigan Supreme Court found that the photographs were relevant under MRE 401 because they "affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses." *Mills*, 450 Mich at 69. Additionally, the probative value of the slides was not substantially outweighed by unfair prejudice because, despite their graphic nature, they were an "accurate factual representation[] of the [victim's] injuries" and they "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78.

The trial court did not abuse its discretion by admitting photographs of the victim lying in a hospital bed with a severely bruised face and wearing a neck brace during the defendant's trial for aggravated domestic assault and assault with intent to do great bodily harm less than murder. *People v Davis (Joel)*, 320 Mich App 484, 487-489 (2017), vacated in part on other grounds 503 Mich 984 (2019).[28] The photographs were "highly relevant and probative to establish an essential element of aggravated domestic assault," and "were not so prejudicial as to warrant exclusion under MRE 403" because "the nature and placement of [the victim's] bruises and lacerations corroborated her testimony about the assault and depicted the seriousness of her injuries." *Davis (Joel)*, 320 Mich App at 488-489. Further, "[e]ven if the neck brace was 'precautionary' only, as argued by defendant, this precaution was required by defendant's actions," and "was part and parcel of the medical treatment [the victim] received for injuries sustained after defendant repeatedly punched her in the face." *Id.* at 489.

4.5 Character Evidence

A. Evidence of Other Crimes, Wrongs, or Acts

A brief discussion on evidence of other crimes, wrongs, or acts, is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

1. Admissibility of Other Acts Evidence Under MRE 404(b)

MRE 404(b) governs evidence of other crimes, wrongs, or acts:

> "(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular

[28] For more information on the precedential value of an opinion with negative subsequent history, see our note.

> occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. If it is material, the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident."

MRE 404 has "no temporal limitation" and does not permit evidence to "show defendant's propensity or character"; however, "MRE 404(b) sets forth a nonexhaustive list of several grounds, other than propensity, for which evidence of other acts may serve as proof 'when the same is material.'" *People v Rosa*, 322 Mich App 726, 735-736 (2018) (concluding that "the testimony of defendant's prior wife was not admissible under MRE 404(b) because the purpose of the evidence was to show that in this case, defendant acted in conformity with the character shown in the prior acts, i.e. that defendant was threatening, abusive, and violent"; while her testimony "demonstrated that defendant was a dangerous man and an incorrigible spouse abuser, . . . it did not offer probative evidence on a material issue," where it did not demonstrate a particular pattern or scheme that would serve to identify the defendant and "[t]estimony about defendant's abusive treatment of his first wife many years ago" did not provide information "about whether defendant had an intent to kill when he strangled [the victim]").

"MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *People v Rockwell*, 188 Mich App 405, 409-410 (1991).

"MRE 404(b) only applies to evidence of crimes, wrongs, or acts 'other' than the 'conduct at issue in the case' that risks an impermissible character-to-conduct inference. Correspondingly, acts comprised by or directly evidencing the 'conduct at issue' are not subject to scrutiny under MRE 404(b)." *People v Jackson (Timothy)*, 498 Mich 246, 265 (2015) (holding that "[e]vidence that the defendant[, who was charged with CSC-I involving a child who was a member of the church where the defendant served as a pastor,] previously engaged in sexual relationships with other parishioners, above or below the age of consent, [fell] well within this scope of coverage[]" and required the prosecution to provide notice under MRE 404(b)).

"[T]here is no 'res gestae exception' to MRE 404(b), nor does the definition of 'res gestae' set forth in [*People v*] *Delgado*[, 404 Mich

76 (1978),] and [*People v*] *Sholl*[, 453 Mich 730 (1996),] delineate the limits of that rule's applicability." *Jackson (Timothy)*, 498 Mich at 268 n 9, 274, overruling any conflicting Court of Appeals caselaw "[t]o the extent that such caselaw holds that there is a 'res gestae exception' to MRE 404(b)[.]" (Citations omitted).

> **Note:** Other acts that are "so intertwined with the charged offense that they directly prove the charged offense, or their presentation is necessary to comprehend the context of the charged offense" may be admissible without regard to MRE 404(b). *People v Spaulding*, 332 Mich App 648, 650 (2020). "Such evidence is also admissible to fill what would otherwise be 'a chronological and conceptual void regarding the events' to the finder of fact." *Id.* (defendant was convicted of aggravated stalking, and while the evidence of his prior communications with the victim did not expressly convey any threats and did not appear to support the victim's claim that she felt "terrorized, frightened, intimidated, threatened, harassed, or molested," see M Crim JI 17.25, "[i]t was impossible to comprehend the *significance of* those communications without an understanding of the history of the relationship between [the victim] and defendant"; their admission was "critical to understand[ing] why a reasonable person would have felt (and [the victim] did feel) scared by defendant's conduct"), quoting *People v Starr*, 457 Mich 490, 500-502 (1998) (quotation marks omitted).

a. Notice Requirements

MRE 404(b)(3) requires the prosecution to

> "(A) provide notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing at least 14 days before trial, unless the court, for good cause, excuses

pretrial notice, in which case the notice may be submitted in any form."

The purpose of the notice requirements set out in MRE 404(b)(3)[29] is to:

- force the prosecutor to identify and seek admission of only relevant evidence;
- ensure that the defendant has an opportunity to object to and defend against evidence offered under MRE 404(b); and
- facilitate a thoughtful ruling on admissibility by the trial court based on an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455 (2001).

b. Procedure for Admissibility of Evidence

The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,[30] is generally governed by the test established in *People v VanderVliet*, 444 Mich 52 (1993), which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime or other bad act.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts.
- Upon request, the trial court may provide a limiting instruction[31] under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that

[29]Notice requirements appearing in MRE 404(b)(3) previously appeared in MRE 404(b)(2), See ADM File No. 2021-10, effective January 1, 2024.

[30] The admissibility of other acts evidence under MRE 404(b) is not always governed by the *VanderVliet* test. When the proponent is seeking admission of other acts evidence based on a *modus operandi theory to establish identity*, the trial court should employ the test enunciated in *People v Golochowicz*, 413 Mich 298, 309 (1982). See *VanderVliet*, 444 Mich at 66, and *People v Ortiz*, 249 Mich App 297, 303 (2001).

[31] See, e.g., M Crim JI 4.11.

caused the respondent to commit the charged offense. V*anderVliet*, 444 Mich at 74-75.

> **Note:** MRE 404(b) codifies the requirements set out in *VanderVliet*, 444 Mich 52 (1993).

The *VanderVliet* case underscores the following principles of MRE 404(b) as a rule of inclusion, not exclusion:

- There is no presumption that other acts evidence should be excluded.
- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except a respondent's propensity to commit criminal or other bad acts.
- A respondent's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, 444 Mich at 65.[32]

Accordingly, "MRE 404(b) . . . permits the admission of any logically relevant evidence, '*even if* it also reflects on a defendant's character,' so long as the evidence is not 'relevant *solely* to the defendant's character or criminal propensity.'" *People v Spaulding*, 332 Mich App 638, 649 (2020), quoting *People v Mardlin*, 487 Mich 609, 615-616 (2010).

In cases where other acts evidence is admissible for one purpose but not others, the trial court should, on request, give a limiting instruction pursuant to MRE 105. See *People v Sabin* (*After Remand*), 463 Mich 43, 56 (2000); *People v Basinger*, 203 Mich App 603, 606 (1994) (absence of opportunity to request a limiting instruction was grounds for reversal because it denied the defendant a fair trial); *People v DerMartzex*, 390 Mich 410, 417 (1973) (failure to give properly requested instruction may be reversible error). However, the trial court has no duty, without a party's request, to give a limiting instruction sua sponte "even though such an instruction should [be] given." *People v Chism*, 390 Mich 104, 119-121 (1973).

[32] The continued viability of *VanderVliet's* analytical framework, and its characterization of MRE 404(b) as a rule of inclusion rather than exclusion, was affirmed in *Sabin* (*After Remand*), 463 Mich at 55-59. See also *People v Katt (Katt I)*, 248 Mich App 282, 303-304 (2001).

2. Admissibility of Other Acts Evidence Under MCL 768.27

MCL 768.27 provides for the admission of other acts evidence. MCL 768.27 states:

> "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

"[W]hile MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable." *People v Jackson (Timothy)*, 498 Mich 246, 269 (2015). MCL 768.27 authorizes the admission of other-acts evidence for the same purposes listed in MRE 404(b)(2) when one or more of the matters "is material." MCL 768.27. "Unlike MCL 768.27, however, MRE 404(b)'s list of such purposes is expressly nonexhaustive, and thus plainly contemplates the admission of evidence that may fall outside the statute's articulated scope." *Jackson (Timothy)*, 498 Mich at 269. Accordingly, "MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct." *Jackson (Timothy)*, 498 Mich at 269.

3. Admissibility of Other Acts Evidence Under MCL 768.27a

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. MCL 768.27a states in part:

> "(1) Notwithstanding [MCL 768.27[33]], in a criminal case in which the defendant is accused of committing a listed offense[34] against a minor, evidence that the defendant committed another listed offense against a minor is admissible and

[33] See Section 4.5(B)(2) for a discussion of MCL 768.27.

[34] *Listed offenses* are contained in MCL 28.722. See MCL 768.27a(2)(a).

> may be considered for its bearing on any matter to which it is relevant."

"MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts," and "does not violate the principles of separation of powers." *People v Pattison*, 276 Mich App 613, 619-620 (2007). Further, "MCL 768.27a does not violate the Ex Post Facto Clause because the altered standard for admission of evidence does "not lower the quantum of proof or value of the evidence needed to convict a defendant." *Pattison*, 276 Mich App at 619.

a. Notice Requirements

MCL 768.27a(1) requires the prosecuting attorney to disclose evidence admissible under that statute to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered."

"The statutory language of MCL 768.27a does not expressly require formal written notice . . . ." *People v Wisniewski*, ___ Mich App ___, ___ n 7 (2025) (cleaned up). "[B]y presenting [the] witness at the preliminary examination, . . . the prosecution complied with its statutory obligation to provide a summary of the substance of [the witness's] testimony that it expected to offer at trial." *Id.* at ___ (holding that the other-acts testimony was properly admitted under MCL 768.27a and MRE 403 in defendant's trial on multiple counts of criminal sexual conduct against minors).

b. Procedure for Determining Admissibility of Evidence

MCL 768.27a permits the admission of evidence that MRE 404(b) precludes. . . . [Specifically], the language in MCL 768.27a allowing admission of another listed offense[35] 'for its bearing on any matter to which it is relevant' permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes." *People v Watkins (Watkins II)*, 491 Mich 450, 470 (2012). "MCL 768.27a irreconcilably conflicts with MRE 404(b)

[35] *Listed offenses* are contained in MCL 28.722. See MCL 768.27a(2)(a).

and . . . the statute prevails over the court rule." *Watkins II*, 491 Mich at 496. Because MCL 768.27a "'does not principally regulate the operation or administration of the courts,'" it is a substantive rule of evidence and prevails over MRE 404(b). *People v Watkins (Watkins I)*, 277 Mich App 358, 363-364 (2007), aff'd 491 Mich 450 (2012), quoting *People v Pattison*, 276 Mich App 613, 619 (2007). "MCL 768.27a does not run afoul of [separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b)." *Watkins II*, 491 Mich at 476-477.

"[W]hile MCL 768.27a prevails over MRE 404(b) as to evidence that falls within the statute's scope, the statute does not mandate the admission of all such evidence, but rather 'the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence,' including MRE 403 and the 'other ordinary rules of evidence, such as those pertaining to hearsay and privilege[.]'" *People v Uribe*, 499 Mich 921, 922 (2016), quoting *Watkins II*, 491 Mich at 484-485. While evidence admissible under MCL 768.27a remains subject to MRE 403, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins II*, 491 Mich at 496.

When deciding whether MRE 403 requires exclusion of other-acts evidence admissible under MCL 768.27a, a court's considerations may include:

> "(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony." *Watkins II*, 491 Mich at 487-488. See also *Uribe*, 499 Mich at 922 (noting "there are 'several considerations' that may properly inform a court's decision to exclude [MCL 768.27a] evidence under MRE 403, including but not limited to 'the dissimilarity between the other acts and the charged crime' and 'the

> lack of reliability of the evidence supporting the occurrence of the other acts[]"), citing *Watkins II*, 491 Mich at 487-488.

See, e.g., *People v Jones*, ___ Mich App ___, ___ (2025) (the trial court properly admitted evidence under MCL 768.27a of the deceased child's prior hospitalization due to possible physical abuse because it was "relevant to showing a pattern of behavior on defendant's part" to use physical discipline; it satisfied the *Watkins II* trustworthiness analysis for an underage child's statement; and it was more probative than prejudicial under MRE 403).

A court may also "consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403." *Watkins II*, 491 Mich at 489. Under certain circumstances even evidence of an offense for which a defendant was acquitted may be admissible. *People v Hoskins*, 342 Mich App 194, 208 (2022). There is "no categorical rule of exclusion or admission" of evidence related to a charged offense for which a defendant was acquitted. *Id*. at 212. Admission under MCL 768.27a of any evidence related to a defendant's prior conduct is subject to analysis under MRE 403. *Hoskins*, 342 Mich App at 203.

The admission of other-acts evidence under any circumstance carries with it "the danger that a jury will convict the defendant solely because it believes he committed other criminal conduct, a possibility that is particularly egregious when the defendant has been *acquitted* of these other acts." *Hoskins*, 342 Mich App at 214. In *Hoskins*, the Court concluded that although "evidence of [the defendant's] acquitted conduct ha[d] some probative value—particularly to demonstrate [the defendant's] propensity to commit the charged offenses—the danger of unfair prejudice from admitting this acquitted conduct is extremely high." *Id*. at 215.

Specifically, the *Hoskins* Court stated that admission of the defendant's acquitted conduct was unfairly prejudicial because:

> (1) an acquitted individual is presumed innocent of the acquitted charge and may not be tried again for the acquitted offense or be subject to increased punishment because of the acquitted offense; however, "[a] jury

> considering other-acts evidence of acquitted conduct will make its own independent determination of whether the defendant committed the acquitted acts, despite a previous jury's unanimous verdict finding that defendant not guilty," *Hoskins*, 342 Mich App at 213;
>
> (2) requiring a defendant to defend against allegations already resulting in a defendant's acquittal "risks prejudicing [a defendant's] ability to present a full and adequate defense against the charges that he currently faces," *id*. at 214; and
>
> (3) whenever any other-acts evidence is admitted against a defendant, there is "the danger that a jury will convict the defendant solely because it believes he committed other criminal conduct, a possibility that is particularly egregious when the defendant has been *acquitted* of these other acts," *id*. at 214.

"The list of 'considerations' in *Watkins* provides a tool to facilitate, not a standard to supplant, [the] proper MRE 403 analysis, and it remains the court's 'responsibility' to carry out such an analysis in determining whether to exclude MCL 768.27a evidence under that rule." *Uribe*, 499 Mich at 922 (citation omitted). The trial court abused its discretion by excluding MCL 768.27a evidence where it failed to conduct an MRE 403 analysis and instead focused only on the considerations listed in *Watkins II*. *Uribe*, 499 Mich at 922. "In ruling the proposed testimony inadmissible under MRE 403, the trial court, citing the illustrative list of 'considerations' in *Watkins*, expressed concern regarding apparent inconsistencies between the proposed testimony and prior statements made by the witness, and certain dissimilarities between the other act and the charged offenses[, but] . . . failed to explain[] . . . how or why these concerns were sufficient . . . to render the 'probative value [of the proposed testimony] . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,' as required for exclusion under MRE 403." *Uribe*, 499 Mich at 922 (citation omitted).

See *People v Hoskins*, 342 Mich App 194 (2022). In *Hoskins*, the Court noted that even though the temporal proximity of the defendant's previous conviction and the charged offenses in his present trial weighed in favor of excluding evidence of the previous conviction—20 years had passed between the two—application of the other *Watkins* factors supported the admission of the evidence under MCL 768.27a. *Hoskins*, 342 Mich App at 205, 206.

However, a trial court can alleviate any danger of unfair prejudice when the court delivers the following instruction to the jury: "*You must not convict the defendant here solely because you think he is guilty of other bad conduct*." *People v Wisniewski*, ___ Mich App ___, ___ (2025) (quotation marks omitted).

4. Admissibility of Other Acts Evidence Under MCL 768.27b

In a criminal action against a defendant for an offense involving domestic violence or sexual assault, prostitution,[36] or human trafficking,[37] evidence that a defendant committed other acts of domestic violence, sexual assault, prostitution, or human trafficking is admissible "for any purpose for which [the evidence] is relevant, if [the evidence] is not otherwise excluded under [MRE 403]," and, unless any condition stated in the statute applies, the act of domestic violence or sexual assault occurred not "more than 10 years before the charged offense[.]" MCL 768.27b(1), (4)(a)-(d).[38] See, e.g., *People v Berklund*, ___ Mich App ___, ___ (2024) ("MCL 768.27b(1) plainly states that, when a defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible provided that it is relevant and not excluded by MCL 768.27b(4) or MRE 403.").[39] The statutory provisions of MCL 768.27b "do[] not limit or preclude the admission or consideration of evidence under any other statute, including, but not limited to, under [MCL 768.27a], rule of evidence, or case law." MCL 768.27b(3). "Thus, under MCL 768.27b, evidence of other acts of domestic violence is admissible, even to show propensity." *People v Skippergosh*, ___ Mich App ___, ___ (2024) (cleaned up). "[T]he prior act does not

[36] MCL 750.448 to MCL 750.462.

[37] MCL 750.462a to MCL 750.462h.

[38] Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006. MCL 768.27b(7).

[39] Note:

have to be identical to the charged offense to be relevant and possibly admissible under MCL 768.27b." *People v Wade*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted, alteration in original).

Propensity evidence that is merely "damaging" to the defense is not unfairly prejudicial under MRE 403. *Wade*, ___ Mich App at ___ (quotation marks and citation omitted). "[W]hen applying MRE 403 to evidence admissible under MCL 768.27b, courts should weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Wade*, ___ Mich App at ___ (quotation marks and citation omitted, alteration in original).

MCL 768.27b "in certain instances expands the admissibility of domestic-violence other-acts evidence beyond the scope permitted by MRE 404(b)(1)[.][40]" *People v Mack*, 493 Mich 1, 2 (2012). The Michigan Supreme Court found that MCL 768.27b's expansion of "admissibility of [domestic-violence other-acts] evidence beyond the scope of MRE 404(b)(1)"[41] did not "infringe on [its] authority to establish rules of 'practice and procedure' under Const 1963, art 6, § 5."[42] *Mack*, 493 Mich at 3.

MCL 768.27b contains a temporal requirement: "Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section unless the court determines that 1 or more of the following apply:

> (a) The act was a sexual assault that was reported to law enforcement within 5 years of the date of the sexual assault.[43]
>
> (b) The act was a sexual assault and a sexual assault evidence kit was collected.[44]

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[40]The other acts permitted previously appeared in MRE 404(b)(1); those other acts now appear in MRE 404(b)(2). See ADM File No. 2021-10, effective January 1, 2024.

[41]*Id.*

[42] In *Mack*, 493 Mich at 3, the Michigan Supreme Court "conclude[d] that MCL 768.27b d[id] not infringe on [its] authority to establish rules of 'practice and procedure' under Const 1963, art 6, § 5" "[f]or the reasons articulated in [*People v*] *Watkins* (*Watkins II*), 491 Mich 450 (2012).]" In *id.* at 472-481, the Court concluded that, because MCL 768.27a "reflects a substantive legislative determination that juries should be privy to a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor[,]" rather than a "policy consideration[] limited to 'the orderly dispatch of judicial business[,]'" the statute "does not run afoul of separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b)."

[43]See, e.g., *Berklund*, ___ Mich App at ___ n 2: "Here, defendant committed the sexual assault more than 10 years before the instant offense, but evidence of the prior sexual assault was not precluded by MCL 768.27b(4) because the sexual assault 'was reported to law enforcement within 5 years of the date of the sexual assault,' MCL 768.27b(4)(a), and 'a sexual assault evidence kit was collected,' MCL 768.27b(4)(b)."

> (c) The act was a sexual assault and the testing of evidence connected to the assault resulted in a DNA identification profile that is associated with the defendant.
>
> (d) Admitting the evidence is in the interest of justice." MCL 768.27b(4).

Although MCL 768.27b "does not define 'interest of justice,'" "the exception should be narrowly construed." *People v Rosa*, 322 Mich App 726, 733, 734 (2018). Rather, "evidence of prior acts that occurred more than 10 years before the charged offense is admissible under [the interest of justice exception in] MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence."[45] *Rosa*, 322 Mich App at 734 (concluding that testimony about abuse that occurred at least 16 years before the charged crimes was not uniquely probative or needed to assure that the jury was not misled because it was "consistent with and cumulative to [the victim's] testimony regarding defendant's character and propensity for violence").

a. Notice Requirement

MCL 768.27b(2) requires the prosecuting attorney to disclose an intent to offer evidence under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

b. Case Law

The following appellate cases address the admissibility of other acts evidence under MCL 768.27b.

- *People v Wade*, ___ Mich App ___ (2025):

  Defendant was tried on second-degree murder charges for the death of his former girlfriend, which "clearly fit[] the definition of an 'offense involving domestic violence'" for MCL 768.27b(1) purposes. *Wade*, ___ Mich App at ___

[44] *Id.*

[45] Note that effective March 17, 2019, MCL 768.27b was amended to expand the admission of prior acts occurring more than 10 years before the charged offense to include certain sexual assaults (in addition to still allowing admission of prior acts "in the interest of justice"). See 2018 PA 372. *Rosa* was decided before this statutory amendment.

(quoting MCL 768.27b(6)(a)(*i*) for the definition of "offense involving domestic violence," and MCL 768.27b(6)(b)(*iv*) for the definition of "family or household member"). Accordingly, evidence of defendant's past beatings of a different former girlfriend was properly admitted against him at the murder trial. *Wade*, ___ Mich App at ___. The former girlfriend's testimony "demonstrated defendant's propensity to commit violent acts against women, . . . and given the particularly violent conduct [the witness] described, defendant's shooting the [victim] would have merely been a step up from defendant's typical behavior, not wholly out of character." *Id.* at ___ (quotation marks and citation omitted). The witness's testimony, when considered with the other evidence, "was probative of whether defendant murdered [the victim], which weigh[ed] in favor of admission under MRE 403." *Wade*, ___ Mich App at ___.

- *People v Berklund*, ___ Mich App ___ (2024):

  "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of sexual assault is admissible under MCL 768.27b(1) so long as the evidence is not excluded by MCL 768.27b(4) or MRE 403, and is relevant." *Berklund*, ___ Mich App at ___, citing MCL 768.27b(1). On interlocutory appeal by leave granted, defendant unsuccessfully "challenge[d] the trial court's decision under MCL 768.27b(1) to allow the prosecution to introduce evidence that defendant previously committed sexual assault." *Berklund*, ___ Mich App at ___. Defendant, who faced a charge of assault with intent to commit great bodily harm less than murder or by strangulation (MCL 750.84(1)(a) or (b)) against a person who used to live with defendant and his wife, argued that the evidence of his prior sexual assault was only admissible under MCL 768.27b(1) if he were on trial for *another sexual assault*, not when he was on trial for *domestic violence*. *Berklund*, ___ Mich App at ___. The Court disagreed, stating that "the manner in which the Legislature chose to construct MCL 768.27b makes plain that it intended for evidence that a defendant previously committed an offense involving sexual assault to be admissible in a current prosecution in which the defendant is accused of an offense involving domestic violence, and vice versa." *Id.* at ___.

- *People v Propp (Propp II)*, 508 Mich 374 (2021), reversing in part and vacating in part *People v Propp (Propp I)*, 330 Mich App 151 (2019):

  In *Propp I*, the defendant argued that specific evidence should not be admitted against him because it was inadmissible hearsay." *Propp I*, 330 Mich App at 156, 171."[R]ules of evidence not specifically mentioned in MCL 768.27b may nonetheless be considered when determining whether evidence is admissible." *Propp II*, 508 Mich at 385. "MCL 768.27b(3) states: "*This section does not limit or preclude the admission or consideration of evidence under* any other statute, *rule of evidence*, or case law." *Propp II*, 508 Mich at 385 (emphasis added). "Although this provision appears to be primarily directed to allow the *admission* of evidence under other sources of law, the plain language of [MCL 768.27b] allows for the *consideration* of evidence under any other rule of evidence." *Propp II*, 508 Mich at 385. Consequently, the Supreme Court concluded that the Court of Appeals had erred in concluding that the Legislature intended for evidence to be "admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence." *Propp II*, 508 Mich at 380. See *Propp I*, 330 Mich at 180-181. The Supreme Court reversed Part IV of the opinion in *Propp I* and remanded the case to the Court of Appeals to consider whether the evidence at issue was admissible when it was examined under other applicable rules of evidence. *Propp II*, 508 Mich at 386. The Supreme Court specifically noted that "MCL 768.27b does not limit or preclude the consideration of MRE 802, which states that hearsay is generally not admissible." *Propp II*, 508 Mich at 386.

- *People v Propp (On Remand) (Propp III)*, 340 Mich App 652 (2022):

  On remand, the Court determined that the evidence the defendant claimed was inadmissible as hearsay was in fact either admissible under other applicable rules of evidence or did not constitute hearsay and so was properly admitted against the defendant at trial. *Propp III*, 340 Mich App at 666-668.

- *People v Rosa*, 322 Mich App 726 (2018):

  "[E]vidence of prior acts that occurred more than 10 years before the charged offense is admissible under [the interest of justice exception in] MCL 768.27b only if that

evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence."[46] *Rosa*, 322 Mich App at 734. In *Rosa*, "[the victim's] testimony laid out a detailed and compelling picture of defendant as an abusive and violent husband." Similarly, the defendant's first wife "described repeated verbal abuse, multiple beatings, and a rape." *Id.* at 734. These prior bad acts "were neither uniquely probative nor were they needed to ensure that the jury was not misled; instead, they were consistent with and cumulative to [the victim's] testimony regarding defendant's character and propensity." *Id.*

- *People v Daniels*, 311 Mich App 257 (2015):

  "MCL 768.27b *require[s]* the trial court to admit [evidence that the defendant committed other acts of domestic violence when]: (1) it is relevant, (2) it describes acts of 'domestic violence' under [MCL 768.27b(6)(a)[47]], and (3) its probative value is not outweighed by the risk of unfair prejudice under MRE 403." *Daniels*, 311 Mich App at 274-275 (in the defendant's trial for molesting and abusing two of his children, the trial court properly "admitted the testimony of [the defendant's other children] regarding the physical violence [the] defendant committed against them[]" where "[e]ach of the acts of physical violence to which the [children] testified [were] relevant, because they [made] 'a material fact at issue'—i.e. whether [the] defendant physically abused [the named victims in the case]—'more probable or less probable than [the material fact] would be' without the testimony[, t]he testimony also involve[d] acts of 'domestic violence' under MCL 768.27b, because the children described instances in which [the] defendant either 'cause[d] or attempt[ed] to cause physical or mental harm to a family or household member' through actual physical abuse[, and] . . . [t]he testimony [was] highly probative, because it demonstrate[d the] defendant's violent and aggressive tendencies, as well as his repeated history of committing physical abuse of all his children—not just [the named victims in the case]"). (Internal citations omitted).

- *People v Meissner*, 294 Mich App 438 (2011):

[46] Note that effective March 17, 2019, MCL 768.27b was amended to expand the admission of prior acts occurring more than 10 years before the charged offense to include certain sexual assaults (in addition to still allowing admission of prior acts "in the interest of justice"). See 2018 PA 372. *Rosa* was decided before this statutory amendment.

[47] Formerly MCL 768.27b(5)(a). See 2018 PA 372, effective March 17, 2019.

"Prior acts of domestic violence can be admissible under MCL 768.27b regardless of whether the acts were identical to the charged offense." *Meissner*, 294 Mich App at 452 ("trial court was within its discretion in finding the prior acts admissible[where] [a]ny potential unfair prejudice to [the] defendant was substantially outweighed by the evidence's probative value[, and] [t]he prior acts of domestic violence illustrated the nature of [the] defendant's relationship with [the victim] and provided information to assist the jury in assessing [the victim's] credibility[]").

- *People v Cameron*, 291 Mich App 599 (2011):

"[P]rior-bad-acts evidence [under MCL 768.27b may] be introduced at trial as long as the evidence satisfies the 'more probative than prejudicial' balancing test of MRE 403[.]" *Cameron*, 291 Mich App at 610. A court must "make two distinct inquiries under the MRE 403 balancing test[:]

> First, th[e] [c]ourt must decide whether introduction of [the individual's] prior-bad-acts evidence . . . [is] unfairly prejudicial.
>
> [Second], th[e] [c]ourt must apply the [MRE 403] balancing test and 'weigh the probativeness or relevance of the evidence' against the unfair prejudice." *Cameron*, 291 Mich App at 611.

In *Cameron*, 291 Mich App at 605, the trial court admitted evidence of the defendant's prior abusive conduct towards the victim and another ex-girlfriend. Under the first inquiry, the Court of Appeals found that the admitted evidence "did not stir such passion as to divert the jury from rational consideration of [the defendant's] guilt or innocence of the charged offenses[,]" and that "the trial court minimized the prejudicial effect of the bad-acts evidence by instructing the jury that the issue in the case was whether [the defendant] committed the charged offense." *Id.* at 611-612. Under the second inquiry, the Court found that the evidence was relevant (1) to establish the victim's credibility, (2) to show that the defendant acted violently toward the victim and that his actions were not accidental, and (3) to show the defendant's propensity to commit acts of violence against women who were, or had been romantically involved with him. *Id.* at 612. The Court concluded that "[the

defendant's] prior bad acts were relevant to the prosecutor's domestic violence charge under MCL 768.27b[,]" and that "[a]ny prejudicial effect of admitting the bad-acts evidence did not substantially outweigh the probative value of the evidence[.]" *Cameron*, 291 Mich App at 612. Accordingly, "the trial court did not abuse its discretion when it allowed [the defendant's] prior-bad-acts evidence to be introduced under MCL 768.27b." *Cameron*, 291 Mich App at 612.

- *People v Railer*, 288 Mich App 213 (2010):

  Where the proposed testimony of a defendant's previous acts of domestic violence is highly relevant to the defendant's tendency to commit the crime at issue, it may be admissible under MCL 768.27b. See *Railer*, 288 Mich App at 220-221. In *id.* at 220, the prosecution was permitted to call the defendant's former girlfriends to testify about the defendant's threats and physical abuse during their respective relationships with him. The Court concluded that their testimony described "behavior [that] clearly meets the definition of 'domestic violence' under [MCL 768.27b], [behavior that] occurred within ten years of the charged offense as required by [MCL 768.27b(4)], and [behavior that] would be highly relevant to defendant's tendency to assault [the victim] as charged." *Railer*, 288 Mich App at 220.

- *People v Pattison*, 276 Mich App 613, 615-616 (2007):

  Where proposed evidence is admissible under MCL 768.27b, it is unnecessary to determine whether it is also admissible under MRE 404(b). See *Pattison*, 276 Mich App at 616. In *id.* at 615, the defendant was charged with four counts of CSC-I for the alleged sexual abuse of his minor daughter that occurred repeatedly over two years while she lived with him. The Court of Appeals concluded that evidence of CSC-I against the defendant's ex-fiancee was admissible under MCL 768.27b because the evidence was "probative of whether he used those same tactics to gain sexual favors from his daughter." *Pattison*, 276 Mich App at 616. Having found the evidence admissible under MCL 768.27b, the Court did not review the evidence's admissibility under MRE 404(b). *Pattison*, 276 Mich App at 616.

B. Rape-Shield Provisions

A brief discussion on Michigan's rape-shield provisions are contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 6.

Because sexual abuse is one tactic that may be employed to control victims in violent domestic relationships, allegations of criminal sexual conduct between intimate partners is not uncommon. In cases involving sexual conduct crimes, MCL 750.520j(1) and MRE 404(a)(2)(C) generally prevent the defendant from introducing evidence of the complainant's past sexual conduct in a prosecution for criminal sexual conduct, except in two narrow circumstances: (1) when the evidence pertains to a complainant's past sexual conduct with the defendant; and (2) when the evidence pertains to a specific instance of sexual activity showing the source or origin of semen, pregnancy, or disease.

> **Note:** Although a person may be charged with or convicted of criminal sexual conduct against their legal spouse, a person may not be charged with or convicted "solely because [their] legal spouse is mentally incapable." MCL 750.520*l*.

Specifically, MCL 750.520j(1) provides:

> "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b to MCL 750.520g][48] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > (a) Evidence of the victim's past sexual conduct with the actor.
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

See also MRE 404(a)(2)(C), which permits the admission in criminal-sexual-conduct cases of evidence of:

[48] The cited statutes describe offenses under the Criminal Sexual Conduct (CSC) Act.

> "(i) the alleged victim's past sexual conduct with the defendant, and
>
> (ii) specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

"'[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483 (1996). In *Adair*, the defendant was charged with sexually assaulting his wife and sought to introduce evidence of specific incidences when he and his wife engaged in consensual sexual relations *after* the alleged assault. *Id.* at 475. In deciding whether subsequent sexual relations are sufficiently probative to be admitted, a court should consider (1) the length of time between the alleged assault and the subsequent sexual relations, and (2) whether the complainant and the defendant had a personal relationship before the alleged assault. *Id.* at 486-487. In explaining its reasoning, the Court stated:

> "On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative force the evidence may have, depending on the circumstances.
>
> Even so, time should not be the only factor. The trial court should also carefully consider the circumstances and nature of the relationship between the complainant and the defendant. If the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship. Additionally, the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault. Depending on the circumstances, the trial court may find that these other considerations have intensified the inflammatory and prejudicial nature of subsequent consensual sexual conduct evidence and properly conclude that it should be precluded or limited. Moreover, the Legislature, by the use of the term 'unless and only to the extent that' in the rape-

> shield statute, expressly limited admission of such evidence to what is necessary for the defense. Therefore, the trial court appropriately should limit the scope of sexual conduct evidence where constitutionally possible." *Adair*, 451 Mich at 486-487.

1. Notice Requirements

MCL 750.520j(2) requires the defendant to provide notice of his or her intent to offer evidence of the complainant's prior sexual conduct:

> "If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

2. Defendant's Right to Confrontation

"When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *People v Benton*, 294 Mich App 191, 198 (2011). "In certain limited situations, evidence that is not admissible under one of the statutory exceptions [in MCL 750.520j(1)(a) or MCL 750.520j(1)(b)] may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation." *Benton*, 294 Mich App at 197. If a trial court determines that evidence of a victim's past sexual conduct is not admissible under one of the statutory exceptions, it must consider whether admission is required to preserve the defendant's constitutional right to confrontation; if the evidence is not so required, the court "'should . . . favor exclusion' of [the] evidence." *Id.* at 197, quoting *People v Hackett*, 421 Mich 338, 339 (1984). See also *People v Masi*, ___ Mich ___, ___ (2025). The Court in *Masi* held that evidence of prior alleged sexual abuse of a minor victim by a third party, without regard to whether a conviction resulted, is "sexual conduct" and subject to the admissibility restrictions in MCL 750.520j(1), but might, "in light of a defendant's right to confrontation and right to present a

defense," otherwise be admissible to explain the minor victim's age-inappropriate sexual knowledge. *Masi*, ___ Mich at ___. "[D]etermining the admissibility of evidence that is otherwise inadmissible under the rape-shield statute for the purpose of complying with a defendant's right of confrontation, courts are required to conduct an *in camera* hearing to determine whether . . . defendant's proffered evidence is relevant , , .and [whether] the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding."[49] *Masi*, ___ Mich at ___ (quotation marks and citation omitted).

4.6 Privileges

A brief discussion on privileges that arise from marital relationships and relationships with service providers is contained in this section. For additional information on privileges in general, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1.

A. Privileges Arising From a Marital Relationship

The two privileges that arise from a marital relationship under MCL 600.2162 are:

- the spousal privilege; and
- the confidential communications privilege.

1. Spousal Privilege

MCL 600.2162(1)-(2) establishes spousal privileges that limit the circumstances under which one spouse may "be examined as a witness" for or against the other spouse in civil, administrative, and criminal proceedings:

> "(1) In a civil action or administrative proceeding, a husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, except as provided in [MCL 600.2162(3)].[50]
>
> (2) In a criminal prosecution, a husband shall not be examined as a witness for or against his wife

[49] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Section 6.2(G) for more information regarding the admissibility test for evidence of the victim's sexual conduct that is otherwise inadmissible under MCL 750.520j(1).

[50] MCL 600.2162(3) lists situations in which the spousal and confidential communication privileges do not apply. See Section 4.6(A)(3) for more information on these exceptions.

> without his consent or a wife for or against her husband without her consent, except as provided in [MCL 600.2162(3)]."

2. Confidential Communication Privilege

MCL 600.2162(4)-(7) establish confidential communication privileges limiting the circumstances under which an individual may "be examined" in civil, administrative, and criminal proceedings as to communications that occurred between the individual and his or her spouse during their marriage:

> "(4) Except as otherwise provided in [MCL 600.2162(5)] and [MCL 600.2162(6)], a married person or a person who has been married previously shall not be examined in a civil action or administrative proceeding as to any communication made between that person and his or her spouse or former spouse during the marriage.
>
> (5) A married person may be examined in a civil action or administrative proceeding, with his or her consent, as to any communication made between that person and his or her spouse during the marriage regarding a matter described in [MCL 600.2162(3)].
>
> (6) A person who has been married previously may be examined in a civil action or administrative proceeding, with his or her consent, as to any communication made between that person and his or her former spouse during the marriage regarding a matter described in [MCL 600.2162(3)].
>
> (7) Except as otherwise provided in [MCL 600.2162(3)], a married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined."

3. Exceptions to Privileges Arising From Marital Relationship

"The spousal privileges established in [MCL 600.2162(1)] and [MCL 600.2162(2)] and the confidential communications

established in [MCL 600.2162(7)] do not apply in any of the following:

> (a) In a suit for divorce, separate maintenance, or annulment.
>
> (b) In a prosecution for bigamy.
>
> (c) In a prosecution for a crime committed against a child of either or both or a crime committed against an individual who is younger than 18 years of age.
>
> (d) In a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.
>
> (e) In a case of desertion or abandonment.
>
> (f) In a case in which the husband or wife is a party to the record in a suit, action, or proceeding if the title to the separate property of the husband or wife called or offered as a witness, or if the title to property derived from, through, or under the husband or wife called or offered as a witness, is the subject matter in controversy or litigation in the suit, action, or proceeding, in opposition to the claim or interest of the other spouse, who is a party to the record in the suit, action, or proceeding. In all such cases, the husband or wife who makes the claim of title, or under or from whom the title is derived, shall be as competent to testify in relation to the separate property and the title to the separate property without the consent of the husband or wife, who is a party to the record in the suit, action, or proceeding, as though the marriage relation did not exist." MCL 600.2162(3).

The defendant's wife could be compelled to testify against him where the charged crime against a third party grew out of a personal wrong or injury committed by the defendant against his wife. *People v Hill*, 335 Mich App 1, 12-13 (2020) (defendant made physical contact with his wife who feared for her safety, causing her to ask the third party for help, and the defendant shot the third party; although, "defendant was not charged with an offense against [his wife]," his "purpose in allegedly shooting [the third party] was to facilitate his assault against [his wife]"). See also MCL 600.2162(2)-(3).

"[T]he legal right not to testify [established] in [MCL 600.2162(2)] . . . is specifically limited by [MCL 600.2162(3)], which states that the spousal privilege established in subsection (2) 'does not apply' in certain cases [.]" *People v Szabo*, 303 Mich App 737, 747 (2014). "When such an 'exception' exists the effect, then, is not that the ownership of the spousal privilege transfers from the one spouse to the other . . . ; rather, the effect is that no spousal privilege exists at all[,]" and the victim-spouse may be compelled to testify against his or her defendant-spouse. *Id.* at 748. Accordingly, a victim-spouse may be compelled to testify against his or her defendant-spouse. *Id.* at 749. In *Szabo*, the victim-wife "was not vested with a spousal privilege [under MCL 600.2162(2)]" and could be compelled to testify where "[the] defendant[-husband] was charged with felonious assault and felony-firearm arising from criminal actions he allegedly committed against [her]" because those actions gave rise to a "cause of action [that grew] out of a personal wrong or injury done by the defendant-spouse against the victim-spouse.'" *Szabo*, 303 Mich App at 737, 748, 749, quoting MCL 600.2162(3)(d).

B. Privileged Communications with Care Providers

The Michigan Legislature has enacted a number of statutes that limit the use of communications with various care providers as evidence in civil or criminal trials.

1. Sexual Assault and Domestic Violence Counselors

Communications between a victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2):

> "Except as provided in . . . [MCL] 722.631,[51] a confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."

[51] For purposes of child protective proceedings, MCL 722.631 abrogates all recognized privileges except the attorney/client and clergy/penitent privileges. See Section 4.6(B)(2) for more information.

If a sexual assault or domestic violence counselor is licensed, certified, or identified as a social worker, psychologist, or other professional, other privileges may also apply:

- Social workers, MCL 333.18513;[52]
- Psychiatrists and psychologists, MCL 330.1750;
- Psychologists, MCL 333.18237;
- Physicians, MCL 600.2157; and
- Clergy, MCL 767.5a(2).[53]

With the exception of a member of the clergy acting in that capacity, or the protected communication between an attorney and his or her client, these privileges are abrogated in child protective proceedings, MCL 722.631.

2. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect

If a person listed as a mandatory reporter under MCL 722.623(1) suspects that a child is being abused or neglected, the person must report the suspected child abuse or neglect.[54] MCL 722.623(1).

"MCL 722.631 governs privileges in child protective proceedings." MCR 3.901(A)(3). MCL 722.631 states:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding

[52] See *People v Carrier*, 309 Mich App 92, 113 (2015) (extending the privilege under MCL 333.18513 to a client whose communications were with an employee who had a limited license, bachelor's of social work).

[53] MCL 600.2156 (a provision often cited as one of the clergy-penitent privileges) "does not qualify as an evidentiary privilege." *People v Bragg*, 296 Mich App 443, 462-463 (2012) (holding that the defendant's admission to his pastor that the defendant had sexually assaulted his young cousin was "privileged and confidential communications under MCL 767.5a(2)[,]" notwithstanding that the pastor had initiated the conversation and that the defendant's mother was present). For discussion of the clergy-penitent privilege and *Bragg*, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 3.

[54] For a detailed discussion of reporting suspected child abuse or neglect, including a list of individuals who are required to report suspected child abuse or neglect under MCL 722.623(1), see the Michigan Judicial Institute's *Child Protective Proceedings*, Chapter 2.

> resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

"[A] communication [between a member of the clergy and a church member] [was] within the meaning of 'similarly confidential communication' when the church member d[id] not make an admission, but ha[d] a similar expectation that the information [would] be kept private and secret." *People v Prominski*, 302 Mich App 327, 328, 336-337 (2013) (where the parishioner "went to [her pastor] 'for guidance[and] advice'" to discuss "her concerns that her husband was abusing her daughters" and "'expected that the conversation be kept private[,]'" the parishioner's communication with the pastor was a confidential communication as contemplated by MCL 722.631, and the pastor was not required to report the suspected child abuse under the mandatory reporting statute, MCL 722.623(1)(a)).

Abrogation of privileges under MCL 722.631 does not depend on whether the person initiating the child protective proceeding was required to report the suspected abuse, or whether the proffered testimony directly addresses the abuse or neglect that gave rise to the protective proceeding. *In re Brock*, 442 Mich 101, 116-120 (1993) (physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding). See also MCR 3.973(E)(1), which states in relevant part that, "as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

4.7 Expert Testimony in Domestic Violence Cases

A brief discussion on expert testimony is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

A. Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

After a court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." MCL 600.2164a(1). The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment shall pay the cost for its use unless the court otherwise directs." MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

If the court determines that the expert testimony meets the preliminary tests in MRE 702, it must next determine whether the probative value of the expert testimony is substantially outweighed by the danger of unfair prejudice. See MRE 403. However, on request, the trial judge may decide that a limiting instruction is an appropriate alternative to excluding the evidence. *People v Christel*, 449 Mich 578, 587 (1995) (expert testimony regarding battered women syndrome was not admissible where it was "irrelevant and not helpful in explaining any fact in issue").

Opinions and diagnoses may be admissible under MRE 803(6).[55]

B. Factual Basis for Opinion

MRE 703 governs the bases of an expert's opinion testimony:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The facts or data must be in evidence—or, in the court's discretion, be admitted in evidence later."

MRE 703 "permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.'" *People v Fackelman*, 489 Mich 515, 534 (2011), quoting 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703). "Thus, a party must establish that facts or data used to form the expert's opinion are admissible at trial." *People v Alexander*, ___ Mich App ___, ___ (2024).

In *Alexander*, the Court held that the trial court did not err by allowing the medical expert to testify regarding her "medical torture" diagnosis of two of the defendant's three children. *Id.* at ___. The Court noted, "a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence." *Id.* at ___ (quotation marks and citation omitted). "Where it is possible to draw a medical diagnosis based on a physical examination, as opposed to a complainant's self-reporting, an expert is fully permitted to testify that, in their opinion, a particular injury was not accidentally self-inflicted." *Id.* at ___ (cleaned up). "To the extent that [a medical expert] relied on hearsay [such as a forensic interview report] to formulate a diagnosis, and no hearsay exception applied, an expert is allowed to recount and rely on hearsay if it was used as a basis to form an opinion." *Id.* at ___.

C. Court-Appointed Expert

"On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations." MRE 706(a). The court may appoint an expert agreed on by the parties or an expert selected by the court. *Id.*

[55] See Section 4.2(G) for additional information on MRE 803(6).

The court may appoint an expert only if the expert consents to act as an expert witness. MRE 706(a). The court must inform an appointed expert of the expert's duties, either in writing (a copy of which must be filed with the court clerk) or orally at a conference where all the parties are able to participate. MRE 706(b).

The appointed expert witness:

> "(1) must advise the parties of any findings the expert makes;
>
> (2) may be deposed by any party;
>
> (3) may be called to testify by the court or any party; and
>
> (4) may be cross-examined by any party, including the party that called the expert." MRE 706(b).

D. Expert Testimony on Battered Spouse/Woman Syndrome[56]

"[An] expert [on battered spouse syndrome] may, when appropriate, explain the generalities or characteristics of the syndrome." *People v Christel*, 449 Mich 578, 591 (1995). "[H]owever, 'the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial.'" *Id.* at 591. The Michigan Supreme Court stated that it did "not adopt the battered spouse syndrome . . . ." *Id.* However, it went on to state that it "will permit testimony regarding specific behavior where relevant and helpful to the factfinder." *Id.* These two things—helpfulness and relevancy—are threshold determinations every trial court must make. *Id.* at 592. In addition, the Court placed several limitations on battered spouse syndrome evidence: "the expert cannot opine that [the] complainant was a battered [spouse], may not testify that [the] defendant was a batterer or that he [or she] is guilty of the crime, and cannot comment on whether [the] complainant was being truthful." *Id.* See, e.g., *People v Skippergosh*, ___ Mich App ___, ___ (2024) (holding that the expert need not be familiar with the facts of the case because "such expert testimony only is admissible to 'explain the generalities or characteristics of the syndrome'"), quoting *Christel*, 449 Mich at 591.

[56] "'Intimate Partner Violence' has replaced the prior term 'Battered Women's Syndrome'. [In *Christel*, o]ur Supreme Court explained that 'battered woman' refers to 'a woman who is repeatedly subjected to any forceful, physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights,' and 'in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.'" *People v Skippergosh*, ___ Mich App ___, ___ n 9 (2024) (citations omitted).

1. Exculpating the Accused

Expert testimony regarding the battered spouse syndrome may be admissible for purposes of exculpating a defendant claiming self-defense when it is relevant and helpful to the jury–that is, when it "will give the trier of fact a 'better understanding of the evidence or assist in determining a fact in issue.'" *People v Wilson (Geraldine)*, 194 Mich App 599, 604-605 (1992). In *Wilson (Geraldine)*, 194 Mich App at 601, 605, limited expert testimony regarding the battered spouse syndrome was admissible where "the defendant[-wife] admit[ted to] shooting [her husband] while he slept, but claim[ed] she acted in self-defense following forty-eight hours of abuse and death threats and years of battery." Specifically, the Court held:

> "We conclude that in cases such as this one [(where the defendant is claiming self defense under the battered spouse syndrome after admitting to shooting her husband while he slept),] expert testimony regarding the [battered spouse syndrome] will give the trier of fact a 'better understanding of the evidence or assist in determining a fact in issue.'
>
> Having determined the introduction of expert testimony regarding the [battered spouse syndrome] generally may be relevant and helpful to the jury, we must now address the scope of its admissibility. . . .We look to our [Michigan] Supreme Court's decision in *People v Beckley*, [434 Mich 691 (1990) (discussing sexual abuse accommodation syndrome)], for guidance. In *Beckley*, the Court addressed the admissibility of expert testimony regarding the sexual abuse accommodation syndrome. Given the nature of 'syndrome' evidence, we find the reasoning contained in *Beckley* applicable to testimony regarding the [battered spouse syndrome].
>
> * * *
>
> We believe the same limitations [as the Court set out in *Beckley*] should apply to experts who testify about the [battered spouse syndrome]. As with the child abuse syndrome, the [battered spouse syndrome] expert is an expert with regard to the syndrome and not the particular defendant. Thus, the expert is qualified only to render an opinion regarding the 'syndrome' and the symptoms that

> manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it.
>
> We therefore affirm that portion of the trial court's interlocutory order permitting the introduction of expert testimony regarding a description of the general syndrome and that certain behavior of the defendant already in evidence is characteristic of battered spouse victims generally, but reverse that portion of the order permitting testimony regarding whether the defendant suffers from the syndrome and whether the defendant's act was the result of the syndrome. Further, as ordered by the trial court and consistent with *Beckley*, the expert may not testify that the allegations of battery are in fact truthful, this being an issue of credibility for the jury." *Wilson (Geraldine)*, 194 Mich App at 604-605.

2. Credibility of the Complainant

"[E]xpert testimony regarding the battered woman syndrome is admissible only when it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified." *Christel*, 449 Mich at 579-589. In *Christel*, 449 Mich at 597, expert testimony regarding the battered woman syndrome was not admissible as it related to the complainant's credibility where "[the] defendant never denied that some abuse occurred," and "[the] complainant [] consistently maintained that the relationship ended [a month before the assault] and there [was] no evidence that [the] complainant hid or minimized, delayed reporting, or recanted the abuse . . . ."[57] Specifically, the Court held:

> "Generally, battered woman syndrome testimony is relevant and helpful when needed to explain a complainant's actions,[58] such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of

[57] In *Christel*, 449 Mich at 592, "[the] defendant d[id] not seriously contest that [the expert] was a qualified expert, and [the defendant] conced[ed], and [the Court] agree[d], that battered woman syndrome evidence is from a recognized discipline." Note, MRE 702 requires "the trial court [to] find that the evidence is from a recognized discipline, as well as relevant and helpful to the trier of fact, and presented by a witness qualified by 'knowledge, skill, experience, training, or education. . . .'" *Christel*, 449 Mich at 587.

[58] "Generally, expert testimony is needed when a witness'[s] actions or responses are incomprehensible to average people." *Christel*, 449 Mich at 592.

> abuse. If relevant and helpful, testimony regarding specific behavior is permissible. However, the expert may not opine whether the complainant is a battered woman, may not testify that [the] defendant was a batterer or guilty of the instant charge, and may not comment on the complainant's truthfulness. Moreover, the trial court, when appropriate, may preclude expert testimony when the probative value of such testimony is substantially outweighed by the danger of unfair prejudice.
>
> In this case, the expert testimony was arguably relevant and helpful in understanding [the] complainant's actions in tolerating physical abuse over a period of years. Moreover, it may have been relevant in explaining why [the] complainant did not report similar incidents earlier. On the other hand, its relevance did not reach the level found in other battered women cases that have considered this issue. [The] [c]omplainant did not remain in the relationship until the date of the assault and try to hide or deny the abuse, did not delay reporting this incident, and did not later retract the claim of abuse. Instead, [the] complainant testified that the relationship ended one month before the assault, explained that she immediately reported the sexual assault, and has consistently maintained that the abuse occurred. Although the testimony was arguably relevant and helpful, on these facts, we are persuaded that a more direct connection and factual premise is necessary, and, hence, we deem the trial court's decision to admit the testimony to be error."[59] *Christel*, 449 Mich at 580-581.

Although the trial court erroneously admitted the expert's testimony, the Michigan Supreme Court found in *Christel*, 449 Mich at 581, "the error harmless in light of the limited nature of the testimony and the other physical and testimonial evidence of

[59] "The prosecution's contention that [the complainant] remained in the relationship in spite of the abuse does not by itself make it relevant and helpful to a material issue." *Christel*, 449 Mich at 597 ("[the prosecution's] contention [was] belied by [the] complainant's own testimony that [her] relationship [with the batterer] ended one month before the incident[, and] [e]xpert testimony usually is not needed to explain alternative prosecution theories, but to explain things not readily comprehensible to an average juror[;] [b]ecause [the] complainant ha[d] consistently maintained that [her] relationship [with the batterer] ended [one month before the assault] and there [was] no evidence that [the] complainant hid or minimized, delayed reporting, or recanted the abuse, [the Michigan Supreme Court] reject[ed] the prosecution's contention that the battered woman syndrome was relevant").

abuse[, where] [t]he expert merely explained the characteristics of a battered woman[, and] [the expert] neither testified that [the] complainant's behavior was consistent with such traits, nor opined about [the] complainant's truthfulness or whether [the] complainant was a battered woman." "[In] [c]ombining the physical evidence of sexual abuse with [the] complainant's testimony, [the Michigan Supreme Court] [was] persuaded that the limited nature of the expert testimony could not have affected the jury's decision to convict[, and] . . . reverse[d] the decision of the Court of Appeals with respect to admission of this expert testimony, but affirm[ed] the result because of the harmless nature of the testimony." *Id.* at 581.

See, e.g., *People v Skippergosh*, ___ Mich App ___, ___ (2024), where the Court held that the trial court did not abuse its discretion in admitting expert testimony regarding intimate partner violence to explain to the jury the complainant's behavior following the assaults. Specifically, the facts that the complainant hid from police when they arrived to investigate after one assault in 2020 and denied having been assaulted in 2021, contrary to multiple witnesses' testimony, demonstrated that "she had a pattern of concealing and denying domestic violence by [defendant]." *Id.* at ___. Expert testimony may be appropriate "'when a complainant endures prolonged toleration of physical abuse and then attempts to hide or minimize the effect of the abuse, delays reporting the abuse to authorities or friends, or denies or recants the claim of abuse.'" *Id.* at ___, quoting *Christel*, 449 Mich at 592.

See also *People v Daoust*, 228 Mich App 1, 11 (1998), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008),[60] where the trial court properly found the "[expert's] testimony [on battered women syndrome] [as being] relevant and helpful to explain why [the complainant] might have initially sought to deflect the blame from her daughter's injuries away from [the] defendant[-boyfriend] while knowing he was responsible."[61]

[60] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[61] In *Daoust*, 228 Mich App at 11, the following circumstances the complainant testified to "correspond[ed] to the circumstances [the expert] described as being consistent with battered woman syndrome[:]" "Although [the complainant] testified that [the] defendant[-boyfriend] never actually hit her, [the complainant] also testified that [the] defendant[-boyfriend] (1) was verbally abusive, (2) repeatedly threatened to harm [her] and [her daughter], (3) discouraged [her] from seeing her friends and paid extremely close attention to her whereabouts, (4) controlled [her] access to her own money, (5) threatened to beat up [the complainant's friend] and leave her for dead after [the friend] reported [the complainant's daughter's] bruises to [the Child] Protective Services, and (6) regularly forced [the complainant] to perform oral sex on him against her will[, and] [the complainant] further testified that she felt ashamed and guilty when [the] defendant[-boyfriend] disciplined [her daughter], but that she was afraid to leave him because of the threats."

Chapter 5: Personal Protection Orders, Peace Bonds, Foreign Protection Orders

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5.1 Jurisdiction and Applicable Authorities in Personal Protection Proceedings

A. Generally

A personal protection order (PPO) is an injunctive order the family division of the circuit court issues to restrain or enjoin "activity and individuals listed in [MCL 600.2950](1)" or "conduct prohibited under [MCL 600.2950a](1) or [MCL 600.2950a](3)." MCL 600.2950(30)(d); MCL 600.2950a(31)(d). For a detailed discussion on the types of PPOs and the conduct subject to restraint, see Section 5.2.

Except as otherwise provided in subchapter 3.700 of the Michigan Court Rules and in MCL 600.2950 and MCL 600.2950a, PPO actions relating to domestic violence or stalking are governed by the court rules. MCR 3.701(A).

In PPO actions against adults, procedural issues are governed by subchapter 3.700 of the Michigan Court Rules. MCR 3.701(A).

In PPO actions against minors, procedural issues are governed by subchapter 3.900 of the Michigan Court Rules, except as provided in MCR 3.981. MCR 3.701(A). MCR 3.981 provides:

> "Procedure for the issuance, dismissal, modification, or recision of minor [PPOs] is governed by subchapter 3.700. Procedure in appeals related to minor [PPOs] is governed by MCR 3.709 and MCR 3.993."[1]

If a respondent is under age 18, issuance of a PPO is subject to the provisions in the Juvenile Code, MCL 712A.1 *et seq*. MCL 600.2950(27); MCL 600.2950a(28).

MCL 712A.2(h) provides the family division of circuit court with "[j]urisdiction over a proceeding under . . . MCL 600.2950 [or] [MCL] 600.2950a, in which a minor less than 18 years of age is the respondent, or a proceeding to enforce a valid foreign protection order[2] issued against a respondent who is a minor less than 18 years of age." If the court exercises its jurisdiction under MCL 712A.2(h), jurisdiction continues until the order expires, regardless of the respondent's age, but any action regarding a minor PPO after the respondent's 18th birthday is no longer subject to the Juvenile Code, MCL 712A.1 *et seq*. MCL 712A.2a(6). "Proceedings to enforce

[1] For information on minors as parties to a PPO proceeding, see Section 5.3.

[2] For information on foreign protection orders, see Section 5.15

a . . . minor [PPO] still in effect when the respondent is 18 or older[] are governed by [MCR 3.708 (governing adult PPO proceedings)]." MCR 3.708(A)(2).

B. Enforcement

"Proceedings to enforce a [PPO] issued against an adult, or to enforce a minor [PPO] still in effect when the respondent is 18 or older, are governed by [MCR 3.708]." MCR 3.708(A)(2). Specifically, MCR 3.708(A)(1) provides that "[a] [PPO] is enforceable under MCL 600.2950(23), [MCL 600.2950](25), [MCL] 600.2950a(23), [MCL 600.2950a](25), [MCL] 764.15b, and [MCL] 600.1701 *et seq*. For the purpose of this rule, '[PPO]' includes a foreign protection order enforceable in Michigan under MCL 600.2950*l*." MCR 3.708(A)(1).

Where the respondent is under 18 years of age, proceedings to enforce a minor PPO are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A); MCR 3.708(A)(2); MCR 3.982(B). Specifically, MCR 3.982(A) provides that "[a] minor [PPO] is enforceable under MCL 600.2950(22), [MCL 600.2950](25), [MCL] 600.2950a(22), [MCL 600.2950a](25), [MCL] 764.15b, and [MCL] 600.1701 *et seq*. For the purpose of MCR 3.981–[MCR] 3.989, 'minor [PPO]' includes a foreign protection order against a minor respondent enforceable in Michigan under MCL 600.2950*l*."

For information on foreign protection orders, see Section 5.15.

C. Tribal Jurisdiction in Cases Involving Domestic Violence

The Violence Against Women Act, 34 USC 12291 *et seq*., was reauthorized in 2022.[3] The 2022 reauthorization "recognize[s] 'special Tribal criminal jurisdiction' (STCJ) over an expanded list of 'covered crimes' that includes, in addition to the VAWA 2013[4] crimes, assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking." 2013 and 2022 Reauthorizations of the Violence Against Women Act (2013 and 2022 VAWA Reauthorizations).

Pursuant to the 2022 VAWA, STCJ enables Tribes "to exercise their sovereign power to investigate, prosecute, convict, and sentence both Indian and non-Indians who commit covered crimes in Indian country against Indian victims." 2013 and 2022 VAWA

[3]Effective October 1, 2022.

[4] The 2013 VAWA reauthorization "recognized the inherent authority of 'participating Tribes' to exercise 'special domestic violence criminal jurisdiction' (SDVCJ) over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country." 2013 and 2022 Reauthorizations of the Violence Against Women Act.

Reauthorizations. Victims of the obstruction of justice or the assault of Tribal justice personnel need not be Indian. *Id*. In addition, a Tribe has STCJ without regard to whether a non-Indian defendant "has ties to the participating Tribe." *Id*.

As stated in the 2022 VAWA reauthorization, a Tribe's criminal jurisdiction over non-Indians extends only to: the assault of Tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and criminal violations of protection orders. 2013 and 2022 VAWA Reauthorizations.

5.2 Types of PPOs

The Legislature has created three types of PPOs, distinguished by the categories of persons who may be restrained:

- *Domestic relationship PPOs* under MCL 600.2950 are available to restrain behavior (including stalking) that interferes with the petitioner's personal liberty, or that causes a reasonable apprehension of violence, if the respondent is involved in certain domestic relationships with the petitioner as defined by the statute.

- *Nondomestic stalking PPOs* under MCL 600.2950a(1) are available to enjoin a person, regardless of that person's relationship with the petitioner, from engaging in stalking (MCL 750.411h), aggravated stalking (MCL 750.411i), or cyberstalking (MCL 750.411s).

- *Nondomestic sexual assault PPOs* under MCL 600.2950a(2) are available to victims of sexual assault, victims who have received obscene material under MCL 750.142, and petitioners who have been placed in reasonable apprehension of sexual assault by the respondent. The respondent may be enjoined from any of the conduct listed in MCL 600.2950a(3).

A. Domestic Relationship PPOs

For purposes of MCL 600.2950, a PPO is "an injunctive order issued by the family division of circuit court restraining or enjoining activity and individuals listed in [MCL 600.2950(1)]." MCL 600.2950(30)(d).

The domestic relationship PPO, MCL 600.2950(1), permits "an individual [to] petition the family division of circuit court to enter a [PPO] to restrain or enjoin" a person who is:

- the petitioner's spouse or former spouse.
- a person with whom the petitioner has had a child in common.
- a person who resides or who has resided in the same household as the petitioner.
- a person with whom the petitioner has or has had a dating relationship. For additional information on petitioning the court for a domestic relationship PPO, see Section 5.6.

A domestic relationship PPO may not be issued if the petitioner and the respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950(26)(a)-(b). If there is no such parent/child relationship, a person under age 18 may be a party to a PPO action.[5] MCL 600.2950(27). However, a domestic relationship PPO may not be issued if the respondent is less than ten years old.MCL 600.2950(26)(c).

A child is emancipated from a parent, no matter whether the parent is the child's natural or adoptive parent, when that parent's parental rights to the child are terminated. *SP v BEK*, 339 Mich App 171, 179 (2021). Therefore, MCL 600.2950(26)(b) does not preclude a trial court from issuing on behalf of the child a personal protection order against a natural parent whose parental rights have been terminated. *SP*, 339 Mich App at 180.

1. Conduct Subject to Restraint

In issuing a domestic relationship PPO under MCL 600.2950, the court may restrain or enjoin the respondent from doing one or more of the following:

"(a) Entering onto premises.

[**Note:** "A court shall not issue a [PPO] that restrains or enjoins [a respondent from entering onto premises under MCL 600.2950(1)(a)] if all of the following apply:

(a) The individual to be restrained or enjoined is not the spouse of the moving party.

(b) The individual to be restrained or enjoined or the parent, guardian, or custodian of the minor to be restrained

[5] See Section 5.3 for additional information on the court procedures for issuing a PPO against a minor.

or enjoined has a property interest in the premises.

(c) The moving party or the parent, guardian, or custodian of a minor petitioner has no property interest in the premises." MCL 600.2950(5).]

(b) Assaulting, attacking, beating, molesting, or wounding a named individual.

(c) Threatening to kill or physically injure a named individual.

(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

(e) Purchasing or possessing a firearm.[6]

(f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

(g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.

(h) If the petitioner is a minor who has been the victim of sexual assault, as that term is defined in [MCL 600.2950a] by the respondent and if the petitioner is enrolled in a public or nonpublic school that operates any of grades K to 12, attending in the same building as the petitioner.

(i) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the

[6] "[T]he petitioner shall notify the court of the respondent's occupation before issuance of the [PPO][,]" "[i]f the respondent is a person who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, . . . MCL 28.601 to [MCL] 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment[.]" MCL 600.2950(2). "[MCL 600.2950(2)] does not apply to a petitioner who does not know the respondent's occupation." *Id.*

address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.[7]

(j) Engaging in conduct that is prohibited under . . . MCL 750.411h [or] [MCL] 750.411i.

(k) Any of the following with the intent to cause the petitioner mental distress or to exert control over the petitioner with respect to an animal in which the petitioner has an ownership interest:[8]

(*i*) Injuring, killing, torturing, neglecting, or threatening to injure, kill, torture, or neglect the animal. A restraining order that enjoins the conduct under this subparagraph does not prohibit the lawful killing or other use of the animal as described in [MCL 750.50(11)].

(*ii*) Removing the animal from the petitioner's possession.

(*iii*) Retaining or obtaining possession of the animal.

(*l*) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." MCL 600.2950(1). See SCAO form *Personal Protection Order / Domestic Relationship)*.

MCL 600.2950(1)(*l*)[9] provides the court with the authority to restrict a respondent's contact with his or her children. *Brandt v Brandt*, 250 Mich App 68, 70-71 (2002). Specifically,

"[MCL 600.2950(1)(*l*)] . . . provided the trial court with authority to issue the PPO prohibiting respondent's contact with [his] children. This 'catchall' provision clearly provides the trial court

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[7] MCL 722.30 provides a noncustodial parent with access to records or information regarding his or her child "unless the parent is prohibited from having access to the records or information by a protective order." "'[R]ecords or information' includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education." *Id.* See also MCL 380.1137a, which prohibits a "school district, local act school district, public school academy, intermediate school district, or nonpublic school" from releasing certain information protected by a PPO.

[8] "For purposes of [MCL 600.2950(1)(k)], a petitioner has an ownership interest in an animal if 1 or more of the following are applicable: (a) The petitioner has a right of property in the animal. (b) The petitioner keeps or harbors the animal. (c) The animal is in the petitioner's care. (d) The petitioner permits the animal to remain on or about premises occupied by the petitioner." MCL 600.2950(29).

[9] Formerly MCL 600.2950(1)(j).

> with authority to restrain respondent from any other action that 'interferes with personal liberty' or might cause 'a reasonable apprehension of violence.'
>
> This statutory provision allows the trial court to restrain respondent from '[a]ny other specific act or conduct . . . that causes a reasonable apprehension of violence.' There is no question that it would be reasonable for petitioner[-mother] to fear that respondent might become violent with petitioner if she were forced to permit respondent to visit the children or exchange the children for parenting time. . . .'
>
> * * *
>
> [W]hile it is true that petitioner did not allege that respondent was physically violent toward his children, petitioner did set forth in detail that on several occasions respondent was physically violent toward petitioner in front of the children[, and] . . . it is clear from petitioner's statement that respondent was becoming increasingly more violent. Therefore, it is entirely possible that respondent's behavior might have eventually escalated and involved the children. This is particularly true where, as here, petitioner sought the PPO to protect her children so that she could leave respondent and file for divorce. Indeed, a PPO is issued on an emergency basis and when the trial court has only limited information. Thus, we agree with the trial court's approach of erring on the side of caution when serious allegations of abuse have been made." *Brandt*, 250 Mich App at 70-71 (internal citations omitted).

2. Standards for Issuing Domestic Relationship PPO

MCL 600.2950(4) requires the court to "issue a [PPO] under [MCL 600.2950] if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in [MCL 600.2950(1)]." See *JLS v HRS*, ___ Mich App ___, ___ (2024). The court must consider all of the following when determining whether reasonable cause exists:

> "(a) Testimony, documents, or other evidence offered in support of the request for a [PPO].

> (b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in [MCL 600.2950(1)]." MCL 600.2950(4).

A court may grant a PPO petition if it finds "'reasonable cause to believe that the individual to be restrained or enjoined may commit' the offense of stalking." *PF v JF*, 336 Mich App 118, 127 (2021), quoting MCL 600.2950(4). The offense of stalking requires activity that establishes "a course or pattern of conduct." *PF*, 336 Mich App at 130; see also MCL 750.411h(1)(a). To determine whether there is a course or pattern of conduct, the court must contemplate "all relevant present and past incidents arising between the parties." *PF*, 336 Mich App at 130. Past incidents to be considered may include allegations that were contained in a previous PPO petition found insufficient to merit granting a PPO, if the subsequent PPO petition contains an additional allegation that is different from the previous allegations and that could not have been included in the PPO petition that had been earlier denied. *Id*. at 128-129. In *PF*, the petitioner sought the first PPO based on five incidents, and the trial court denied the request. *Id*. at 126. After the court denied the request, a sixth incident occurred, and it "drove petitioner again to seek the assistance of a [different] court in an effort to obtain a PPO against respondent." *Id*. at 129. If the subsequent PPO petition contained only the allegations already considered and decided by a court, subsequent review of another PPO petition containing only those same allegations would be prohibited under res judicata. *Id*. at 128-129. However, res judicata does not prohibit a court from considering the allegations first found insufficient to issue a PPO, when those first allegations, repeated in the subsequent petition, are used to establish a course or pattern of conduct when considered with conduct not included in the initial petition. *Id*. at 130-131 (finding that the petitioner's second request for a PPO was not barred by res judicata). "[M]ultiple acts or a series of acts are necessarily required to issue a PPO based on stalking conduct, and any one of the acts can shed light on the other acts. One incident can change the dynamics and meaning of surrounding incidents." *Id*. at 129.

A court cannot refuse to issue a domestic relationship PPO based solely on the absence of certain reports or other indications of abuse:

> "A court shall not refuse to issue a [domestic relationship PPO] solely because of the absence of any of the following:

> (a) A police report.[10]
>
> (b) A medical report.
>
> (c) A report or finding of an administrative agency.
>
> (d) Physical signs of abuse or violence." MCL 600.2950(6).

"When the court holds a hearing before issuing a PPO, the petitioner bears the burden of providing evidence that shows that there is 'reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the' violent or harassing acts identified in [MCL 600.2950(1)]." *Kampf v Kampf*, 237 Mich App 377, 385 (1999). "Although [MCL 600.2950(4) does not] . . . specifically state that the burden of proof is on the petitioner, the burden of proof naturally falls on the petitioner under [MCL 600.2950(4)] . . . because the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO." *Kampf*, 237 Mich App at 385-386.

"'The granting . . . of a PPO is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.'" *JLS v HRS*, ___ Mich App ___, ___ (2024) (reversing and remanding the trial court's denial of respondent's motion to terminate the ex parte PPO against him by denying him a "meaningful opportunity" to "respond to the evidence" against him, as "due process necessarily mandates . . . .") (quotation marks and citations omitted).[11]

3. Standard for Issuing Domestic Relationship *Ex Parte* PPO

If the petitioner specifically requests that the PPO be issued without written or oral notice to the respondent or his or her attorney,[12] the court must issue the PPO *ex parte* if both of the following are met:

- "the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in [MCL 600.2950(1).]" MCL 600.2950(4).[13]

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[10] For information on police reports in cases involving domestic violence, see Section 3.3.

[11] For more information on modifying or terminating a PPO, see Section 5.9.

[12] If the petition does not request an ex parte order, the court must schedule a hearing as soon as possible. See MCR 3.705(B)(1). For additional information on court procedures for PPO hearings, see Section 5.6(F).

- "it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a [PPO] can be issued." MCL 600.2950(12). See also MCR 3.703(G); MCR 3.705(A)(2).

  Note: "The court must rule on a request for an ex parte order within one business day of the filing date of the petition." MCR 3.705(A)(1). If the court refuses to enter the PPO ex parte, it must advise the petitioner of the right to request a hearing.[14] MCR 3.705(A)(5). For additional information on the procedures required for issuing PPOs, see Section 5.6.

A respondent need not have actually committed one of the acts prohibited in MCL 600.2950(1) before a trial court may issue an *ex parte* order; an *ex parte* order issued under MCL 600.2950(4) requires "only that there was reasonable cause to believe that [the respondent] *may* commit one of the acts." *SP v BEK*, 339 Mich App 171, 187 (2021).

"In cases in which an ex parte order is sought, the petitioner must show that the danger is imminent and that the delay to notify the respondent is intolerable or in itself dangerous." *Kampf*, 237 Mich App at 385. "Although [MCL 600.2950(12) does not] . . . specifically state that the burden of proof is on the petitioner, the burden of proof naturally falls on the petitioner under . . . [MCL 600.2950(12)] because the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO." *Kampf*, 237 Mich App at 385-386; see also *JLS v HRS*, ___ Mich App ___, ___ (2024) ("The petitioner bears the burden of establishing reasonable cause for issuance of a PPO[.]") (quotation marks and citation omitted; alteration in original).

"There is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for

[13] For additional information on the requirements under MCL 600.2950(4), see Section 5.2(A)(1).

[14] The court must schedule a hearing as soon as possible, "unless it determines after interviewing the petitioner that the [petitioner's] claims are sufficiently without merit[, and] that the action should be dismissed without a hearing[.]" MCR 3.705(B)(1).

notice and an opportunity to be heard after the order is issued." *Kampf*, 237 Mich App at 383-384. The procedural safeguards set out in MCL 600.2950(12) (issuing ex parte order), MCL 600.2950(13) (filing motion to modify or rescind ex parte order), and MCL 600.2950(14) (hearing on motion to modify or rescind ex parte order) satisfy due process. See *Kampf*, 237 Mich App at 384. See also *JLS*, ___ Mich App at ___, where the Court of Appeals found no abuse of discretion by the trial court in issuing an ex parte PPO when petitioner supported the petition with 17-page statement detailing allegations of multiple impermissible acts under MCL 600.2950(1). "[A]lthough petitioner's allegations, if viewed from respondent's perspective, could be explained, [the Court could not] conclude that the trial court committed an abuse of discretion by issuing the ex parte PPO at petitioner's behest." *JLS*, ___ Mich App at ___.

"A [PPO] issued under [MCL 600.2950(12)] is valid for not less than 182 days." MCL 600.2950(13). See also MCR 3.705(A)(3). It must state its expiration date. *Id*.

B. Nondomestic Stalking PPOs

For purposes of MCL 600.2950a, a PPO is "an injunctive order issued by the family division of circuit court restraining or enjoining conduct prohibited under [MCL 600.2950a(1)] or [MCL 600.2950a(3)]."MCL 600.2950a(31)(d).

The nondomestic stalking PPO, MCL 600.2950a(1), permits "an individual [to] petition the family division of circuit court to enter a [PPO] to restrain or enjoin an individual from engaging in conduct that is prohibited under . . . MCL 750.411h [(stalking)], [MCL] 750.411i [(aggravated stalking)], [or] [MCL] 750.411s [(cyberstalking)]."[15] For additional information on petitioning the court for a nondomestic stalking PPO, see Section 5.6.

A nondomestic stalking PPO must not be issued if the petitioner and the respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950a(27)(a)-(b). If there is no such parent/child relationship, a person under age 18 may be a party to a PPO action.[16] MCL 600.2950a(28). However, a nondomestic stalking PPO must not be issued if the respondent is less than ten years old. MCL 600.2950a(27)(c).

[15] For a detailed discussion of MCL 750.411h, MCL 750.411i, and MCL 750.411s, see Section 2.3.

[16] See Section 5.3 for additional information on the court procedures for issuing a PPO against a minor.

The court must not enter a nondomestic stalking PPO if the petitioner is a prisoner. MCL 600.2950a(30). If the court issues a PPO in violation of MCL 600.2950a(30), the court "shall rescind the [PPO] upon notification and verification that the petitioner is a prisoner." *Id.*

"[F]or the reasons stated in *Kampf*, [237 Mich App at 377,] [the Court of Appeals] conclude[d] that MCL 600.2950a provides sufficient procedural safeguards to satisfy due process." *IME v DBS*, 306 Mich App 426, 437 (2014). The *Kampf* Court stated that "[t]here is no procedural due process defect [under MCL 600.2950] in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued." *Kampf*, 237 Mich App at 383-384. Accordingly, the procedural safeguards set out in MCL 600.2950a(1)-(2) (issuing ex parte order), MCL 600.2950a(13)-(14) (filing motion to modify or rescind ex parte order; hearing on motion), MCL 600.2950a(14) (hearing on motion to modify or rescind ex parte order), MCL 600.2950a(18) (notice), and MCL 600.2950a(22) (requiring actual notice and opportunity to comply before being arrested) satisfy due process. See *IME*, 306 Mich App at 436-438.

1. Conduct Subject to Restraint

In issuing a nondomestic stalking PPO under MCL 600.2950a(1), the court may restrain or enjoin the respondent from stalking under MCL 750.411h(1)(e). MCL 600.2950a(1). Stalking is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(e). The prohibited conduct must be a pattern involving a series of two or more "separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a).

Harassment, as used in MCL 600.2950a(1)(d), is "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected

activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(d).

A PPO entered under MCL 600.2950a may prohibit a person from engaging in the following unconsented courses of conduct:[17]

- stalking, which includes, but is not limited to:
  - following or appearing within the petitioner's sight.
  - appearing at the petitioner's workplace or residence.
  - approaching or confronting the petitioner in a public place or on private property.
  - entering onto or remaining on property the petitioner owns, leases, or occupies.
  - sending the petitioner mail or electronic communications.
  - contacting the petitioner by telephone.
  - placing an object on or delivering an object to property the petitioner owns, leases, or occupies.
  - purchasing or possessing a firearm.[18] MCL 600.2950a(1), MCL 600.2950a(3),[19] MCL 600.2950a(26); MCL 750.411h(1)(f); SCAO form CC 380, *Personal Protection Order (Nondomestic)*.[20]

[17] Note that the conduct described in the statutory provisions governing stalking, aggravated stalking, and cyberstalking, must be intended to cause and actually cause the petitioner to "feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d)-(e); MCL 750.411i(1)(d)-(e); MCL 750.411s(1)(b)-(d). In addition, the petitioner must suffer emotional distress as a result of the conduct. MCL 750.411h(1)(d); MCL 750.411i(1)(d); MCL 750.411s(1)(d).

[18] "If the respondent to a petition under [MCL 600.2950a] is an individual who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, . . . MCL 28.601 to [MCL] 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, a department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment, the petitioner shall notify the court of the respondent's occupation before the [PPO] is issued." MCL 600.2950a(5). "[MCL 600.2950a(5)] does not apply to a petitioner who does not know the respondent's occupation." *Id.*

[19] Additional restraints may be ordered under MCL 600.2950a(3) when the petitioner seeks a PPO and the respondent has been convicted of sexually assaulting the petitioner or threatening to sexually assault the petitioner. See MCL 600.2950a(2)(a)-(b) for additional information and requirements.

[20] The SCAO form *Personal Protection Order (Nondomestic)*.

- aggravated stalking, which includes, but is not limited to conduct that constitutes stalking (see above), when any of the following conditions are present:

  - at least one of the actions constituting stalking violates a restraining order, and the respondent received actual notice of the order, or at least one of the actions constituting stalking violates an injunction or preliminary injunction.

  - at least one of the actions constituting stalking violates a condition of probation, parole, pretrial release, or release on bond pending appeal.

  - the respondent's course of conduct includes making at least one credible threat (i.e. threat to kill or physically injure another individual that causes the person hearing the threat to reasonably fear for his or her or another person's safety) against the petitioner, a member of the petitioner's family, or an individual living with the petitioner.

  - the respondent has been previously convicted of stalking or aggravated stalking. MCL 600.2950a(1); MCL 600.2950a(26); MCL 750.411(1)(b); MCL 750.411i(1)(f); MCL 750.411i(2); SCAO form CC 380, *Personal Protection Order (Nondomestic)*.

- cyberstalking, which includes posting a message through the use of any medium of communication, including the Internet or a computer computer program, computer system, or computer network, or any other electronic medium of communication without the consent of the victim if all of the following apply:

  - "[t]he person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim."

  - the person posts the message with the intent "to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested."

  - any conduct that arises from the posting "would cause a reasonable person to suffer emotional

distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

- "[c]onduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 600.2950a(1); MCL 750.411s(1); SCAO form CC 380, *Personal Protection Order (Nondomestic)*.

2. Standard for Issuing Nondomestic Stalking PPO

In order for the court to grant a nondomestic stalking petition under MCL 600.2950a(1), the petitioner must "allege[] facts that constitute stalking as defined in . . . [MCL 750.411h] or [MCL 750.411i], or conduct that is prohibited under [MCL 750.411s]."[21] MCL 600.2950a(1).

A respondent may argue that a PPO enjoining conduct described in MCL 750.411s violates his or her First Amendment rights. See *TT v KL*, 334 Mich App 413, 445-446 (2020). It is only then that the issue of defamation (an exception to the First Amendment) may serve as a possible argument by a PPO petitioner. *Id.* at 446. When this issue arises, "the trier of fact must determine [whether] the statements or posts were definitively false." *Id.* at 450. However, the language to be prohibited by the PPO must "be specifically limited to the [false and defamatory] speech." *Id.* In *TT*, 334 Mich App at 418, "the . . . PPO prohibited respondent 'from posting defamatory statements about [p]etitioner on social media and/or from publishing such statements elsewhere.'" The trial court should have amended the PPO because the scope of language prohibited by it was "much too broad and unconfined to the boundaries set in MCL 750.411s." *TT*, 334 Mich App at 450. "The trial court should have amended the PPO to provide that, absent petitioner's consent, respondent is prohibited from posting online messages that assert that petitioner is allowing [a two-time sex offender] to have access to, or contact, with [the parties' daughter] and that otherwise violate MCL 750.411s." *TT*, 334 Mich App at 450.

Although a respondent's comment was clearly offensive and in poor taste, the comment was constitutionally protected and could not support the issuance of a PPO. *CNN v SEB*, 345 Mich App 151, 164 (2023). In *CNN*, the respondent's comment "'did not reach the level of intending the commission of an unlawful

[21] For a detailed discussion of MCL 750.411h, MCL 750.411i, and MCL 750.411s, see Section 2.3.

act of violence,'" and the petitioner "did not describe being threatened by the statement." *Id*. at 164. "True threats" include those statements made by a speaker who intends that the statement "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. at 164, quoting *Virginia v Black*, 538 US 343, 359 (2003). "True threats of violence are outside the bounds of First Amendment protection and are punishable as crimes." *People v Kvasnicka*, ___ Mich App ___, ___ (2025)~~(~~ (cleaned up). **[TO RTS: SOME WEIRD SPACING GOING ON HERE AND THAT WAS THE ONLY WAY I COULD FIX IT.]**The respondent's statement to CNN, "'[H]ere come your masser (sic),'" was not a threat and nothing indicates that SEB meant to create violence. *CNN*, 345 Mich App at 164. "Rather, SEB boorishly expressed anger about a white neighbor interfering in her disagreement with CNN. Her words were racially charged, puerile, and ugly, but they also were protected." *Id*. at 164.

MCL 600.2950a(1) does not require the respondent to have been charged or convicted of violating MCL 750.411h, MCL 750.411i, or MCL 750.411s for relief to be sought or granted under MCL 600.2950a(1).

3. Standard for Issuing Nondomestic Stalking Ex Parte PPO

If the petitioner specifically requests that the PPO be issued without written or oral notice to the respondent or his or her attorney,[22] the court must issue the PPO ex parte if both of the following are met:

- "the petition alleges facts that constitute stalking as defined in . . . [MCL 750.411h] or [MCL 750.411i], or conduct that is prohibited under [MCL 750.411s][.]"[23] MCL 600.2950a(1).[24]

- "it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice

[22] If the petition does not request an ex parte order, the court must schedule a hearing as soon as possible. See MCR 3.705(B)(1). For additional information on court procedures for PPO hearings, see Section 5.6(F).

[23] For a detailed discussion of MCL 750.411h, MCL 750.411i, and MCL 750.411s, see Section 2.3.

[24] MCL 600.2950a(1) does not require the respondent to have been charged with or convicted of a violation of MCL 750.411h, MCL 750.411i, or MCL 750.411s for relief to be sought or granted under MCL 600.2950a(1).

or that the notice will precipitate adverse action before a [PPO] can be issued." MCL 600.2950a(12). See also MCR 3.703(G); MCR 3.705(A)(2).

Note: "The court must rule on a request for an ex parte order within one business day of the filing date of the petition." MCR 3.705(A)(1). If the court refuses to enter the PPO ex parte, it must advise the petitioner of the right to request a hearing.[25] MCR 3.705(A)(5). For additional information on the procedures required for issuing PPOs, see Section 5.6.

"A [PPO] issued under [MCL 600.2950a(12)] is valid for not less than 182 days." MCL 600.2950a(13). See also MCR 3.705(A)(3). It must state its expiration date. *Id.*

C. Nondomestic Sexual Assault PPO

For purposes of MCL 600.2950a, a PPO is "an injunctive order issued by the family division of circuit court restraining or enjoining conduct prohibited under [MCL 600.2950a(1)] or [MCL 600.2950a(3)]." MCL 600.2950a(31)(d).

The nondomestic sexual assault PPO provision, MCL 600.2950a(2), permits, "an individual [to] petition the family division of circuit court to enter a [PPO] to restrain or enjoin an individual" from conduct listed in MCL 600.2950a(3) when the respondent (1) has been convicted of sexually assaulting the petitioner, (2) "has been convicted of furnishing obscene material to the petitioner under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law," or (3) has subjected, threatened, or placed the petitioner in reasonable apprehension of sexual assault.[26] For additional information on petitioning the court for a nondomestic sexual assault PPO, see Section 5.6. For additional information on criminal

[25] The court must schedule a hearing as soon as possible, "unless it determines after interviewing the petitioner that the [petitioner's] claims are sufficiently without merit[, and] that the action should be dismissed without a hearing[.]" MCR 3.705(B)(1).

[26] See, e.g., *HMM v JS*, ___ Mich App ___, ___ (2024), regarding an ex parte PPO issued against respondent on behalf of a 17-year-old minor petitioner who alleged that respondent, her uncle, sexually assaulted her approximately ten years earlier. Respondent's motion to terminate the PPO was denied after a virtual hearing. *Id.* at ___. On appeal, the Court found that the circuit court abused its discretion throughout the hearing proceedings by: (1) allowing petitioner to testify off-camera "for no discernible reason"; (2) curtailing respondent's ability to cross-examine petitioner; and (3) shifting the burden of proof to respondent. *Id.* at ___. Although respondent did not expressly preserve his objections, the Court found that "plain-error review . . . applies to unpreserved issues in PPO proceedings," because of the potential criminal sanctions for a PPO violation and "the liberty interests at stake." *Id.* at ___.

sexual conduct as it relates to domestic violence proceedings, see Section 2.4.

A nondomestic stalking PPO must not be issued if the petitioner and the respondent have a parent/child relationship and the child is an unemancipated minor. MCL 600.2950a(27)(a)-(b). If there is no such parent/child relationship, a person under age 18 may be a party to a PPO action.[27] MCL 600.2950a(28). However, a nondomestic stalking PPO must not be issued if the respondent is less than ten years old. MCL 600.2950a(27)(c).

The court must not enter a nondomestic stalking PPO if the petitioner is a prisoner. MCL 600.2950a(30). If the court issues a PPO in violation of MCL 600.2950a(30), the court "shall rescind the [PPO] upon notification and verification that the petitioner is a prisoner." *Id.*

"[F]or the reasons stated in *Kampf*, [237 Mich App at 377,] [the Court of Appeals] conclude[d] that MCL 600.2950a provides sufficient procedural safeguards to satisfy due process." *IME v DBS*, 306 Mich App 426, 437 (2014). The *Kampf* Court stated that "[t]here is no procedural due process defect [under MCL 600.2950] in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued." *Kampf*, 237 Mich App at 383-384. Accordingly, the procedural safeguards set out in MCL 600.2950a(1)-(2) (issuing ex parte order), MCL 600.2950a(13)-(14) (filing motion to modify or rescind ex parte order; hearing on motion), MCL 600.2950a(14) (hearing on motion to modify or rescind ex parte order), MCL 600.2950a(18) (notice), and MCL 600.2950a(22) (requiring actual notice and opportunity to comply before being arrested) satisfy due process. See *IME*, 306 Mich App at 436-438.

Moreover, MCL 600.2950a(2)(a) is not facially invalid "[b]ecause the statute does not on its face impair a fundamental right, . . . [and because t]he Legislature's decision to allow the victims of sexual assault to seek personal protection orders against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting the victims of sexual assault from further victimization." *IME*, 306 Mich App at 441, 443. In addition, "trial courts have substantial discretion to fashion a PPO that balances the petitioner's need for appropriate protection and the

[27] See Section 5.3 for additional information on the court procedures for issuing a PPO against a minor.

respondent's liberty interests[,]" and "[t]his flexibility advances the Legislature's interest in protecting the victims of sexual assault while ensuring that the perpetrators' liberty interests are not arbitrarily or unreasonably restrained." *Id.* at 443-444.

1. Conduct Subject to Restraint

In issuing a nondomestic sexual assault PPO under MCL 600.2950a, the court may restrain or enjoin the respondent from doing one or more of the following:

> "(a) Entering onto premises.
>
> (b) Threatening to sexually assault, kill, or physically injure petitioner or a named individual.
>
> (c) Purchasing or possessing a firearm.[28]
>
> (d) Interfering with the petitioner's efforts to remove the petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.
>
> (e) Interfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationship or environment.
>
> (f) Following or appearing within the sight of the petitioner.
>
> (g) Approaching or confronting the petitioner in a public place or on private property.
>
> (h) Appearing at the petitioner's workplace or residence.
>
> (i) Entering onto or remaining on property owned, leased, or occupied by the petitioner.
>
> (j) Contacting the petitioner by telephone.

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[28] "[T]he petitioner shall notify the court of the respondent's occupation before the [PPO] is issued[,]" "[i]f the respondent to a petition under [MCL 600.2950a] is an individual who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, . . . MCL 28.601 to [MCL] 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, a department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment[.]" MCL 600.2950a(5). "[MCL 600.2950a(5)] does not apply to a petitioner who does not know the respondent's occupation." *Id.*

(k) If the petitioner is a minor who is enrolled in a public or nonpublic school that operates any of grades K to 12, attending school in the same building as the petitioner.

(*l*) Sending mail or electronic communications to the petitioner.

(m) Placing an object on, or delivering an object to, property owned, leased, or occupied by the petitioner.

(n) Engaging in conduct that is prohibited under . . . MCL 750.411s.

(o) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence or sexual assault." MCL 600.2950a(3). See also the SCAO form *Personal Protection Order (Nondomestic Sexual Assault)*.

2. Standard for Issuing Nondomestic Sexual Assault PPO

The court must grant a petition under MCL 600.2950a(2)(a) "if [it] determines that the respondent has been convicted of a sexual assault of the petitioner or that the respondent was convicted of furnishing obscene material to the petitioner under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law."

The court must not grant a petition under MCL 600.2950a(2)(b), "unless the petition alleges facts that demonstrate that the respondent has perpetrated or threatened sexual assault against the petitioner.[29] Evidence that a respondent has furnished obscene material to a minor petitioner is evidence that the respondent has threatened sexual assault against the petitioner." MCL 600.2950a(2)(b). However, MCL 600.2950a(2)(b) does not require the

[29] MCL 600.2950a(4) provides for the applicability of the rape-shield provisions under MCL 750.520j in "any hearing on a petition for, a motion to modify or terminate, or an alleged violation of a [PPO] requested or issued under [MCL 600.2950a(2)] except as follows: (a) [t]he written motion and offer of proof must be filed at least 24 hours before a hearing on a petition to issue a [PPO] or on an alleged violation of a [PPO][;] (b) [t]he written motion and offer of proof must be filed at the same time that a motion to modify or terminate a [PPO] is filed." For more information on applying the rape-shield provisions to nondomestic PPO proceedings, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 5.

respondent to have been charged with or convicted of "sexual assault or an offense under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law."

3. Standard for Issuing Nondomestic Sexual Assault Ex Parte PPO

If the petitioner specifically requests that the PPO be issued without written or oral notice to the respondent or his or her attorney,[30] the court must issue the PPO ex parte if both of the following are met:

- "the court determines that the respondent has been convicted of a sexual assault of the petitioner or that the respondent was convicted of furnishing obscene material to the petitioner under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law," MCL 600.2950a(2)(a); *or* "the petition alleges facts that demonstrate that the respondent has perpetrated or threatened sexual assault against the petitioner," MCL 600.2950a(2)(b).[31]

- "it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a [PPO] can be issued." MCL 600.2950a(12). See also MCR 3.703(G); MCR 3.705(A)(2).

  Note: "The court must rule on a request for an ex parte order within one business day of the filing date of the petition." MCR 3.705(A)(1). If the court refuses to enter the PPO ex parte, it must advise the petitioner of the right to request a hearing.[32] MCR 3.705(A)(5). For additional information on

[30] If the petition does not request an ex parte order, the court must schedule a hearing as soon as possible. See MCR 3.705(B)(1). For additional information on court procedures for PPO hearings, see Section 5.6(F).

[31] "Evidence that a respondent has furnished obscene material to a minor petitioner is evidence that the respondent has threatened sexual assault against the petitioner." MCL 600.2950a(2)(b). However, MCL 600.2950a(2)(b) does not require the respondent to have been charged with or convicted of a violation of "sexual assault or an offense under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law."

[32] The court must schedule a hearing as soon as possible, "unless it determines after interviewing the petitioner that the [petitioner's] claims are sufficiently without merit[, and] that the action should be dismissed without a hearing[.]" MCR 3.705(B)(1).

the procedures required for issuing PPOs, see Section 5.6.

"A [PPO] issued under [MCL 600.2950a(12)] is valid for not less than 182 days." MCL 600.2950a(13). See also MCR 3.705(A)(3). It must state its expiration date. *Id.*

5.3 Minors and Legally Incapacitated Individuals as Parties to Personal Protection Proceeding

A. Minor or Legally Incapacitated Individual as Petitioner

The court cannot issue a PPO if the petitioner is the respondent's unemancipated minor child. MCL 600.2950(26)(b);MCL 600.2950a(27)(b).

If a minor or legally incapacitated individual is petitioning for a PPO, MCR 3.703(F)(1) requires:

- "the petitioner [to] proceed through a next friend[,]" and
- "[t]he petitioner [to] certify that the next friend is not disqualified by statute and that the next friend is an adult."

"Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment." MCR 3.703(F)(2). However, if the petitioner is a minor under the age of 14, the court must appoint a next friend. *Id.*

"The next friend is not responsible for the costs of the action." MCR 3.703(F)(2).

For purposes of MCL 600.2950(26)(b), "emancipated minor" includes "a minor child where the parental rights of one or both parents have been terminated." *SP v BEK*, 339 Mich App 171, 179 (2021) (affirming the trial court's conclusion that MCL 600.2950(26)(b) did not preclude it from issuing a personal protection order on behalf of a minor child against the child's natural parent, the respondent, because the minor child was considered emancipated as to the respondent when the respondent's parental rights to the minor were terminated). See also MCL 722.1(c).

B. Minor as Respondent

The issuance, dismissal, modification, or recision of a minor PPO is governed by the same rules applicable to adult PPOs. See MCR

3.981. Those issues are discussed throughout this benchbook, and unless specifically noted otherwise, apply to all types of PPO proceedings. However, "[p]roceedings to enforce a minor [PPO] where the respondent is under 18 are governed by subchapter 3.900[, and] . . . [p]roceedings . . . to enforce a minor [PPO] still in effect when the respondent is 18 or older, are governed by [MCR 3.708]." MCR 3.708(A)(2). See Section 5.11 for additional information on enforcement proceedings under MCR 3.708. Discussion of enforcement proceedings under subchapter 3.900 are beyond the scope of this benchbook. For a complete discussion of the enforcement of minor PPOs, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13.

Issuance of a minor PPO is subject to the Juvenile Code, MCL 712A.1 *et seq.* MCL 600.2950(27); MCL 600.2950a(28). MCL 712A.2(h) provides the family division of circuit court with "[j]urisdiction over a proceeding under . . . MCL 600.2950 and [MCL] 600.2950a, in which a minor less than 18 years of age is the respondent, or a proceeding to enforce a valid foreign protection order[33] issued against a respondent who is a minor less than 18 years of age." "If the court exercise[s] jurisdiction over a child under [MCL 712A.2(h)], jurisdiction of the court [will] continue[] until the [PPO] expires[,] but action regarding the [PPO] after the respondent's eighteenth birthday is not subject to the [Juvenile Code]."[34] MCL 712A.2a(6).

A minor PPO petition must conform to the same requirements as an adult PPO petition, and it must also satisfy the additional requirements set out in MCR 3.703(C). See MCR 3.703(B)-(C). See Section 5.6(A) for a detailed discussion.

The court cannot issue a minor PPO if:

- the respondent is the petitioner's unemancipated minor child. MCL 600.2950(26)(a); MCL 600.2950a(27)(a).
- the respondent is a child under the age of 10. MCL 600.2950(26)(c); MCL 600.2950a(27)(c); MCL 712A.2(h).

"A judge must preside at[] . . . a proceeding on the issuance, modification, or termination of a minor [PPO]." MCR 3.912(A)(4).

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[33] For information on foreign protection orders, see Section 5.15.

[34] For purposes of the Juvenile Code, the terms "'child', 'minor', 'youth' or any other term signifying a person under the age of 18 applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8). For purposes of MCL 712A.2a, the term "'juvenile' applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(9).

Note, however, that a nonattorney referee may conduct a preliminary hearing for the enforcement of a PPO, and a referee licensed to practice law in Michigan may preside at a hearing to enforce a minor PPO. MCR 3.913(A)(2)(d).

MCL 712A.17c(10) provides the court with the general authority to appoint a guardian ad litem[35] for a minor involved as a respondent in a PPO proceeding under MCL 712A.2(h):[36]

> "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under [the Juvenile Code]."

5.4 Domestic Violence Victim Advocates

Under MCL 600.2950c(1), a court may provide a domestic violence victim advocate to assist a petitioner in obtaining a PPO:

> "The family division of the circuit court in each county may provide a domestic violence victim advocate to assist victims of domestic violence in obtaining a [PPO]. The court may use the services of a public or private agency or organization that has a record of service to victims of domestic violence to provide the assistance. A domestic violence victim advocate may provide, but is not limited to providing, all of the following assistance:
>
> (a) Informing a victim of the availability of, and assisting the victim in obtaining, serving, modifying, or rescinding, a [PPO].
>
> (b) Providing an interpreter for a case involving domestic violence including a request for a [PPO].
>
> (c) Informing a victim of the availability of shelter, safety plans, counseling, other social services, and generic written materials about Michigan law."

"To the extent not protected by the immunity conferred by . . . MCL 691.1401 to [MCL] 691.1415, and individual other than a court employee who provides assistance under [MCL 600.2950c] is presumed to be acting in good faith and is not liable in a civil action for damages for acts or omissions in providing the assistance, except acts or omissions

[35] For information on guardian ad litems, see MCR 3.916.

[36] See also MCR 3.916(A), which provides the court with the authority to "appoint a guardian ad litem for a party if the court finds that the welfare of the party requests it."

amounting to gross negligence or willful and wanton misconduct." MCL 600.2950b(5). Domestic violence victim advocates rendering assistance in accordance with MCL 600.2950c do not violate statutory prohibitions against the unauthorized practice of law. MCL 600.916(2); MCL 600.2950c(3). In addition, a victim advocate who provides assistance to a victim "in accordance with the address confidentiality program act," MCL 780.851 *et seq.*,[37] does not violate the prohibition against the unauthorized practice of law. MCL 600.916(3).

A domestic violence victim advocate is not authorized to "represent or advocate for a domestic violence victim in court." MCL 600.2950c(2).

5.5 Court-Appointed Foreign Language Interpreter[38]

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[39] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

5.6 Procedures for Issuing PPOs

MCR 3.701 provides for "[p]rocedure related to [PPOs] against adults [to be] governed by [subchapter 3.700]." MCL 600.1021(1)(k) provides the family division of circuit court with sole and exclusive jurisdiction over personal protection proceedings under MCL 600.2950 and MCL 600.2950a.

"Procedure for the issuance, dismissal, modification, or recision of minor [PPOs] is governed by subchapter 3.700."[40] MCR 3.981.[41] Issuance of a PPO against a respondent under the age of 18 is subject to the Juvenile Code, MCL 712A.1 *et seq.* MCL 600.2950(27); MCL 600.2950a(28). MCL 712A.2(h) provides the court with "[j]urisdiction over a proceeding

[37] For more information about the address confidentiality program act, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 5.

[38] See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 1, for more information on foreign language interpreters.

[39] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

[40] For a discussion of the procedures for the dismissal of PPOs, see Section 5.8, and for the modification and termination of PPOs, see Section 5.9.

[41] MCR 3.701 provides for "[p]rocedure related to [PPOs] against minors [to be] governed by subchapter 3.900, except as provided in MCR 3.981."

under . . . MCL 600.2950 and [MCL] 600.2950(a), in which a minor less than 18 years of age is the respondent[.]"

"A judge must preside at a proceeding on the issuance, modification, or termination of a minor [PPO]." MCR 3.912(A)(4). Note, however, that a nonattorney referee may conduct a preliminary hearing for the enforcement of a PPO, and a referee licensed to practice law in Michigan may preside at a hearing to enforce a minor PPO. MCR 3.913(A)(2)(d).

A. Filing a Petition

"A personal protection action is an independent action commenced by filing a petition with a court."[42] MCR 3.703(A). MCR 3.703(A) prohibits an individual from filing a personal protection action as part of an existing case or by joinder of a personal-protection claim to another action.

> **Note:** MCR 3.703(A) abrogates the statutory provisions of MCL 600.2950(1) and MCL 600.2950a(1)-(2), which permit the filing of a petition for a PPO as a motion in a pending action or joined as a claim with another action. See MCR 1.104, which provides for the "[r]ules of practice set forth in any statute, if not in conflict with any of these rules, [to be] effective until superseded by rules adopted by the Supreme Court."

MCL 600.2950b(1) requires "[t]he state court administrative office [(SCAO)] [to] develop and make available forms for use by an individual who wishes to proceed without an attorney."[43] See also, MCR 3.701(B), which requires "[t]he state court administrator [to] approve forms for use in personal protection act proceedings[,]" and make these forms "available for public distribution by the clerk of the circuit court." For commencing a personal protection action, see the following SCAO-approved forms:

- **Petition for Domestic Relationship PPO**

[42] Unless the context of a rule indicates otherwise, a "'petition' refers to a pleading for commencing an independent action for personal protection and is not considered a motion as defined in MCR 2.119[.]" MCR 3.702(2).

[43] MCL 600.2950b(1) also requires: (1) "[t]he forms [to] include at least a petition for relief, a notice of hearing, and proof of service for a [PPO] under [MCL 600.2950] or [MCL 600.2950a][;]" (2) ["[t]he forms [to] be written in plain English in a simple and easily understood format, and [to] be limited, if practicable, to 1 page in length[;]" and (3) "[i]nstructions for the forms [to] be written in plain English and [to] include a simple and easily understood explanation of the proper method of service and filing of the proof of service." For the notice of hearing and proof of service SCAO-approved form, see SCAO form *Proof of Service/Oral Notice Regarding Personal Protection Order*.

- SCAO form *Petition for Personal Protection Order (Domestic Relationship)*.
- SCAO form *Petition for Personal Protection Order Against a Minor (Domestic Relationship)*.

- **Petition for Nondomestic Stalking PPO**
  - SCAO form *Petition for Personal Protection Order (Nondomestic)*.
  - SCAO form *Petition for Personal Protection Order Against a Minor (Nondomestic)*.

- **Petition for Nondomestic Sexual Assault PPO**
  - SCAO form *Petition for Personal Protection Order (Nondomestic Sexual Assault)*.
  - SCAO form *Petition for Personal Protection Order Against a Minor (Nondomestic Sexual Assault)*.

"The court shall provide a form prepared under [MCL 600.2950b] without charge[, and] [u]pon request, the court may provide assistance, but not legal assistance, to an individual in completing a form prepared under [MCL 600.2950b] and the [PPO] form if the court issues such an order, and may instruct the individual regarding the requirements for proper service of the order." MCL 600.2950b(4). For a discussion on entry of a PPO, see Section 5.7.

"There are no fees for filing a personal protection action, and no summons is issued."[44] MCR 3.703(A).

1. Petition for PPO Requirements

Pursuant to MCR 3.703(B), a petition for a PPO must:

[44] Michigan receives financial assistance to further the objectives of the Violence Against Women Act (VAWA), 34 USC 12291 et seq. See 34 USC 10446 (governing federal grants to combat violent crimes against women), formerly classified to 42 USC 3796gg-1. Definitions and grant provisions appearing in 34 USC 10447 (definitions and grant conditions for 34 USC 10441 et seq.) are those that appear in 34 USC 12291 of the VAWA. 34 USC 10450(a)(1) requires the State to certify that "its laws, policies, and practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence, dating violence, sexual assault, or stalking offense, or in connection with the filing, issuance, registration, modification, enforcement, dismissal, withdrawal or service of a protection order, or a petition for a protection order, to protect a victim of domestic violence, dating violence, sexual assault, or stalking, that the victim bear the costs associated with the filing of criminal charges against the offender, or the costs associated with the filing, issuance, registration, modification, enforcement, dismissal, withdrawal or service of a warrant, protection order, petition for a protection order, or witness subpoena, whether issued inside or outside the State, tribal, or local jurisdiction[.]" 34 USC 10450(a)(1),formerly classified to 42 USC 3796gg-5(a)(1). 34 USC 10450 is part of federal legislation aimed at combatting violent crimes against women using federal grant money.

> "(1) be in writing;
>
> (2) state with particularity the facts on which it is based;
>
> (3) state the relief sought and the conduct to be restrained;
>
> (4) state whether an ex parte order is being sought;[45]
>
> (5) state whether a [PPO] action involving the same parties has been commenced in another jurisdiction; and
>
> (6) be signed by the party or attorney as provided in MCR 1.109(E). The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address."[46]

If the petition for a PPO involves a minor-respondent, the petition must also contain:

> "(1) the minor's name, address, and either age or date of birth; and
>
> (2) if known or can be easily ascertained, the names and addresses of the minor's parent or parents, guardian, or custodian." MCR 3.703(C).

"An individual who knowingly and intentionally makes a false statement to a court in support of his or her petition for a [PPO] is subject to the contempt powers of the court." MCL 600.2950(24); MCL 600.2950a(24).

2. Petition Must Specify Other Pending Actions or Prior Orders or Judgments

MCR 3.703(D) requires "[t]he petition [to] specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and

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[45] "If the petition requests an ex parte order, the petition must set forth specific facts showing that immediate and irreparable injury, loss, or damage will result to the petitioner from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued." MCR 3.703(G).

[46] See also MCL 600.2950(3) and MCL 600.2950a(6), which also permit the petitioner to omit his or her address, and if omitted, to provide the court with a mailing address.

the case number if known." For the requirements set out under MCR 3.703(D), see Section 5.6(C).

3. Notification to Court if Respondent Has License to Carry Concealed Weapon

"[T]he petitioner shall notify the court of the respondent's occupation before issuance of the [PPO]," "[i]f the respondent is a person who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, . . . MCL 28.601 to [MCL] 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment[.]" MCL 600.2950(2); MCL 600.2950a(5).

The notice requirement under MCL 600.2950(2) and MCL 600.2950a(5) does not apply to a petitioner who does not know the respondent's occupation.

For additional information on statutory firearm restrictions in domestic violence cases, see Chapter 6.

4. Personal Protection Action Initiated By E-Filing

"Where e-filing is implemented, a partially-completed personal protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the petition." MCR 3.703(A). The petitioner or a person assisting the petitioner must complete "only the case caption and the known fields with identifying information, including protected personal identifying information of the respondent[.]" *Id*. For the information to be entered in LEIN, the form must include, at a minimum, the respondent's "race, sex, and date of birth or age [.]" *Id*.

B. Venue

The petitioner may file a petition for a PPO:

- "in any county in Michigan regardless of residency" if the respondent is an adult. MCR 3.703(E)(1).
- "in either the petitioner's or [the] respondent's county of residence" if the respondent is a minor. MCR 3.703(E)(2).

> "If the [minor] respondent does not live in [Michigan], venue for the action is proper in the petitioner's county of residence." *Id.* See also MCL 712A.2(h), which contains substantially similar language.

C. Other Pending Actions or Prior Orders or Judgments

MCR 3.703(D)(1) requires a petitioner to specify in a petition "whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number if known."

"If the petition is filed in the same court as a pending action or where an order or judgment has already been entered by that court affecting the parties, it shall be assigned to the same judge." MCR 3.703(D)(1)(a). "If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court should contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information." MCR 3.703(D)(1)(b).

"If the prior action resulted in an order providing for continuing jurisdiction of a minor, and the new action requests relief with regard to the minor, the court must comply with MCR 3.205."[47] MCR 3.703(D)(2).

In domestic relations proceedings, the issuance of a domestic relations order, divorce judgment, order for separate maintenance, or decree of annulment does not preclude the court from also issuing a PPO to protect one of the parties from the other. See MCL 552.14; MCR 3.207(A). For additional information on domestic relations proceedings, see Section 5.13.

D. Existing Custody and Parenting Time Orders

MCL 600.2950(1)(d) permits the court to enjoin a respondent from "[r]emoving minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction." "Proceedings to modify custody and parenting time orders are subject to subchapter 3.200." MCR 3.706(C)(3)(b).

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[47] MCR 3.205 sets out the procedural requirements for prior and subsequent orders and judgments that affect a minor.

Before issuing a PPO in a case where a custody or parenting time order already exists between the parties, the court "must contact the court having jurisdiction over the parenting time or custody matter as provided in MCR 3.205,[48] and where practicable, the judge should consult with that court, as contemplated in MCR 3.205(C)(2), regarding the impact upon custody and parenting time rights[.]" MCR 3.706(C)(1).

"If the respondent's custody or parenting time rights will be adversely affected by [a] [PPO], the issuing court shall determine whether conditions should be specified in the order which would accommodate the respondent's rights or whether the situation is such that the safety of the petitioner and [the] minor children would be compromised by such conditions." MCR 3.706(C)(2).

"A [PPO] takes precedence over any existing custody or parenting time order until the [PPO] has expired, or the court having jurisdiction over the custody or parenting time order modifies the custody or parenting time order to accommodate the conditions of the [PPO]." MCR 3.706(C)(3).

If either party wants to modify the existing custody or parenting time order, the party must file a motion and request a hearing with the court having jurisdiction over that order. MCR 3.706(C)(3)(a). "The hearing must be held within 21 days after the motion is filed." MCR 3.706(C)(3)(a).

E. Ex Parte Proceedings

MCR 3.705(A)(1) requires "[t]he court [to] rule on a request for an ex parte order within one business day of the filing date of the petition."[49]

1. Issuance of Ex Parte Order

If the petitioner specifically requests that the PPO be issued without written or oral notice to the respondent or his or her attorney,[50] the court must issue the PPO ex parte if both of the following are met:

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[48] MCR 3.205 provides for the exchange of information between courts exercising concurrent jurisdiction in actions affecting minors.

[49] "If the petition requests an ex parte order, the petition must set forth specific facts showing that immediate and irreparable injury, loss, or damage will result to the petitioner from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued." MCR 3.703(G). See also MCL 600.2950(12); MCL 600.2950a(12).

[50] If the petition does not request an ex parte order, the court must schedule a hearing as soon as possible. See MCR 3.705(B)(1). For additional information on court procedures for PPO hearings, see Section 5.6(F).

- the court determines the petitioner met the statutory requirements set out under MCL 600.2950(4) (domestic relationship PPO), MCL 600.2950a(1) (nondomestic stalking PPO), or MCL 600.2950a(2) (nondomestic sexual assault PPO).[51]

- "it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to the relief sought, [and] . . . immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a [PPO] can be issued." MCR 3.705(A)(2). See also MCL 600.2950(12) and MCL 600.2950a(12), which contain substantially similar requirements.

If the court considers information that is not contained in a written complaint, petition, or affidavit, MCR 3.705(A)(2) requires that "[a] permanent record or memorandum [] be made of any nonwritten evidence, argument, or other representations made in support of issuance of an ex parte order."

If the petitioner is petitioning for a nondomestic stalking PPO or a nondomestic sexual assault PPO under MCL 600.2950a, "the court must state in writing the specific reasons for issuance of the [ex parte] order." MCR 3.705(A)(2). See also, MCL 600.2950a(7), which requires "the court [to] immediately state in writing the specific reasons for issuing or refusing to issue the [PPO]."[52]

"An ex parte order is valid for not less than 182 days, and must state its expiration date." MCR 3.705(A)(3). See also MCL 600.2950(13) and MCL 600.2950a(13), which also require the ex parte PPO to be "valid for not less than 182 days."

Once an ex parte order is entered, MCR 3.705(A)(4) requires the petitioner to "serve the petition and order as provided in MCR 3.706(D)."[53] "However, failure to make service does not affect the order's validity or effectiveness." MCR 3.705(A)(4).

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[51] See Section 5.2(A) for the statutory requirements set out under MCL 600.2950(4) (domestic relationship PPOs), Section 5.2(B) for the statutory requirements set out under MCL 600.2950a(1) (nondomestic stalking PPOs), and Section 5.2(C) for the statutory requirements set out under MCL 600.2950a(2) (nondomestic sexual assault PPOs).

[52] Note that MCL 600.2950(7) only requires the court to "state immediately in writing the specific reasons it refused to issue a [PPO]."

2. Denial of Ex Parte Order

If the court denies a petition for an ex parte order, it must:

- immediately state, in writing, specific reasons for refusing to issue the ex parte order. MCL 600.2950(7); MCL 600.2950a(7); MCR 3.705(A)(5). "[A] trial court's conclusory determination that the allegations are 'insufficient' for ex parte relief is [not] adequate for appellate review." *PC v JLS*, 346 Mich App 233, 240 (2023). "Because the trial court failed to state its specific reasons for refusing to issue the PPO, we have no evidence that the 'trial court was aware of the issues in the case and correctly applied the law.'" *PC*, 346 Mich App at 243, quoting *In re JCB*, 336 Mich App 736, 753 (2021).

- advise the petitioner of the right to request a hearing as set out in MCR 3.705(B). MCR 3.705(A)(5). However, the court need not advise the petitioner of the right to request a hearing "if the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit[, and] that the action should be dismissed without a hearing." MCR 3.705(A)(5).

"If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the petition is final." MCR 3.705(A)(5).

"There is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, . . . and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued." *Kampf v Kampf*, 237 Mich App 377, 383-384 (1999) (ex parte PPO issued under MCL 600.2950(12) did not violate the respondent-husband's due process guarantee of notice and an opportunity to be heard).

[53] MCR 3.706(D) requires "[t]he petitioner [to] serve the order on the respondent as provided in MCR 2.105(A)[, and] [i]f the respondent is a minor, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, the petitioner shall also in the same manner serve the order on the respondent's parent or parents, guardian, or custodian." MCR 2.105(A) requires personal service or service by registered or certified mail, return receipt requested. "On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J)." MCR 3.706(D).

F. Hearing Procedures

"[U]nless [the court] determines after interviewing [a] petitioner that the [petitioner's] claims are sufficiently without merit[, and] that the action should be dismissed without a hearing[,]" the court must schedule a hearing as soon as possible if:

> "(a) the petition does not request an ex parte order; or
>
> (b) the court refuses to enter an ex parte order and the petitioner subsequently requests a hearing." MCR 3.705(B)(1).

MCR 3.705(B)(1) requires the court to interview the petitioner or hold an evidentiary hearing before dismissing a PPO petition. *Lamkin v Engram*, 295 Mich App 701, 709-710 (2012) (the trial court committed reversible error when it treated the petition as a request for an ex parte PPO, denied the order, then dismissed the petition before interviewing the petitioner or conducting an evidentiary hearing, despite repeated requests by the petitioner).

The court must hold a hearing on the record on a petition for a PPO. MCR 3.705(B)(3). "In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1)." MCR 3.705(B)(3).[54]

"At the conclusion of the hearing[,] the court must state the reasons for granting or denying a [PPO] on the record and enter an appropriate order." MCR 3.705(B)(6). See also MCL 600.2950(7); MCL 600.2950a(7).[55] If denying the petition, the court must also immediately state, in writing, its specific reasons for the denial. MCL 600.2950(7); MCL 600.2950a(7); MCR 3.705(B)(6). Additionally, if the petitioner was petitioning for a nondomestic stalking or nondomestic sexual assault PPO under MCL 600.2950a, and the court grants the petition, the court must also immediately state, in

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[54] But see *HMM v JS*, ___ Mich App ___, ___ (2024), where the Court found plain error when the trial court allowed the 17-year-old petitioner to testify off-camera at the hearing on respondent's motion to terminate an ex parte PPO issued on the petitioner's behalf under MCL 600.2950a(2)(b). "Typically, the trial court has an advantage in determining the weight and credibility of a witness's testimony, and we give regard to that opportunity to judge credibility." *HMM*, ___ Mich App at ___. "Here, however, the circuit court limited its own ability to judge petitioner's demeanor" by allowing "the petitioner to testif[y] off-camera for no discernible reason[.]" *Id*. at ___. Further, "[a]llowing petitioner to testify off-camera may have prevented respondent and the circuit court from viewing any interactions between petitioner and those present with her during her testimony." *Id*. at ___. Although the trial court intended to protect petitioner, "respondent was also off-camera, so it is unclear how petitioner being off camera further protected her." *Id*. at ___. The Court vacated the trial court's order denying respondent's motion to terminate the PPO. *Id*. at ___.

[55] Note that MCL 600.2950(7) only requires the court to "immediately state on the record the specific reasons it refuses to issue a [PPO]" if a hearing is held; whereas, MCL 600.2950a(7) requires the court to "immediately state on the record the specific reasons for issuing or refusing to issue a [PPO]."

writing, its specific reasons for issuing the PPO. MCL 600.2950a(7); MCR 3.705(B)(6).

1. Service of Notice of Hearing

MCR 3.705(B)(2) requires the petitioner to arrange for service of the petition and notice of the hearing on the respondent as provided in MCR 2.105(A)[56] within the following timeframes:

- one day before the hearing for a petition for a domestic relationship PPO under MCL 600.2950.
- one day before the hearing for a petition for a nondomestic stalking PPO under MCL 600.2950a(1).
- two days before the hearing for a petition for a nondomestic sexual assault PPO under MCL 600.2950a(2).

"If the respondent is a minor, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, the petitioner shall also in the same manner [as provided in MCR 2.105(A)] serve notice of the hearing and the petition on the respondent's parent or parents, guardian, or custodian." MCR 3.705(B)(2).

2. Petitioner Fails to Attend Scheduled Hearing

"The petitioner must attend the hearing. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the petition." MCR 3.705(B)(4).

3. Respondent Fails to Attend Scheduled Hearing

"If the respondent fails to appear at a hearing on the petition and the court determines that the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the order may be entered without further notice to the respondent if the court determines that the petitioner is entitled to relief." MCR 3.705(B)(5).

G. Mutual Orders Prohibited

The court must not issue mutual PPOs. MCL 600.2950(8); MCL 600.2950a(8); MCR 3.706(B). However, correlative separate orders

[56] MCR 2.105(A) requires personal service or service by registered or certified mail, return receipt requested.

are permitted if both parties properly petition the court, and the court makes separate findings that support an order against each party. MCL 600.2950(8); MCL 600.2950a(8).

> **Note:** A domestic PPO restraining a petitioner issued without separate application and fact finding as to each party will not be accorded full faith and credit in other US jurisdictions. 18 USC 2265(c). See Section 5.15(C) for additional information on full faith and credit for other jurisdictions' protection orders.

H. Prohibition of Dissemination of PPO Information Over Internet

"Pursuant to 18 USC 2265(d)(3)," MCR 3.705(C) prohibits the court "from making available to the public on the Internet any information regarding the registration of, filing of a petition for, or issuance of an order under [MCR 3.705] if such publication would be likely to publicly reveal the identity or location of the party protected under the order." 18 USC 2265(d)(3) (provision of Violence Against Women Act (VAWA)) states:

> "A State, Indian tribe,[57] or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes. The prohibition under this paragraph applies to all protection orders for the protection of a person residing within a State, territorial, or Tribal jurisdiction, whether or not the protection order was issued by that State, territory, or Tribe."

[57]The VAWA was reauthorized, effective October 1, 2022. See the United States Department of Justice homepage for Tribal Justice and Safety, the 2013 and 2022 Reauthorizations of the Violence Against Women Act, for information on the VAWA and Indian tribes.

5.7 Entry of PPO

"A [PPO] is effective and immediately enforceable anywhere in this state after being signed by a judge." MCL 600.2950(9); MCL 600.2950a(9). Typically, an ex parte PPO must not be issued without written or oral notice to the respondent. See MCL 600.2950(12); MCL 600.2950a(12).

To the extent possible, the PPO must appear on a single form. MCL 600.2950(11); MCL 600.2950a(11). For entering a PPO, see the following SCAO-approved PPO forms.

A. PPO Required Content

An order granting a PPO must contain all of the following provisions:

> "(1) A statement that the [PPO] has been entered, listing the type or types of conduct enjoined.[58]
>
> (2) A statement that the [PPO] is effective when signed by the judge and is immediately enforceable anywhere in Michigan, and that, after service, the [PPO] may be enforced by another state, an Indian tribe, or a territory of the United States.
>
> (3) A statement that violation of the [PPO] will subject the individual restrained or enjoined to either of the following:
>
> > (a) If the respondent is 17 years of age or more, immediate arrest and, if the respondent is found guilty of criminal contempt, imprisonment for not more than 93 days and may be fined not more than $500; or
> >
> > (b) If the respondent is less than 17 years of age, immediate apprehension and, if the respondent is found in contempt, the dispositional alternatives listed in MCL 712A.18.
>
> (4) An expiration date stated clearly on the face of the order.
>
> (5) A statement that the [PPO] is enforceable anywhere in Michigan by any law enforcement agency, and that if

[58] See Section 5.2(A) for conduct subject to restraint under domestic relationship PPOs, Section 5.2(B) for conduct subject to restraint under nondomestic stalking relationship PPOs, and Section 5.2(C) for conduct subject to restraint under nondomestic sexual assault PPOs.

> the respondent violates the [PPO] in another jurisdiction, the respondent is subject to the enforcement procedures and penalties of the jurisdiction in which the violation occurred.
>
> (6) Identification of the law enforcement agency, designated by the court to enter the [PPO] into the law enforcement information network [(LEIN)].
>
> (7) For ex parte orders, a statement that, within 14 days after being served with or receiving actual notice of the order, the individual restrained or enjoined may file a motion to modify or terminate the [PPO] and a request for a hearing, and that motion forms and filing instructions are available from the clerk of the court." MCR 3.706(A). See also MCL 600.2950(11) and MCL 600.2950a(11), which contain substantially similar provisions.

B. Required Duties of the Clerk of the Court After Entry of a PPO

After a court issues a PPO, the clerk of the court that issued the PPO has the following responsibilities to facilitate entry of the PPO and other related documents into the Law Enforcement Information Network (LEIN) system:

- immediately on issuance of a PPO, and without requiring proof of service on the respondent, file a true copy of the PPO with the court-designated law enforcement agency that will enter the PPO into the LEIN network.[59] MCL 600.2950(15)(a); MCL 600.2950a(15)(a).

- provide the petitioner with two or more true copies of the PPO and must inform the petitioner that he or she may take a copy to the court-designated law enforcement agency for entry into the LEIN network. MCL 600.2950(15)(b), MCL 600.2950(16); MCL 600.2950a(15)(b), MCL 600.2950a(16).

- notify the court-designated law enforcement agency after receiving proof of service on the respondent. MCL 600.2950(19)(a); MCL 600.2950a(19)(a).

[59] MCL 600.2950(10) and MCL 600.2950a(10) require "[t]he issuing court [to] designate a law enforcement agency that is responsible for entering a [PPO] into the [LEIN]."

- notify the court-designated law enforcement agency if the court rescinds, modifies, or extends the PPO.[60] MCL 600.2950(19)(b); MCL 600.2950a(19)(b).

In addition to notifying the court-designated law enforcement agency for purposes of LEIN entry, the clerk of the court that issues a PPO is also required to make the following notices "immediately upon issuance and without requiring a proof of service on the individual restrained or enjoined[]" pursuant to MCL 600.2950(15)(c)-(f) and MCL 600.2950a(15)(c)-(f):

- "If the respondent is identified in the pleadings as a law enforcement officer, notify the officer's employing law enforcement agency, if known, about the existence of the [PPO]." MCL 600.2950(15)(c); see also MCL 600.2950a(15)(c), containing substantially similar language.

- "If the [PPO] prohibits the respondent from purchasing or possessing a firearm, notify the county clerk of the respondent's county of residence about the existence and contents of the [PPO]."[61] MCL 600.2950(15)(d); see also MCL 600.2950a(15)(d), containing substantially similar language.

- "If the respondent is identified in the pleadings as a department of corrections employee, notify the state department of corrections about the existence of the [PPO]." MCL 600.2950(15)(e); see also MCL 600.2950a(15)(e), containing substantially similar language.

- "If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify the friend of the court for the county in which the information is located of the existence of the [PPO]." MCL 600.2950(15)(f); see also MCL 600.2950a(15)(f), containing substantially similar language.

C. Service of the Petition and Order

MCR 3.706(D) requires "[t]he petitioner [to] serve the order on the respondent as provided in MCR 2.105(A)[, and] [i]f the respondent is a minor, and the whereabouts of the respondent's parent or parents, guardian, or custodian is known, the petitioner shall also in the same manner serve the order on the respondent's parent or

[60] For additional information on the modification or termination of a PPO, see Section 5.9, and for additional information on the extension of a PPO, see Section 5.10.

[61] See Chapter 6 for a detailed discussion of firearm restrictions in domestic violence cases.

parents, guardian, or custodian."[62] Upon entry of an ex parte order, MCR 3.705(A)(4), requires the petitioner to "serve the petition and order as provided in MCR 3.706(D)."[63] Failure to serve either a regular PPO or an ex parte PPO "does not affect [the PPO's] validity or effectiveness." MCR 3.705(A)(4); MCR 3.706(D).

MCR 2.105(A) provides:

> "Process may be served on a resident or nonresident individual by
>
> > (1) delivering a summons and a copy of the complaint to the defendant personally; or
> >
> > (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under [MCR 2.105](A)(2)."[64] See also MCL 600.2950(18) and MCL 600.2950a(18), which contain substantially similar requirements.
>
> "A proof of service or proof of oral notice must be filed with the clerk of the court issuing the [PPO]." MCL 600.2950(18); MCL 600.2950a(18).

1. Alternative Service

"On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J)." MCR 3.706(D). MCR 2.105(J) provides:

> "(1) On a showing that service of process cannot reasonably be made as provided by [MCR 2.105], the court may by order permit service of process to be made in any other manner reasonably calculated to give the [respondent] actual notice of the proceedings and an opportunity to be heard.

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[62] See MCL 600.2950(18) and MCL 600.2950a(18), which require the minor respondent's parent, guardian, or custodian to also be served "personally or by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the parent, guardian, or custodian."

[63] For additional information on ex parte proceedings, see Section 5.6(C).

[64] Service may be made by any legally competent adult who is not a party to the action. MCR 2.103(A).

> (2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the [respondent's] address or last known address, or that no address of the [respondent] is known. If the name or present address of the [respondent] is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.
>
> (3) Service of process may not be made under this subrule before entry of the court's order permitting it."

2. Law Enforcement Officer or Clerk Providing Service

a. Generally

A law enforcement officer or court clerk is authorized to serve a respondent with or notify a respondent of an issued PPO:

> "If the individual restrained or enjoined has not been served, a law enforcement officer[65] or clerk of the court who knows that a [PPO] exists may, at any time, serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined of the existence of the [PPO], the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order." MCL 600.2950(18). See also MCL 600.2950a(18), which contains substantially similar language.

b. During Alleged Violation of PPO

A law enforcement officer responding to a call about an alleged PPO violation may serve a respondent with or notify a respondent of an issued PPO:

[65] MCL 28.6(5) provides the Michigan State Police officers with the authority to serve a PPO.

> "If the individual restrained or enjoined has not been served, a law enforcement agency or officer responding to a call alleging a violation of a [PPO] shall serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined of the existence of the [PPO], the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order." MCL 600.2950(22).[66] See also MCL 600.2950a(22),[67] which contains substantially similar language.

When responding to an alleged PPO violation, MCL 600.2950(22) and MCL 600.2950a(22) require the "law enforcement officer [to] enforce the [PPO] and immediately enter or cause to be entered into the [Law Enforcement Information Network (LEIN)] that the individual restrained or enjoined has actual notice of the [PPO]. The law enforcement officer also shall file a proof of service or proof of oral notice with the clerk of the court issuing the [PPO]." See MCR 3.706(E), which also requires the law enforcement officer, who provides oral notice of the PPO, to file proof of the notification with the court.

If the respondent has not received notice of the PPO, he or she must "be given an opportunity to comply with the [PPO] before the law enforcement officer makes a custodial arrest for violation of the [PPO]," and if the respondent fails to immediately comply with the PPO, the law enforcement officer has grounds to make an immediate custodial arrest.[68] MCL 600.2950(22); MCL 600.2950a(22). For additional information on warrantless arrests, see Section 5.11(A).

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[66] MCL 600.2950(18)'s requirement that an issued PPO must be served on the person to be restrained or enjoined, does not "prohibit the immediate effectiveness of a [PPO] or its immediate enforcement under [MCL 600.2950](21) or [MCL 600.2950](22)." MCL 600.2950(18).

[67] MCL 600.2950a(18)'s requirement that an issued PPO must be served on the person to be restrained or enjoined, does not "prohibit the immediate effectiveness of a [PPO] or immediate enforcement under [MCL 600.2950a](21) or [MCL 600.2950a](22)." MCL 600.2950a(18).

[68] MCL 600.2950(22) and MCL 600.2950a(22) "do[] not preclude an arrest under . . . MCL 764.15 and [MCL] 764.15a, or a proceeding under . . . MCL 712A.14."

5.8 Dismissal of a PPO Action

"Except as specified in MCR 3.705(A)(5) and [MCR 3.705](B), an action for a [PPO] may only be dismissed upon motion by the petitioner prior to the issuance of an order. There is no fee for such a motion."[69] MCR 3.704.

Under MCR 3.705(A)(5) a court may dismiss a petition for an ex parte PPO where "the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit [and] that the action should be dismissed without a hearing." If a court determines that dismissal is appropriate, it is not required to give the petitioner notice of his or her right to request a hearing under MCR 3.705(B). See MCR 3.705(A)(5).

Under MCR 3.705(B)(1), a court may dismiss a petition for a PPO where the court "determines after interviewing the petitioner that the claims are sufficiently without merit [and] that the action should be dismissed without a hearing[.]"

Under MCR 3.705(B)(4), a court may dismiss a petition for a PPO where the petitioner fails to attend the hearing scheduled on the petition.

5.9 Modification or Termination of PPO

A. Time Requirements for Filing Motion

1. Petitioner's Motion to Modify or Terminate

"The petitioner may file a motion to modify or terminate the [PPO] and request a hearing at any time after the [PPO] is issued." MCR 3.707(A)(1)(a).

2. Respondent's Motion to Modify or Terminate

"The respondent may file a motion to modify or terminate an ex parte [PPO] or an ex parte order extending a [PPO] and request a hearing within 14 days after being served with, or receiving actual notice of, the order. Any motion otherwise to modify or terminate a [PPO] by the respondent requires a showing of good cause." MCR 3.707(A)(1)(b). See also MCL 600.2950(13) and MCL 600.2950a(13), which contain substantially similar language.

[69] Note that failure to serve the PPO does not affect its validity or effectiveness. MCR 3.705(A)(4); MCR 3.706(D).

B. Service Requirements

"The moving party shall serve the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.105(A)(2) [(service via certified or registered mail, return receipt requested, and delivery restricted to addressee)] at the mailing address or addresses provided to the court."[70] MCR 3.707(A)(1)(c). However, "one day before the hearing is deemed sufficient notice to the petitioner" where "the moving party is a respondent who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of employment, a police officer certified by the [Michigan commission on law enforcement standards act[71]] MCL 28.601 to [MCL 28.615], a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of employment[.]" MCR 3.707(A)(1)(c).

Although MCR 3.707 does not address procedural requirements regarding service of a motion to modify or terminate a PPO in cases involving a respondent under the age of 18, it does require "[p]etitioners or respondents who are minors . . . [to] proceed through a next friend, as provided in MCR 3.703(F)." MCR 3.707(C).

Committee Tip:

MCR 3.707 does not address service of a motion to modify or terminate a PPO in cases involving a respondent under the age of 18. However, the Advisory Committee suggests making service on both the minor respondent and the minor respondent's parent or parents, guardian, or custodian, if practicable. See MCR 3.705(B)(2) (service of notice of hearing on issuance of PPO on the minor respondent's parent, guardian, or custodian, if whereabouts is known); MCR 3.706(D) (service of PPO on the minor respondent's parent or parents, guardian, or custodian, if whereabouts is known).

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[70] "On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J)." MCR 3.707(A)(1)(c).

[71] Formerly the Michigan law enforcement officers training council act.

C. Hearing Procedures

Generally, within 14 days after a motion to modify or terminate a PPO is filed, the court must schedule a hearing. MCL 600.2950(14); MCL 600.2950a(14); MCR 3.707(A)(2).

"The trial court was required to hold the hearing on a motion to terminate a PPO and to allow respondent a meaningful opportunity to challenge the merits of the Ex Parte PPO." *JLS v HRS*, ___ Mich App ___, ___ (2024) (cleaned up). "Such a meaningful opportunity requires not only the invitation to argue against the validity of the PPO, but also the willingness to receive evidence from the respondent." *Id.* at ___. "Under due process principles, '[t]he opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence.'" *Id.* at ___ (citation omitted; alteration in original). "Therefore, due process necessarily mandates an opportunity for the respondent to present evidence at a hearing to terminate a PPO." *Id.* at ___ (reversed and remanded "for a prompt hearing on the motion that comports with due process").

"The circuit court denied respondent the opportunity to know and respond to the evidence when, even after petitioner's testimony was brief and vague, the court did not allow respondent to cross-examine her about her allegations." *HMM v JS*, ___ Mich App ___, ___ (2024). At the hearing on his motion to terminate the ex parte PPO, when respondent's counsel attempted to cross-examine the 17-year-old petitioner about her allegations that respondent sexually assaulted her "a few times" several years earlier, "the circuit court interjected and told counsel 'that's going to be all the questions we're going to ask with regard to that' . . . ." *Id.* at ___. "By depriving respondent of the opportunity to cross-examine petitioner about the alleged sexual assault, the circuit court increased the risk of erroneously depriving respondent of significant liberty interests." *Id.* at ___ (vacating on due process grounds the order denying respondent's motion to terminate the PPO).

In addition, an accelerated timeframe exists for cases involving certain respondents. The court must schedule the hearing within *five* days after the motion to modify or terminate a PPO is filed if:

- the PPO prohibits a respondent from purchasing or possessing a firearm, and
- the respondent is licensed to carry a concealed weapon and is required to carry a weapon as part of his or her employment as:

- a police officer licensed or certified under MCL 28.601 to MCL 28.615;
- a sheriff;
- a deputy sheriff or a member of the Michigan Department of State Police;
- a local corrections officer;
- a Department of Corrections employee; or
- a federal law enforcement officer who carries a firearm during the normal course of his or her employment. MCL 600.2950(2); MCL 600.2950(14); MCL 600.2950a(5); MCL 600.2950a(14); MCR 3.707(A)(2).

MCR 3.912(A)(4) requires a judge to preside at a proceeding on the modification or termination of a minor PPO.[72]

D. Burden of Proof

"'[A] petitioner bears the burden of proof when seeking to obtain an ex parte PPO.'" *HMM v JS*, ___ Mich App ___, ___ (2024), quoting *Pickering v Pickering*, 253 Mich App 694, 698-699 (2002) (alteration in original). "Similarly, on a motion to terminate or modify the ex parte PPO, 'the burden of proof remains with a petitioner who seeks to establish a justification for the continuance of a PPO.'" *HMM*, ___ Mich App at ___ (cleaned up). In *HMM*, the circuit court erroneously shifted "not just the burden of going forward with evidence, but also the burden of persuasion, from petitioner to respondent," when it "restricted its own access to petitioner's testimony to audio only and cut short respondent's attempts at cross examination." *Id.* at ___. See also MCR 3.310(B)(5)[73]and *JLS v HRS*, ___ Mich App ___, ___ (2024) ("[Respondent's motion to terminate the ex parte PPO] triggered an obligation on the part of petitioner to establish 'a justification for the continuance of [the] PPO at a hearing on the respondent's motion . . . .'") (citation omitted; second alteration in original). "In Michigan, there are two aspects of the 'burden of proof'—the burden of persuasion and the burden of going forward with the evidence." *HMM*, ___ Mich App at ___ (quotation marks and citation omitted). "Although the latter burden

[72]For additional information on minors as parties to a personal protection proceeding, see Section 5.3.

[73] MCR 3.310(B)(5) provides, in part, "[a]t a hearing on a motion to dissolve a restraining order granted without notice, the burden of justifying continuation of the order is on the applicant for the restraining order whether or not the hearing has been consolidated with a hearing on a motion for a preliminary injunction or an order to show cause."

might shift throughout a proceeding as evidentiary presumptions rise and fall, the former burden *always* remains with the petitioner." *Id.* at ___ (citations omitted).

E. Notice of Modification or Termination

"If a [PPO] is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the [PPO] of the change." MCR 3.707(A)(3). See also MCL 600.2950(19)(b) and MCL 600.2950a(19)(b), which contain substantially similar language.

"A modified or terminated order must be served as provided in MCR 2.107 [(governing service and filing of pleadings and other documents)]." MCR 3.707(A)(3).

F. Minors or Legally Incapacitated Individuals

"Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.703(F)." MCR 3.707(C). For additional information on minors and legally incapacitated individuals as parties to a personal protection proceeding, see Section 5.3.

G. Motion Fees

There are no motion fees for filing a motion to modify or terminate a PPO. MCL 600.2529(1)(e); MCR 3.707(D).

5.10 Extension of PPO

A. Time Requirements for Filing Motion

"The petitioner may file an ex parte motion to extend the effectiveness of the order, without [a] hearing, by requesting a new expiration date. The motion must be filed with the court that issued the [PPO] no later than 3 days before the order is to expire." MCR 3.707(B)(1).

A petitioner's "[f]ailure to timely file a motion to extend the effectiveness of [a PPO] does not preclude the petitioner from commencing a new personal protection action regarding the same respondent, as provided in MCR 3.703." MCR 3.707(B)(1).

B. Court Procedures

Within three days of a petitioner filing an ex parte motion to extend the effectiveness of the order, the court must act on the petitioner's motion. MCR 3.703(B)(1).

C. Notice of Extension

"If the expiration date on a [PPO] is extended, an amended order must be entered." MCR 3.707(B)(2). "The clerk must immediately notify the law enforcement agency specified in the [PPO] of the change." *Id.* See also MCL 600.2950(19)(b) and MCL 600.2950a(19)(b), which contain substantially similar language.

"The [amended] order must be served on the respondent as provided in MCR 2.107 [(governing service of pleadings and other documents)]." MCR 3.707(B)(2).

D. Minors or Legally Incapacitated Individuals

"Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.703(F)." MCR 3.707(C). For additional information on minors and legally incapacitated individuals as parties to a personal protection proceeding, see Section 5.3.

E. Motion Fees

There are no motion fees for filing a motion to extend a PPO. MCR 3.707(D).

F. On the Court's Own Motion

"[B]oth MCR 3.707(B)(1) and MCR 3.708(H)(5) are relevant to the trial court's authority to extend a PPO." *In re SB*, ___ Mich App ___, ___ (2024). "MCR 3.707(B)(1) contains no language permitting the trial court to extend a PPO on its own initiative, while providing for the procedure and time limits for *a petitioner* to move to extend the PPO. Thus, it appears that MCR 3.707(B)(1)'s drafters made a 'meaningful choice' that a petitioner may initiate an extension of a PPO by motion, not the trial court." *SB*, ___ Mich App at ___, quoting *Dawley v Hall*, 501 Mich 166, 171-172 (2018).

However, when sentencing a respondent for criminal contempt under MCR 3.708(H)(5)(a) for violating a PPO, "the court may impose other conditions to the personal protection order," including an extension. *SB*, ___ Mich App at ___, quoting MCR 3.708(H)(5).

Interpreting the words "other" and "condition" according to their "common, ordinary meaning[s]," "MCR 3.708(H)(5) can be reasonably construed as granting the trial court discretion to impose different or additional stipulations, provisions, qualifications, or prerequisites to the PPO—i.e., to limit or expand the scope of the PPO—when sentencing a respondent for criminal contempt." *SB*, ___ Mich App at ___ (affirming the trial court's sua sponte ten-month extension of respondent's PPO after finding him guilty of criminal contempt and sentencing him to 93 days in jail for violating his PPO). In *SB*, ___ Mich App at ___, the Court "conclude[d] that 'other conditions' under MCR 3.708(H)(5) do indeed include modifications to a PPO's expiration date."

5.11 Enforcement Proceedings

This section discusses proceedings to enforce a PPO issued against an adult or to enforce a minor PPO still in effect when the respondent is 18 years of age or older. For a comprehensive discussion on enforcement proceedings involving minor respondents, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13.

A PPO is a court order that prohibits or requires certain actions by a respondent and provides penalties for its violations. Thus, PPOs are enforced by contempt proceedings. For a detailed discussion of contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

Because PPO violations typically involve past violations of the court's order and situations where the status quo cannot be restored, criminal contempt sanctions are usually imposed. See MCL 600.2950(23); MCL 600.2950a(23). In rare cases (e.g., where the respondent refuses to relinquish property), civil contempt sanctions may be appropriate; in these cases, MCL 600.1715 applies. See MCL 600.2950(25) and MCL 600.2950a(25). Before initiating contempt proceedings, the court must determine whether civil or criminal contempt proceedings are appropriate because a defendant charged with criminal contempt is entitled to be notified of that fact when he or she is notified of the charges. *In re Contempt of Rochlin* (*Kane v Rochlin*), 186 Mich App 639, 649 (1990). For additional information on distinguishing between civil and criminal contempt, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 2, and Contempt Quick Reference Materials, *Comparison of Civil and Criminal Contempt*.

"Proceedings to enforce a [PPO] issued against an adult, or to enforce a minor [PPO] still in effect when the respondent is 18 or older, are governed by [MCR 3.708]." MCR 3.708(A)(2). Specifically, MCR 3.708(A)(1) provides that "[a] [PPO] is enforceable under MCL

600.2950(23), [MCL 600.2950](25), [MCL] 600.2950a(23), [MCL 600.2950a](25), [MCL] 764.15b, and [MCL] 600.1701 *et seq*. For the purpose of this rule, '[PPO]' includes a foreign protection order[74] enforceable in Michigan under MCL 600.2950*l*." MCR 3.708(A)(1).

"[T]he behavior of a PPO respondent is the only relevant consideration in a contempt proceeding[.]" *In re Kabanuk*, 295 Mich App 252, 253 (2012). The person "who holds a PPO is under no obligation to act in a certain way[;] [i]nstead, [when determining if a PPO has been violated,] [the] court must look only to the behavior of the individual against whom the PPO is held." *Id.* at 258.

A. Initiating Contempt Proceedings

Under the PPO statutes and MCR 3.708, contempt proceedings against an adult my be initiated by either law enforcement or the petitioner:

- Criminal contempt proceedings may be initiated by a warrantless arrest under MCL 764.15b.[75] See MCL 600.2950(23); MCL 600.2950a(23).
- If the respondent has not been arrested for an alleged PPO violation, the petitioner may initiate contempt proceedings by filing a motion to show cause. See MCR 3.708(B).

1. Initiating Criminal Contempt Proceedings by Warrantless Arrest

Criminal contempt proceedings may be initiated by a warrantless arrest under MCL 764.15b. See MCL 600.2950(25); MCL 600.2950a(25). MCL 764.15b(1)(a)-(b) authorize a law enforcement officer to arrest an individual named in a PPO without a warrant on reasonable cause to believe that the individual is violating or has violated the order.[76] This sub-subsection discusses the prerequisites to a warrantless arrest on a PPO violation. The warrantless arrest requirements set out in MCL 764.15b do not preclude warrantless arrest on other grounds. See, generally, MCL 764.15 (general provision authorizing warrantless arrest) and MCL 764.15a, (authorizing warrantless arrest for domestic assault).

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[74] For additional information on foreign protection orders, see Section 5.15

[75] However, a petitioner who obtains a PPO does not have a federal due process right to have it enforced even when officers have probable cause to believe that a violation has occurred. *Town of Castle Rock, Colo v Gonzales*, 545 US 748, 768 (2005).

[76] MCL 28.6(5) authorizes state police officers to also make warrantless arrests for PPO violations.

Note: Police officers are required to prepare a standard domestic violence incident report whenever they investigate or intervene in a domestic violence incident, and are required to provide the victim with written notice following the intervention or investigation of the domestic violence incident. MCL 764.15c(1)-(4). A *domestic violence incident* includes "an incident reported to a law enforcement agency involving allegations of . . . [a] violation of a [PPO] issued under . . . MCL 600.2950, or a violation of a valid foreign protection order." MCL 764.15c(7)(c)(*i*). For additional information on police reports in cases involving domestic violence, see Section 3.3.

a. Notice Prerequisites to Warrantless Arrest

"Subject to [MCL 600.2950(22) and MCL 600.2950a(22)]," MCL 600.2950(21) and MCL 600.2950a(21) provide for the immediate enforceability of a PPO anywhere in Michigan "by any law enforcement agency that has received a true copy of the order, is shown a copy of it, or has verified its existence on the [LEIN.]"[77]

If the respondent has not been served with the PPO when the officer responds to an alleged PPO violation, MCL 600.2950(22) and MCL 600.2950a(22) require the law enforcement officer to serve the respondent with the PPO and to give the respondent an opportunity to comply with the PPO before making an arrest.[78] If the respondent fails to immediately comply with the PPO, the law enforcement officer has grounds to make an immediate custodial arrest.[79] MCL 600.2950(22); MCL 600.2950a(22). A similar provision applies to foreign protection orders. See MCL 600.2950*l*(9).[80]

MCL 600.2950(22), MCL 600.2950a(22), and MCL 600.2950*l*(9) "do[] not preclude an arrest under . . . MCL 764.15 [(general authority to arrest)] [or] [MCL] 764.15a

[77] "A [PPO] is effective and immediately enforceable anywhere in this state after being signed by a judge." MCL 600.2950(9); MCL 600.2950a(9).

[78] For additional information on providing the respondent with notice of the PPO, including the law enforcement officer's service of the PPO during an alleged PPO violation, see Section 5.7(C).

[79] See *Kampf v Kampf*, 237 Mich App 377, 385 (1999) ("although a PPO is effective at the time it is signed by a judge, a respondent can avoid arrest for a first violation if the respondent lacks notice and ceases the behavior that violates the order").

[80] For additional information on foreign protection orders, see Section 5.15.

[(arrest for domestic assault)],[81] or a proceeding under . . . MCL 712A.14 [(custodial detention for juvenile)]."

b. Making Warrantless Arrest

MCL 764.15b authorizes a peace officer to make a warrantless arrest "when the peace officer has or receives positive information that another peace officer has reasonable cause to believe all of the following apply:"

- A PPO has been issued under MCL 600.2950, MCL 600.2950a, or is a valid foreign PPO.[82]
- The restrained or enjoined individual is violating or has violated one or more of the acts specifically prohibited in the PPO.
- The PPO was issued under MCL 600.2950 or MCL 600.2950a and "states on its face that a violation of its terms subjects the [restrained or enjoined] individual to immediate arrest and either of the following:

  (*i*) If the individual restrained or enjoined is 18 years of age or older, to criminal contempt of court and, if found guilty of criminal contempt, to imprisonment for not more than 93 days and to a fine of not more than $500.00.[83]

  (*ii*) If the individual restrained or enjoined is less than 18 years of age, to the dispositional alternatives listed in . . . MCL 712A.18."[84] MCL 764.15b(1).

Reasonable cause to make an arrest means "having enough information to lead an ordinarily careful person

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[81] For additional information on arrest for domestic assault under MCL 764.15a, see Section 2.2(E).

[82] For a detailed discussion on the procedures for issuing PPOs under MCL 600.2950 and MCL 600.2950a, see Section 5.6, and for a discussion of foreign protection orders, see Section 5.15.

[83] But see MCL 600.2950a(23), which authorizes for individuals *age 17* or older, the same penalties found in MCL 764.15b(1)(c)(*i*) for individuals *age 18* or older. See 2019 PA 112, effective October 1, 2021, which changed the age in MCL 764.15b(1)(c) from age 17 to age 18.

[84] But see MCL 600.2950a(23), which subjects an individual under *age 17* to the dispositional alternatives in MCL 712A.18. As amended, MCL 764.15b(1)(c)(*ii*) indicates that individuals under *age 18* are subject to the dispositional alternatives under MCL 712A.18. See 2019 PA 112, effective October 1, 2021. For a detailed discussion on the enforcement proceedings for minor respondents, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13.

to believe that the defendant committed a crime." *People v Freeman*, 240 Mich App 235, 236-237 (2000) ("the arresting officer's reliance on the LEIN information provided reasonable cause to believe that [the] defendant had notice of the [PPO] and had violated its provisions, thereby subjecting [the defendant] to [an] immediate arrest").

MCL 28.243(1) requires law enforcement agencies to collect biometric data of individuals arrested for criminal contempt of court for an alleged violation of a PPO.

Note that MCL 764.9c(3)(b) prohibits a police officer from issuing an appearance ticket for persons subject to detainment for violation of a PPO.

c. Arraignment

"If the respondent is arrested for violation of a [PPO] as provided in MCL 764.15b(1), the court in the county where the arrest is made shall proceed as provided in MCL 764.15b(2)-(5), except as provided in this rule." MCR 3.708(C)(1).

MCL 764.15b(2) requires the respondent who was arrested for a PPO violation under MCL 764.15b to be "brought before the family division of the circuit having jurisdiction in the cause within 24 hours after arrest to answer to a charge of contempt for violating the [PPO][.]" "If it appears that a circuit judge will not be available within 24 hours after [the] arrest, the respondent shall be taken, within that time, before a district court, which shall set bond and order the respondent to appear for arraignment before the family division of the circuit court in that county." MCR 3.708(C)(3).[85] "If the district court will not be open within 24 hours after [the] arrest, a judge or district court magistrate shall set bond and order the defendant to appear before the circuit court in the county for a hearing on the charge." MCL 764.15b(3).

Note, however, that the court must not "rescind a [PPO], dismiss a contempt proceeding based on a [PPO], or impose any other sanction for a failure to comply with a time limit prescribed in [MCL 764.15b]." MCL 764.15b(8).

If the respondent is arrested in a county other than the one with which the PPO was issued, the hearing on the

[85] See also MCL 764.15b(3), which contains substantially similar language.

charged PPO violation may take place in either the arraigning court or the issuing court.[86] See MCL 764.15b(5), which provides the "family division of circuit court in each county of [Michigan]" with jurisdiction to conduct contempt proceedings based on a PPO violation issued in Michigan or a valid foreign protection order.

"The [arraigning] court . . . shall notify the court that issued the [PPO] or foreign protection order that the issuing court may request that the defendant be returned to that court for violating the [PPO] or foreign protection order."[87] MCL 764.15b(5).

Committee Tip:

Because after-hours arrests are common in domestic violence cases, the editorial advisory committee suggests for courts to clearly communicate with law enforcement officers and jail officials about procedures following after-hours arrests.

Note also that the warrantless arrest statute and PPO court rules are silent as to the time with which the district court should schedule an arraignment. The editorial advisory committee suggests that the district court schedule the arraignment in circuit court for the earliest possible time and without unnecessary delay. See MCL 764.15b(2)(a) and MCR 3.708(F)(1)(a), which require the circuit court to set a hearing for an alleged PPO violation within 72 hours after the arrest, and MCR 6.104(A), which requires district courts[88] and circuit courts to arraign an individual without unnecessary delay when the individual is arrested in a criminal case and who remains in custody.

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[86] "A contempt proceeding brought in a court other than the one that issued the [PPO] shall be entitled 'In the Matter of Contempt of [Respondent].'" MCR 3.708(C)(2). The court clerk must provide the issuing court with a copy of all documents pertaining to the contempt proceeding. *Id.*

[87] "If the court that issued the [PPO] or foreign protection order requests that the defendant be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the defendant to that county." MCL 764.15b(5).

[88] Effective January 1, 2015, ADM File No. 2014-18 amended MCR 6.001(B) to provide, in part, that MCR 6.104(A), which requires courts to arraign an individual without unnecessary delay when the individual is arrested in a criminal case and remains in custody, also applies to "matters of procedure in criminal cases cognizable in the district courts."

2. Motion to Show Cause

"If the respondent violates the [PPO], the petitioner may file a motion, supported by appropriate affidavit, to have the respondent found in contempt." MCR 3.708(B)(1). The court may not charge a fee for the filing of such motion. *Id.*

"If the petitioner's motion and affidavit establish a basis for a finding of contempt, the court shall either:

> (a) order the respondent to appear at a specified time to answer the contempt charge; or
>
> (b) issue a bench warrant for the arrest of the respondent." MCR 3.708(B)(1).

MCR 3.708(B)(2) requires the petitioner to "serve the motion to show cause and the order on the respondent by personal service at least 7 days before the show cause hearing."

B. First Appearance or Arraignment Following Warrantless Arrest or Motion to Show Cause

At the respondent's first court appearance before the circuit court whether for an arraignment under MCL 764.15b, or for a show cause proceeding, the court must:

> "(1) advise the respondent of the alleged violation,
>
> (2) advise the respondent of the right to contest the charge at a contempt hearing,
>
> (3) advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated a personal protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one,
>
> (4) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority,
>
> (5) set a reasonable bond pending a hearing of the alleged violation,[89]

> (6) take a guilty plea as provided in [MCR 3.708](E) or schedule a hearing as provided in [MCR 3.708](F).
>
> As long as the respondent is either present in the courtroom or has waived the right to be present, on motion by either party, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location."[90] MCR 3.708(D).

The notice of violation should advise the respondent whether the proceedings involve allegations of criminal or civil contempt and "the specific offense with which he [or she] is charged." *In re Contempt of Rochlin* (*Kane v Rochlin*), 186 Mich App 639, 649 (1990).

1. Pleas of Guilty

MCR 3.708(E) permits a respondent to plead guilty to a PPO violation. Before a court accepts a guilty plea, while "speaking directly to the respondent and receiving the respondent's response," it must do the following:

> "(1) advise the respondent that by pleading guilty the respondent is giving up the right to a contested hearing and, if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in [MCR 3.708](D)(3),[91]
>
> (2) advise the respondent of the maximum possible jail sentence for the violation,
>
> (3) ascertain that the plea is understandingly, voluntarily, and knowingly made, and

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[89] "The court must set a reasonable bond pending the [violation] hearing unless the court determines that release will not reasonably ensure the safety of the individuals named in the [PPO]." MCR 3.708(F)(1)(a). "If [the] respondent is released on bond pending the [violation] hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the individuals named in the [PPO], including continued compliance with the [PPO]. The release order shall also comply with MCL 765.6b." MCR 3.708(F)(1)(b). MCL 765.6b(1) and MCR 6.106(D) authorize the court to release a defendant subject to conditions it determines are appropriate to reasonably ensure the defendant's appearance or the public's safety. See Section 3.5(C) for additional information on ordering conditional releases.

[90] "The use of videoconferencing technology under [MCR 3.708] must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court." MCR 3.708(I).

[91] MCR 3.708(D)(3) requires the court, or the local funding unit's appointing authority if it has determined that it will provide representation for alleged violations of PPOs, to appoint the respondent a lawyer at public expense if the court determines that it may sentence the respondent to jail, and the respondent wants a lawyer but is financially unable to retain one.

(4) establish factual support for a finding that the respondent is guilty of the alleged violation." MCR 3.708(E).

2. Bond Requirements

"The court must set a reasonable bond pending the [violation] hearing unless the court determines that release will not reasonably ensure the safety of the individuals named in the [PPO]." MCR 3.708(F)(1)(a).

The bond must be set within 24 hours after the respondent's arrest for a PPO violation. MCL 764.15b(2)(b). See also MCR 3.708(D)(5) and MCR 3.708(F)(1)(a), which also require the court to set a reasonable bond pending a violation hearing.

If a circuit court judge is not available within 24 hours after a respondent's arrest, the district court must set bond and "order the respondent to appear for arraignment before the family division of the circuit court in that county." MCR 3.708(C)(3). See also MCL 764.15b(3). "If the district court will not be open within 24 hours after the [respondent's] arrest, a judge or district court magistrate shall set bond and order the [respondent] to appear before the circuit court in the county for a hearing on the charge." MCL 764.15b(3).

"If a respondent is released on bond pending the [violation] hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the individuals named in the [PPO], including continued compliance with the [PPO]. The release order shall also comply with MCL 765.6b."[92] MCR 3.708(F)(1)(b).

3. Timing of Violation Hearing

"Following the respondent's appearance or arraignment, the court shall . . . [s]et a date for the [violation] hearing at the earliest practicable time except as required under MCL 764.15b." MCR 3.708(F)(1).

"The [violation] hearing of a respondent being held in custody for an alleged violation of a [PPO] must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting

[92] MCL 765.6b(1) and MCR 6.106(D) authorize the court to release a defendant subject to conditions it determines are appropriate to reasonably ensure the defendant's appearance or the public's safety. See Section 3.5(C) for additional information on ordering conditional releases.

attorney."[93] MCR 3.708(F)(1)(a). See also MCL 764.15b(2)(a), which contains substantially similar language.

In all contempt proceedings involving an alleged PPO violation, the court may extend the time for holding the violation hearing pending the outcome of a separate prosecution "[i]f the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, upon motion of the prosecutor[.]"[94] MCR 3.708(F)(1)(c).

> **Note:** State and federal constitutional guarantees against double jeopardy are of particular concern in contempt proceedings for alleged PPO violations because the behavior may also provide the basis for separate criminal charges. For a detailed discussion on the interplay between double jeopardy and contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 4.

The court *must* extend the violation hearing beyond the time period for holding the violation hearing (72 hours in arrest cases; as soon as practicable in appearance cases) but "for not less than 14 days or a lesser period requested if the prosecuting attorney [who is prosecuting the contempt proceeding] moves for adjournment." MCL 764.15b(7).

Note, however, that the court must not "rescind a [PPO], dismiss a contempt proceeding based on a [PPO], or impose any other sanction for a failure to comply with a time limit prescribed in [MCL 764.15b]." MCL 764.15b(8).

4. Notification Requirements

Following the respondent's appearance or arraignment, the court must provide notice to:

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[93] Note that there are no statutory or court rule provisions for adjournment or postponement on motion by an attorney retained by the petitioner. See MCL 764.15b(7), which requires a prosecutor to prosecute criminal contempt proceedings "unless the party who procured the [PPO] retains his or her own attorney for the criminal contempt proceeding or the prosecuting attorney determines that the [PPO] was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation." See also MCR 3.708(G).

[94] Note that the "criminal penalty provided for under [MCL 600.2950 and MCL 600.2950a] may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct." MCL 600.2950(23); MCL 600.2950a(23). See also MCL 600.2950/(8), which contains substantially similar language for foreign protection orders.

- "the prosecuting attorney of a criminal contempt proceeding." MCR 3.708(F)(2). See also MCL 764.15b(2)(c); MCL 764.15b(4)(b).

- "the petitioner and his or her attorney, if any, of the contempt proceeding and direct the party to appear at the hearing and give evidence on the charge of contempt." MCR 3.708(F)(3). See also MCL 764.15b(2)(d); MCL 764.15b(4)(a).

C. Prosecution of Criminal Contempt Proceeding

The prosecuting attorney must prosecute a criminal contempt proceeding, unless:

- the petitioner retains his or her own attorney for the criminal contempt proceeding. MCL 764.15b(7); MCR 3.708(G).

- the prosecutor determines that the PPO was not violated. MCL 764.15b(7).

- the prosecutor decides that it would not be in the interests of justice to prosecute the criminal contempt violation. MCL 764.15b(7).

See *In re LT*, 342 Mich App 126, 138 (2022) ("[T]he trial court denied [the respondent] the right to a fair hearing before a neutral judge because the court allowed petitioner to prosecute the contempt proceedings unrepresented by counsel, assisted petitioner with the presentation of his case, and otherwise rendered a verdict tainted by the court's prior involvement with the parties.").

"If the prosecuting attorney prosecutes the criminal contempt proceeding, the court may dismiss the proceeding upon motion of the prosecuting attorney for good cause shown." MCL 764.15b(7). Note, however, that the court must not "dismiss a contempt proceeding based on a [PPO] . . . for a failure to comply with a time limit prescribed in [MCL 764.15b]." MCL 764.15b(8).

D. Violation Hearing

1. Jurisdiction

"The family division of circuit court in each county of [Michigan] has jurisdiction to conduct contempt proceedings based upon a violation of a [PPO] . . . issued by the circuit court in any county of this state or upon violation of a foreign protection order." MCL 764.15b(5).[95]

If the respondent is arrested in a county other than the one within which the PPO was issued, the hearing on the charged PPO violation may take place in either the arraigning court or the issuing court. However, "[t]he [arraigning] court shall notify the court that issued the [PPO] or foreign protection order that the issuing court may request that the defendant be returned to that court for violating the [PPO] or foreign protection order." MCL 764.15b(5).

> **Note:** "If the court that issued the [PPO] or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county." MCL 764.15b(5).

"A contempt proceeding brought in a court other than the one that issued the [PPO] shall be entitled 'In the Matter of Contempt of [Respondent].'" MCR 3.708(C)(2). The court clerk must provide the issuing court with a copy of all documents pertaining to the contempt proceeding. *Id.*

"[A] trial court lacked legal authority to try [the respondent] for criminal contempt unless the action was prosecuted by a prosecuting attorney or an attorney retained by [the petitioner]." *In re LT*, 342 Mich App 126, 139 (2022) (holding that "[t]he absence of a proper prosecutor constituted a jurisdictional defect rendering [the respondent's] conviction void"; when an individual authorized to prosecute a respondent for criminal contempt does not appear at the hearing, the court must dismiss the matter "for want of jurisdiction").

2. Hearing Procedures

MCR 3.708(H)(1)-(4) sets out the procedures for hearings on alleged PPO violations:

> "(1) *Jury*. There is no right to a jury.
>
> (2) *Conduct of the Hearing*. The respondent has the right to be present at the [violation] hearing, to present evidence, and to examine and cross-examine witnesses. As long as the respondent is either present in the courtroom or has waived the right to be present, on motion by either party, and

[95] MCL 764.15b(6) contains similar provisions applicable to minor PPO proceedings. For a discussion on enforcing a minor PPO, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13.

> with the consent of the parties, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location.[96]
>
> (3) *Evidence*; *Burden of Proof*. The rules of evidence apply to both criminal and civil contempt proceedings. The petitioner or the prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence.[97]
>
> (4) *Judicial Findings*. At the conclusion of the hearing, the court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record."

The court must not "rescind a [PPO], dismiss a contempt proceeding based on a [PPO], or impose any other sanction for a failure to comply with a time limit prescribed in [MCL 764.15b]." MCL 764.15b(8).

3. Sentencing for Criminal Contempt

"If the respondent pleads or is found guilty of criminal contempt, the court shall impose a sentence of incarceration for not more than 93 days and may impose a fine of not more than $500.00." MCR 3.708(H)(5)(a). "[MCR 3.708(H)(5) also] grants the trial court discretionary authority to impose other conditions to a PPO in connection with its sentence only after a respondent is convicted of criminal contempt." *In re SB*, ___ Mich App ___, ___ (2024) (affirming the trial court's sua sponte ten-month extension of respondent's PPO as a condition of his sentence after convicting him of criminal contempt and sentencing him to 93 days in jail).[98] See also MCL 600.2950(23) and MCL 600.2950a(23), which contain similar criminal

[96] "The use of videoconferencing technology under [MCR 3.708] must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court." MCR 3.708(I).

[97] The petitioner may retain his or her own attorney for the criminal contempt proceedings. See MCR 3.708(G) and MCL 764.15b(7), which require the prosecuting attorney to prosecute criminal contempt proceedings initiated by a warrantless arrest or a show cause order unless the party retains his or her own attorney.

[98] See Section 5.10 for more information on extending a PPO.

contempt sanctions.[99] The court may also use its power under the Revised Judicature Act, MCL 600.1701 *et seq.*, to "place an individual who is guilty of criminal contempt on probation in the manner provided for persons guilty of a misdemeanor as provided in [MCL 771.1 to MCL 771.14a]."[100] MCL 600.1715(1). See also MCR 3.708(A)(1).

Committee Tip:

Because domestic violence can have lethal consequences, safety is of primary concern in imposing a sentence upon conviction of a PPO violation. There are many danger signals to look for when making a safety assessment. This is known as assessing any present "lethality factors." For additional information on lethality indicators, see the Batterer Intervention Standards for the State of Michigan, Section 5.2, at http://www.biscmi.org/resources/michigan-standards/.

As part of the sentence for a conviction of criminal contempt, including probation, the court may order a person who is found guilty of criminal contempt for violation of a PPO to reimburse the state or a local unit of government for expenses incurred in relation to the PPO violation. MCL 769.1f(1)(i); MCL 769.1f(5). Reimbursable expenses incurred in relation to a PPO violation include but are not limited to the expenses for an emergency response and for prosecution. MCL 769.1f(1). MCL 769.1f(4) requires the payment of any court-ordered reimbursement to be made immediately, unless the court provides for payment within a specified period or in specified installments. For additional information on ordering

[99] As noted above, a PPO issued under MCL 600.2950 or MCL 600.2950a is enforceable under MCL 764.15b (warrantless arrest when a PPO is violated). The penalties under MCL 764.15b(1)(c) (imprisonment for not more than 93 days and fine of not more than $500) comport with those in MCL 600.2950(23), MCL 600.2950a(23), and MCR 3.708(H)(5)(a).

[100] As for the award of attorney fees in cases of PPO violations, the *LAC* Court agreed with the rationale in *Eldridge v Eldridge*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2008 (Docket No. 278470), with regard to the taxation of costs: "'[MCR 3.708(H)(5)] distinguishes between the sentences available for criminal (subsection (a)) and civil (subsection (b)) contempt.'" *LAC*, ___ Mich App at ___, quoting *Eldridge*, unpub op at 2-3. "'For criminal contempt, the sanctions are limited to a sentence of 93 days and a fine of $500, with no reference to the statutory sanctioning scheme.'" *LAC*, ___ Mich App at ___, quoting *Eldridge*, unpub op at 2-3. "'In the case of civil contempt, [MCR 3.708(H)(5)(b)] explicitly adopts the sanctions provided in MCL 600.1715 and MCL 600.1721.'" *LAC*, ___ Mich App at ___, quoting *Eldridge*, unpub op at 2-3. "'The sanctions provided for criminal contempt are exclusive of the statutory sanctions referenced for civil contempt.'" *LAC*, ___ Mich App at ___, quoting *Eldridge*, unpub op at 2-3.

reimbursement for state and local government enforcement of PPO violations, including a list of reimbursable expenses the court may order, see MCL 769.1f.

However, "[n]either [MCL 600.2950(23)] nor [MCR 3.708(H)(5)(a)] provide an avenue for the assessment of attorney fees" against a respondent "for [petitioner's] expenses in bringing the show-cause motion" in a criminal contempt proceeding for a domestic PPO violation. *LAC v GLS*, ___ Mich App ___, ___ (2024) (reversing the trial court's award of attorney fees to petitioner under MCR 3.206(D)(2)(b)). In Michigan, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted). MCL 600.2950(23) and MCR 3.708(H)(5)(a) both limit the criminal contempt penalty for violating a PPO to incarceration for a maximum of 93 days, and a maximum fine of $500.[101] *LAC*, ___ Mich App at ___. "Both statute and court rule provide a specific punishment for a PPO violation that does *not* include the assessment of attorney fees." *LAC*, ___ Mich App at ___. Further, because the case "did not involve divorce, separate maintenance, an affirmation of marriage, annulment, or paternity," the rules in MCR 3.200 *et seq.* did not apply and "[t]he trial court's reliance on MCR 3.206(D)(2)(b) was therefore erroneous." *LAC*, ___ Mich App at ___.

In addition to sentencing the respondent for a PPO violation:

- the court may also impose other conditions to the PPO. MCR 3.708(H)(5).

- the court may impose other penalties for other criminal offenses arising from the same conduct. MCL 600.2950(23); MCL 600.2950a(23).MCL 769.16a(1) requires the clerk of the court to report to the Michigan State Police the final disposition of criminal contempt charges for violation of a PPO or a foreign protection order.

If fingerprints have not already been taken, the court must order as part of the sentence for a conviction of criminal contempt "that the fingerprints of the person convicted be taken and forwarded to the [Michigan State Police]."[102] MCL

[101] These penalties mirror those in MCL 764.15b(1)(c).

[102] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243 and several related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to "biometric data" rather than "fingerprints[.]"

769.16a(5). The Michigan State Police must collect and file "criminal history record information on all persons arrested" for criminal contempt for violation of a PPO or a foreign protection order.[103] MCL 28.242(1).

4. Sentencing for Civil Contempt

"If the respondent pleads or is found guilty of civil contempt, the court shall impose a fine or imprisonment as specified in MCL 600.1715."[104] MCR 3.708(H)(5)(b). See also MCL 600.2950(25) and MCL 600.2950a(25), which indicate that PPOs are enforceable under the Revised Judicature Act, MCL 600.1701 et seq.[105]

Specifically, MCL 600.1715 provides:

> "(1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days or both, in the discretion of the court. . . .
>
> (2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment."

In addition to sentencing the respondent to jail and/or a fine for a PPO violation, the court may also "impose other conditions to the [PPO]." MCR 3.708(H)(5).

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[103] If a conviction is vacated or the defendant is otherwise found not guilty after a previous conviction, the clerk of the court must report that information to Michigan State Police and the Michigan Department of Corrections. Those departments must enter that information into each database maintained for recording criminal convictions and remove all information about the defendant's convictions from each database available to the public. MCL 769.16a(8).

[104] For information on sentencing minor respondents who refuse or fail to comply with a PPO, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13.

[105] The general contempt provisions of the Revised Judicature Act authorize the imposition of either criminal or civil contempt sanctions, both of which can involve imprisonment and fines. For a detailed discussion of the Revised Judicature Act, MCL 600.1701 *et seq.*, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

5.12 Appeals

"Except as provided by this rule, appeals involving [PPO] matters must comply with subchapter 7.200 [of the Michigan Court Rules]. Appeals involving minor [PPOs] under the Juvenile Code must additionally comply with MCR 3.993."[106] MCR 3.709(A). See also MCR 3.981, which requires compliance with MCR 3.709 and MCR 3.993 in minor PPO appeals. MCR 3.993 provides, in pertinent part:

> "(A) The following orders are appealable to the Court of Appeals by right:
>
> * * *
>
> (7) any final order.
>
> In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts.
>
> (B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.
>
> * * *
>
> (D) Request and Appointment of Counsel.
>
> > (1) A request for appointment of appellate counsel must be made within 21 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion.
> >
> > (2) If a request for appointment of appellate counsel is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed. The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule.
> >
> > (3) The order described in subrule (D)(2) must be entered on a form approved by the State Court Administrator's Office, entitled 'Claim of Appeal and Order Appointing Counsel,' and the court must

[106] "Minor personal protection action" refers to a PPO action in which the respondent is under age 18. MCR 3.702(6)-(7). For additional information regarding a minor as a party to a personal protection proceeding, see Section 5.3.

> immediately send to the Court of Appeals a copy of the Claim of Appeal and Order Appointing Counsel, a copy of the judgment or order being appealed, and a copy of the complete register of actions in the case. The court must also file in the Court of Appeals proof of having made service of the Claim of Appeal and Order Appointing Counsel on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/ recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.[107]

(E) Transcripts. If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense." MCR 3.993.

Although mediation may be ordered during the pendency of certain appeals, "[a]ppeals of domestic relations actions and *protection matters* are excluded from mediation under [MCR 7.213]." MCR 7.213(A)(1)(a) (emphasis added).

A. Appeals From Entry of PPO

MCR 3.709(B) provides:

> "(1) Either party has an appeal of right from
>
> (a) an order granting or denying a [PPO] after a hearing under subrule 3.705(B)(6),[108] or
>
> (b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.
>
> (2) Appeals of all other orders are by leave to appeal."

"[A]n appeal taken from the entry of a [PPO] is [not] rendered moot solely due to the expiration of the PPO"; "identifying an improperly issued PPO as rescinded is a live controversy," and "an appeal challenging a PPO, with an eye toward determining whether a PPO should be updated in [the Law Enforcement Information Network] as rescinded, need not fall within an exception to the mootness doctrine to warrant appellate review; instead, such a dispute is

[107] MCR 7.204, in part, prescribes the time requirements for filing an appeal.

[108] For information on a hearing under MCR 3.705(B)(6), see Section 5.6(F).

simply not moot." *TM v MZ*, 501 Mich 312, 318-320 (2018) (holding that "the mere fact that the instant PPO expired during the pendency of this appeal does not render this appeal moot").

Unpreserved issues on appeal in PPO proceedings are reviewed for plain error. *HMM v JS*, ___ Mich App ___, ___ (2024). Although the "raise-or-waive rule" applies in general civil cases and PPO proceedings are civil in nature, plain-error review applies to PPO proceedings "because of the potential criminal consequences for a respondent's violation of a PPO, and the liberty interests at stake." *Id.* at ___.

B. Appeals From Finding After Violation Hearing

MCR 3.709(C) provides:

> "(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.
>
> (2) All other appeals concerning violation proceedings are by application for leave."

A trial court's sentencing order on a criminal contempt conviction for a PPO violation—including an extension of the PPO's expiration date as a condition of the sentence[109]—is appealable as of right under MCR 3.709(C)(1). *In re SB*, ___ Mich App ___, ___ (2024) ("[A]lthough an extension of a PPO by itself is normally only appealable by leave granted, the order imposed here as a condition of respondent's sentence is encompassed in the instant appeal as of right from this sentence."). In other words, "[b]ecause the [trial] court clearly contemplated the PPO's extension as a condition of its sentence, respondent's appeal of the extension is an appeal from respondent's sentence for criminal contempt entered after the contested hearing, which would then be by right." *Id.* at ___.

5.13 Issuing a PPO in Domestic Relations Proceedings

MCL 552.14 and MCR 3.207 specifically authorize courts to issue PPOs incident to domestic relations proceedings. For a discussion of procedures related to issuing PPOs, see Section 5.6.

On a party's motion, the court may issue a PPO "at any time after the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance[.]" MCL 552.14(1).

[109] For information on extending a PPO, see Section 5.10.

The court may also issue a PPO on a party's motion "before or at the time of a judgment of divorce, order for separate maintenance, or decree of annulment, regardless of whether a [PPO] [was] issued under [MCL 552.14(1)][.]" MCL 552.14(2).

When issuing a PPO in a domestic relations proceeding, the court should do so "as provided in subchapter 3.700 [of the Michigan Court Rules]." MCR 3.207(A).

Note that "[a] [PPO] takes precedence over any existing custody or parenting time order until the [PPO] has expired, or the court having jurisdiction over the custody or parenting time order modifies the custody or parenting time order to accommodate the conditions of the [PPO]." MCR 3.706(C)(3).

5.14 Peace Bonds

A brief discussion on peace bonds is contained in this section. For a more comprehensive discussion on peace bonds, see the Proceedings to Prevent Crime Act, MCL 772.1 *et seq.*

A peace bond is a court order issued by a district or municipal court judge that requires a person to keep the peace. MCL 772.1.

A. Filing of Complaint

To initiate peace bond proceedings, MCL 772.2 requires the complainant to file a written complaint under oath in district or municipal court alleging that a person has threatened to commit an offense against a person or property of another.

B. Court Proceedings

On filing of a complaint, the judge must "examine on oath the complainant and any witnesses who may be produced." MCL 772.2. "If the judge determines from the examination that there is just reason to believe the person will commit an offense described in [MCL 772.2], the judge may enter an order directing the person to appear on a date certain within 7 days."[110] MCL 772.3. "If upon examination the court determines there is not just cause to believe that an offense will be committed by the person against whom the complaint is made, the person shall promptly be discharged." MCL

[110] "If the person fails to appear as ordered, the court shall issue a warrant[or] [a]lternatively, the court may issue a warrant directed to the sheriff or any peace officer, reciting the substance of the complaint and commanding that the person be promptly apprehended and brought before the court." MCL 772.3.

772.7. MCL 772.7 also requires the court to "order the complainant to pay the costs of the prosecution" where "the court finds the complaint unfounded, frivolous, or malicious."

If the person named in the complaint does not agree to post a recognizance, the court must conduct a trial to determine if a recognizance will be required. MCL 772.4(1). "The person has a right to a trial by jury[, or] [t]he person may, with the consent of the complainant and approval of the court, waive a determination of the facts by a jury and elect to be tried before a judge without a jury." *Id.* "If the judge or jury finds the accused is likely to breach the peace, the court shall require the accused to enter into a recognizance with sufficient sureties approved by the court to keep the peace towards all the people of this state, and especially towards the person or persons named in the complaint." MCL 772.4(2). MCL 772.4(3) also provides the court or jury with the authority to "return a special verdict that the complaint and accusation is groundless or malicious."

"If the person so ordered to recognize refuses or neglects to provide that recognizance, the court shall commit the person to the county jail during the period for which security was required, or until the person provides that recognizance." MCL 772.6. Note, however, that the court must hold a hearing to determine a person's ability and good faith effort to pay a recognizance before the court may incarcerate a person for failing to pay the recognizance, and "[i]n determining whether to incarcerate the person, the court shall also consider the person's employment status, earning ability, and financial resources; the willfulness of the person's failure to pay the recognizance; and any other special circumstances that may have a bearing on the person's ability to pay the recognizance." *Id.*

C. Issuance of Peace Bond

"The recognizance shall be in a sum set by the court, for a period as the court directs, but not exceeding 5 years."[111] MCL 772.4(2). The court may also include specific conditions in the recognizance. *Id.*

"Upon complying with the order of the court, the party complained of shall be discharged." MCL 772.5. However, "[t]he person ordered to post the recognizance may, at any time pursuant to the rules of the court, petition the court to reduce the recognizance or eliminate the requirement of a recognizance." MCL 772.4(2).

[111] "In determining the amount of the recognizance, the court shall consider the person's employment status, earning ability, and financial resources, and any other special circumstances that may have a bearing on the person's ability to provide that recognizance." MCL 772.4(2).

MCL 772.13 requires the court clerk to file a true copy of a peace bond "with the law enforcement agency or agencies having jurisdiction of the area in which the complainant resides or works."

D. Violation of Recognizance or Peace Bond

"If a peace officer has reason to believe that the conditions of a recognizance required under this chapter are being violated in his or her presence or were violated, the peace officer shall arrest the person and hold him or her for presentation to the court on the next day." MCL 772.13a.

"If the court is presented with allegations that the person violated 1 or more conditions of a peace bond, the court may issue an order directing the person to appear before the court on a date certain within 7 days or may issue a warrant. If the person fails to appear as ordered, the court shall issue a warrant. If the person appears and denies violating any conditions of the recognizance, the court shall schedule a hearing to be held within 7 days. The hearing shall be conducted in the same manner as a probation violation hearing."[112] MCL 772.13b.

"If the court finds by admission or after a hearing that the conditions of the recognizance were violated, the court shall order the recognizance forfeited. The court may also require an additional recognizance with sufficient sureties to secure the peace. If the person fails to recognize, the court shall proceed as set forth in [MCL 772.6[113]]. If a recognizance is forfeited, the court, upon a petition by the person, may remit a portion of the penalty, as the circumstances render just and reasonable." MCL 772.14.

"In addition to forfeiting the bond, a person who is required by an order issued under this chapter to keep the peace toward a spouse, former spouse, person with whom he or she has had a child in common, or person residing or having resided in the same household and who fails to comply with that order, is subject to the contempt powers of the court and may be imprisoned for not more than 90 days or fined not more than $500.00, or both." MCL 772.14a.

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[112] For information on probation violation hearings, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 2.

[113] "If the person so ordered to recognize refuses or neglects to provide that recognizance," MCL 772.6 provides the court with the authority to "commit the person to the county jail during the period for which security was required, or until the person provides that recognizance." Note, however, that the court must hold a hearing to determine a person's ability and good faith effort to pay a recognizance before the court may incarcerate a person for failing to pay the recognizance, and "[i]n determining whether to incarcerate the person, the court shall also consider the person's employment status, earning ability, and financial resources; the willfulness of the person's failure to pay the recognizance; and any other special circumstances that may have a bearing on the person's ability to pay the recognizance." *Id.*

5.15 Foreign Protection Order

MCL 600.1021(1)(k) provides the family division of circuit court with sole and exclusive jurisdiction over cases involving foreign protection orders enforceable in Michigan under MCL 600.2950*l*.

MCL 600.2950h(a) defines a *foreign protection order* as "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person." Note that MCL 600.2950h(a)'s definition of the term *foreign protection order* does not include an order issued in another country.

"[A] [f]oreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." MCL 600.2950h(a).

A. Validity of Foreign Protection Order

A foreign protection order is deemed valid if it meets all of the following conditions:

> "(a) The issuing court had jurisdiction over the parties and subject matter under the laws of the issuing state, tribe, or territory.[114]
>
> (b) Reasonable notice and opportunity to be heard is given to the respondent sufficient to protect the respondent's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided to the respondent within the time required by state or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." MCL 600.2950i(1).

[114] [18 USC 2265(e)] "authorizes Indian tribal courts to issue and enforce *civil* protection orders against *any person*—Indian or non-Indian, tribal member or non-tribal member—in matters arising in the Indian country of an Indian tribe." *Spurr v Pope*, 936 F3d 478, 486 (CA 6, 2019) (upholding the tribal court's issuance of a civil PPO against an individual who was neither an Indian nor a tribal member).

B. Enforcement Proceedings

"A valid foreign protection order shall be accorded full faith and credit by the court and shall be subject to the same enforcement procedures and penalties as if it were issued in this state."[115] MCL 600.2950j(1). Law enforcement officers, prosecuting attorneys, and courts must enforce a foreign protection order using the same procedures used to enforce a PPO issued in Michigan.[116] MCL 600.2950*l*(1). For a detailed discussion of enforcement procedures for PPOs issued in Michigan, see Section 5.11.

> **Note:** MCL 600.2950*l*(10) provides a "law enforcement officer, prosecutor, or court personnel acting in good faith [] immun[ity] from civil and criminal liability in any action arising from the enforcement of a foreign protection order." "This immunity does not in any manner limit or imply an absence of immunity in other circumstances." MCL 600.2950*l*(10).

A party may assert any of the following as affirmative defenses when responding to enforcement proceedings:

> "(a) Lack of jurisdiction by the issuing court over the parties or subject matter.
>
> (b) Failure to provide notice and opportunity to be heard.
>
> (c) Lack of filing of a complaint, petition, or motion by or on behalf of a person seeking protection in a civil foreign protection order." MCL 600.2950i(2).

A violation of a foreign protection order may also subject the offender to federal criminal prosecution under the Violence Against Women Act (VAWA), 34 USC 12291 *et seq*.[117]See also 18 USC 2261 *et seq*. The VAWA specifically provides for protections against:

- a person traveling in interstate or foreign commerce or entering or leaving Indian country "or is present within the special maritime and territorial jurisdiction of the United States," with the intent to violate the part of a protection order "that prohibits or provides protection against

[115] See 18 USC 2265. See Section 5.15(C) for more information on full faith and credit.

[116] Note that "[a] foreign protection order that is a conditional release order or a probation order issued by a court in a criminal proceeding shall be enforced pursuant to [MCL 600.2950m], [MCL 764.15(1)(g)], the uniform criminal extradition act, . . . MCL 780.1 to [MCL] 780.31, or the uniform rendition of accused persons act, . . . MCL 780.41 to [MCL] 780.45." MCL 600.2950*l*(2). See Section 3.5 for additional information on conditional releases, and Section 3.6 for additional information on probation orders.

[117]Formerly classified to 42 USC 13925 *et seq*. The VAWA was reauthorized, effective October 1, 2022.

violence, threats, or harassment against, contact or communication with, or physical proximity to, another person or the pet, service animal, emotional support animal, or horse of that person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued . . . ." 18 USC 2262(a)(1).

- "[a] person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person or the pet, service animal, emotional support animal, or horse of that person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued . . . ." 18 USC 2262(a)(2).

Penalties for violations of 18 USC 2262(a)(1) or (2) are found in 18 USC 2262(b).

1. Presenting Officer With Copy of Foreign Protection Order

MCL 600.2950*l*(3) addresses enforcement requirements where a law enforcement officer is presented with a copy of a foreign protection order:

> "A law enforcement officer may rely upon a copy of any protection order that appears to be a foreign protection order and that is provided to the law enforcement officer from any source if the putative foreign protection order appears to contain all of the following:
>
> (a) The names of the parties.
>
> (b) The date the protection order was issued, which is prior to the date when enforcement is sought.
>
> (c) The terms and conditions against [the] respondent.
>
> (d) The name of the issuing court.
>
> (e) The signature of or on behalf of a judicial officer.

> (f) No obvious indication that the order is invalid, such as an expiration date that is before the date enforcement is sought."

In determining whether a presented order is valid, MCL 600.2950*l*(4) permits a law enforcement officer to rely on:

- a petitioner's statement that the foreign protection order that the petitioner is presenting is effective, and
- the petitioner's or the respondent's statement verifying that the respondent received notice of the protection order.

> **Note:** "The fact that a putative foreign protection order that an officer has been shown cannot be verified on [LEIN] or the NCIC national protection order file is not grounds for a law enforcement officer to refuse to enforce the terms of the putative foreign protection order, unless it is apparent to the officer that the putative foreign protection order is invalid." MCL 600.2950*l*(4).

"When enforcing a foreign protection order, the law enforcement officer shall maintain the peace and take appropriate action with regard to any violation of criminal law. The penalties provided for under [MCL 600.2950] and [MCL 600.2950a] and . . . the probate code of 1939, . . . MCL 712A.1 to [MCL] 712A.32, may be imposed in addition to a penalty that may be imposed for any criminal offense arising from the same conduct." MCL 600.2950*l*(8).

2. No Copy of Foreign Protection Order Provided

MCL 600.2950*l*(5) addresses requirements when a law enforcement officer is asked to enforce a foreign protection order but is not presented with such an order:

> "If a person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, the law enforcement officer shall attempt to verify through [LEIN], or the NCIC protection order file, administrative messaging, contacting the court that issued the foreign protection order, contacting the law enforcement agency in the issuing jurisdiction, contacting the issuing jurisdiction's protection order registry, or any other method the law enforcement officer believes to be reliable, the

existence of the foreign protection order and all of the following:

(a) The names of the parties.

(b) The date the foreign protection order was issued, which is prior to the date when enforcement is sought.

(c) Terms and conditions against [the] respondent.

(d) The name of the issuing court.

(e) No obvious indication that the foreign protection order is invalid, such as an expiration date that is before the date enforcement is sought."

If a person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, "the law enforcement officer shall enforce the foreign protection order if the existence of the order and the information listed under [MCL 600.2950*l*](5) are verified, subject to [MCL 600.2950*l*](9)." MCL 600.2950*l*(6).

"If a person seeking enforcement of a foreign protection order does not have a copy of the foreign protection order, and the law enforcement officer cannot verify the order as described in [MCL 600.2950*l*](5), the law enforcement officer shall maintain the peace and take appropriate action with regard to any violation of criminal law." MCL 600.2950*l*(7).

3. No Evidence of Respondent Being Served Foreign Protection Order

A law enforcement officer must serve a respondent with a copy of a foreign protection order if the respondent has not already been served:

"If there is no evidence that the respondent has been served with or received notice of the foreign protection order, the law enforcement officer shall serve the respondent with a copy of the foreign protection order, or advise the respondent about the existence of the foreign protection order, the name of the issuing court, the specific conduct enjoined, the penalties for violating the order in [Michigan], and, if the officer is aware of the penalties in the issuing jurisdiction, the penalties

for violating the order in the issuing jurisdiction." MCL 600.2950*l*(9).

Once notice is given, the law enforcement officer must:

- "enforce the foreign protection order[;]"
- "provide the petitioner, or cause the petitioner to be provided, with proof of service or proof of oral notice[;]"
- "provide the issuing court, or cause the issuing court to be provided, with a proof of service or proof of oral notice, if the address of the issuing court is apparent on the face of the foreign protection order or otherwise is readily available to the officer[;]"
- "provide the [LEIN] or the NCIC protection order file entering agency, or cause the [LEIN] or NCIC protection order file entering agency to be provided, with a proof of service or proof of oral notice" where "the foreign protection order is entered into LEIN or the NCIC protection order file." MCL 600.2950*l*(9).

"If there is no evidence that the respondent has received notice of the foreign protection order, the respondent shall be given an opportunity to comply with the foreign protection order before the officer makes a custodial arrest for violation of the foreign protection order[,]" and if the respondent fails to immediately comply with the foreign protection order, the law enforcement officer has grounds to make an immediate custodial arrest. MCL 600.2950*l*(9).[118]

C. Full Faith and Credit

A valid foreign protection order must be afforded full faith and credit and is subject to the same enforcement procedures and penalties as a PPO issued in Michigan. MCL 600.2950j(1).[119] See also 18 USC 2265(a), a VAWA provision that states: "Any protection order issued that is consistent with [18 USC 2265](b)[120] by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government

[118] MCL 600.2950*l*(9) "does not preclude an arrest under . . . MCL 764.15 [or] [MCL] 764.15a, or a proceeding under . . . MCL 712A.14."

[119] For enforcement procedures and penalties related to PPOs issued in Michigan, see Section 5.11.

or Territory as if it were the order of the enforcing State or tribe." 18 USC 2265(a).[121] Note that prior registration in the enforcing jurisdiction and notice of such registration to the restrained individual are not prerequisites to according full faith and credit under 18 USC 2265(d)(2).

> **Note:** For additional information on implementing the full faith and credit provisions of the VAWA, including a checklist the court issuing a PPO could follow to help facilitate enforcement of its PPOs in other jurisdictions, see the National Council of Juvenile & Family Court Judges's publication *A Passport to Safety* at http://www.ncjfcj.org/resource-library/publications/passport-safety.

1. Orders for Child Custody or Support

A child custody or support provision contained within a valid foreign protection order must be afforded full faith and credit and is subject to the same enforcement procedures and penalties as any provision within a PPO issued in Michigan. MCL 600.2950j(2). Note, however, MCL 600.2950j(2) is not to be "construed to preclude law enforcement officers' compliance with the child protection law, . . . MCL 722.621 to [MCL] 722.638." See also 18 USC 2265(a), a VAWA provision requiring courts to give full faith and credit to qualified protection orders issued in other states and in tribal jurisdictions that contain child custody and support provisions. 18 USC 2266(5)(B) defines the term protection order to include "any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking."

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[120] Under 18 USC 2265(b), "[a] protection order issued by a State, tribal, or territorial court is consistent with 18 USC 2265(b) if[:] (1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process [and in] the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights."

[121] "A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order." 18 USC 2265(d)(1).

2. Mutual Orders

A mutual foreign protection order is entitled to full faith and credit and is enforceable against the respondent where the court issued the mutual protection order against both parties, and the respondent was the petitioner's spouse or intimate partner. MCL 600.2950k(1). However, a mutual foreign protection order is not enforceable against the person who petitioned for the order unless the petitioner's spouse or intimate partner (the respondent) filed a separate written pleading seeking the foreign protection order, and the issuing court made specific findings supporting relief for both parties. MCL 600.2950k(2)(a)-(b). See also 18 USC 2265(c), a VAWA provision that contains substantially similar requirements.

> **Note:** MCL 600.2950(8), MCL 600.2950a(8), and MCR 3.706(B) prohibit the court from issuing mutual PPOs in Michigan. However, correlative separate orders are permitted if both parties properly petition the court, and the court makes separate findings that support an order against each party. MCL 600.2950(8); MCL 600.2950a(8). See Section 5.6 for additional information on procedures for issuing PPOs.

5.16 Petitioner's Retention of Existing Wireless Telephone Number

"In an action described in [MCL 600.2950(1) (domestic relationship PPOs)] or [MCL 600.2950a(1) (nondomestic stalking PPOs)],[122] or in another action if the respondent in the action has been ordered, in a separate criminal case, to have no contact with the petitioner or a minor child of whom the petitioner has legal custody," and the petitioner is not the named wireless service phone customer, the court may order a wireless telephone service provider to transfer billing responsibility for and rights to the petitioner's wireless telephone number (or the wireless telephone number of a minor to whom the petitioner has legal custody) to the petitioner.[123] MCL 600.2950n(1).

"An order issued under [MCL 600.2950n(1)] must list the name and billing telephone number of the named customer, the name and

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[122] See Section 5.2(A) for a discussion on domestic relationship PPOs issued under MCL 600.2950(1), and Section 5.2(B) for a discussion on nondomestic stalking PPOs issued under MCL 600.2950a(1).

[123] "[MCL 600.2950n] and [MCL 600.2950o] do not affect the ability of the court to determine the temporary use, possession, and control of personal property or to apportion the assets and debts of the parties as otherwise provided by law." MCL 600.2950n(3).

telephone number of the petitioner, and each telephone number to be transferred to the petitioner. The court shall ensure that the contact information of the petitioner is not provided to the customer or [the] respondent." MCL 600.2950n(2).

If the wireless telephone service provider notifies the petitioner within 72 hours of receiving the court's order that it cannot "operationally or technically effectuate" the order for one of the reasons set out under MCL 600.2950o(2)(a)-(d), the court's order is automatically suspended. MCL 600.2950o(2)-(3).

Chapter 6: Statutory Firearms and Ammunition Restrictions in Domestic Violence Cases

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6.1 Chapter Overview

This chapter addresses federal and state statutory firearms and ammunition restrictions that apply to individuals who are subject to the following criminal proceedings or court orders:[1]

- indictment on felony or misdemeanor charges.
- conviction of a felony.
- conviction of a misdemeanor.
- pretrial conditional release orders and probation orders issued in criminal cases for the protection of a named person.
- personal protection orders (PPOs).

Under federal and Michigan statutes, individuals subject to the foregoing proceedings or orders may face four types of restrictions on access to firearms and ammunition:

- **Prohibition from purchasing, possessing, or receiving any** firearms**.** Federal law prohibitions arise upon indictment for a felony charge, conviction of any felony or misdemeanor crime involving domestic violence, and on entry of certain orders for conditional pretrial release, probation, or personal protection. State law prohibitions arise upon conviction of certain felonies.
- **Prohibition from obtaining a license to purchase, carry, or transport a** pistol **(pistol license).** This prohibition arises under state law only. It applies to individuals who are subject to a felony indictment, a felony conviction, a pretrial conditional release order issued for the protection of a named person, or a PPO. It may also apply to persons deemed a threat to themselves or others.
- **Prohibition from obtaining a license to carry a concealed pistol (concealed pistol license).** This prohibition arises under state law only. It applies to individuals who are

[1] In general, firearms records "are confidential, are not subject to disclosure under the freedom of information act . . ., MCL 15.231 to [MCL 15.245], and shall not be disclosed to any person[.]" However, firearms records may be accessed and disclosed by a peace officer or authorized system user in certain circumstances, including in those situations where the individual whose firearms records are the subject of disclosure "poses a threat to . . . other individuals[,]" or where he or she "has committed an offense with a pistol that violates a law of this state, another state, or the United States." MCL 28.421b(2)(a)-(b). See MCL 28.421b in its entirety for other situations in which firearms records may be disclosed.

subject to a felony indictment, a felony or misdemeanor conviction, a pretrial conditional release order issued for the protection of a named person, or a PPO. It may also apply to persons deemed dangerous to themselves or others.

- **Suspension or revocation of an existing concealed pistol license.** A concealed pistol license may be suspended under state law if its holder is charged with a felony or misdemeanor. A concealed pistol license may be revoked if its holder becomes ineligible to obtain a license.

- **Prohibition from possessing, using, transporting, selling, carrying, shipping, or distributing** ammunition. Federal law prohibitions arise upon indictment for a felony charge, conviction of any felony or misdemeanor crime involving domestic violence, and on entry of certain orders for conditional pretrial release, probation, or personal protection. State law prohibitions arise upon conviction of certain felonies.

This chapter also addresses Michigan firearms restrictions that apply to individuals who are otherwise deemed dangerous to themselves or others, firearms restrictions against law enforcement employees, and a brief overview of Michigan statutory provisions governing the seizure and forfeiture of firearms used during the commission of a crime.

See Appendix for a table that summarizes federal and Michigan statutory firearms and ammunition restrictions that arise out of procedures involving domestic violence cases.

6.2 Constitutional Right to Keep and Bear Arms

Under Const 1963, art 1, § 6, "[e]very person has a right to keep and bear arms for the defense of himself and the state." See also US Const, Am II, which is "'fully applicable to the states through the Fourteenth Amendment.'" *People v Deroche*, 299 Mich App 301, 305 (2013), quoting *People v Yanna*, 297 Mich App 137, 142 (2012). "[A]n 'arm' is any weapon used for offense or self-defense[.]" *People v Dummer*, ___ Mich App ___, ___ (2025), citing *DC v Heller*, 554 US 570, 581 (2008).[2]

The "right to possess and carry weapons in case of confrontation" is an individual constitutional right, but it is not unlimited. *Heller*, 554 US at 592, 595. A firearm regulation "is lawful under the Second Amendment" if it fits within our "historical tradition of firearm regulation[.]'" *United States v Rahimi*, 602 US ___, ___ (2024), quoting *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1, 17 (2022). "Since the founding, our Nation's firearm laws have included provisions preventing individuals

who threaten physical harm to others from misusing firearms." *Rahimi*, 602 US at ___ (quotation marks and citation omitted).

For instance, "the constitutional right to bear arms contained in Const 1963, art 1, § 6, does not guarantee [a] defendant the right to possess a firearm after defendant is convicted of a felony." *People v Swint*, 225 Mich App 353, 363, 375 (1997) ("defendant's right to bear arms under Const 1963, art 1, § 6[,] is not absolute and is subject to the reasonable limitations set forth in MCL 750.224f [felon-in-possession statute, which criminalizes possession of a firearm or ammunition by a convicted felon] as part of the state's police power").[3] And while "the government cannot justify infringing on defendant's Second Amendment right to possess a handgun in his home simply because defendant was intoxicated in the general vicinity of the firearm," *Deroche*, 299 Mich App at 312, "*Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home." *Rahimi*, 602 US at ___. "In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Id.* at ___, quoting *Heller*, 554 US at 626, 627 n 26.

6.3 Michigan's Restrictions on Obtaining an Emergency License To Carry Concealed Pistol

This section discusses Michigan's statutory firearm restrictions that apply to individuals seeking an emergency license to carry a concealed pistol.

"A county clerk shall issue an emergency license to carry a concealed pistol to an individual if the individual has obtained a personal protection order [(PPO)] issued under . . . MCL 600.2950 [or MCL] 600.2950a,"[4] or "if a county sheriff determines that there is clear and convincing evidence[5] to believe the safety of the individual or the safety of a member of the individual's family or household is endangered by the

[2]Defendant in *Dummer* challenged the constitutionality of Michigan's statute prohibiting the possession of metallic ("brass") knuckles, MCL 750.224(1)(d), under the Second Amendment to the United States Constitution, US Const Am II, and Article 1, § 6 of the Michigan Constitution, Const 1963, art 1, § 6. *Dummer*, ___ Mich App at ___. Applying the two-part test set forth in *New York State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1, 17, 24 (2022), to analyze the constitutionality of government arms regulations the *Dummer* Court held that defendant's possession of brass knuckles was presumptively protected conduct under the Second Amendment, but that brass knuckles were historically considered "dangerous and unusual weapons that were not used by law-abiding citizens for lawful purposes, and therefore were subject to regulation." *Id.* at ___. According to the *Dummer* Court, the laws from other jurisdictions "and the decisions interpreting them set out a guiding historic principle that appears uniform amongst a majority of States: brass knuckles are dangerous and unusual weapons that have not, from 1791 through the post-Civil War era, played a role in the defense of self or others." *Id.* at ___.

[3] "This Court has found that 'the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power.'" *Swift*, 225 Mich App at 363, quoting *Bay Co Concealed Weapons Licensing Bd v Gasta*, 96 Mich App 784, 788 (1980).

[4] For a detailed discussion on PPOs, see Chapter 5.

individual's inability to immediately obtain a license to carry a concealed pistol[,]" unless a criminal record check conducted by the Department of State Police through the law enforcement information network (LEIN) indicates that the individual is not eligible under:

- MCL 28.425b(7)(d) (individual subject to certain court orders),
- MCL 28.425b(7)(e) (individual subject to firearm restriction for felony conviction),
- MCL 28.425b(7)(f) (individual subject to felony indictment or conviction),
- MCL 28.425b(7)(h) (individual subject to indictment or conviction of certain specified misdemeanors within last eight years),
- MCL 28.425b(7)(i) (individual subject to indictment or conviction of certain specified misdemeanors within last 3 years),
- MCL 28.425b(7)(j) (found guilty but mentally ill or plead guilty/acquitted by reason of insanity),
- MCL 28.425b(7)(k) (current or previous involuntary commitment for mental illness), or
- MCL 28.425b(7)(m) (under court order of legal incapacity). MCL 28.425a(4).

"An individual shall not obtain more than 1 emergency license in any 5-year period." MCL 28.425a(4).

"Except as otherwise provided in [MCL 28.425a], an emergency license is valid for 45 days or until the county clerk issues a notice of statutory disqualification, whichever occurs first." MCL 28.425a(4). "If a county clerk issues a notice of statutory disqualification to an applicant who received an emergency license under this section, the applicant shall immediately surrender the emergency license to the county clerk by mail or in person if that emergency license has not expired. An individual who fails to surrender a license as required by this subsection after he or she is notified of a statutory disqualification is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." *Id.*

[5] "Clear and convincing evidence includes, but is not limited to, an application for a personal protection order, police reports and other law enforcement records, or written, audio, or visual evidence of threats to the individual or member of the individual's family or household." MCL 28.425a(4).

6.4 Firearms Restrictions Involving Individuals Subject to Indictment on Felony or Misdemeanor Charges

This section discusses Federal and Michigan statutory firearm restrictions that apply to individuals who are subject to indictment on felony or misdemeanor charges.

A. Federal Restrictions Related to Firearms or Ammunition Involving Individuals Subject to Indictment on Felony Charges

18 USC 922(n) prohibits a person "who is under indictment for a crime punishable by imprisonment for a term exceeding one year[6] to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[7]

> **Note:** A person may apply to the US Attorney General for relief from disabilities imposed under 18 USC 922(n). See 18 USC 925(c). 18 USC 925(c) permits the US Attorney General to grant the requested relief "if it is established to [the US Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Federal law also prohibits the sale or other disposal of firearms or ammunition to a person who is subject to indictment of "a crime punishable by imprisonment for a term exceeding one year[.]" See 18 USC 922(d)(1)[8] and 18 USC 924(a)(2), which impose a fine and/or a maximum ten-year prison term against a person who sells or otherwise disposes of a firearm or ammunition to someone he or she

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[6] Crimes punishable by more than one year in prison do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

[7] See 18 USC 925(a)(1) for exemptions from federal firearm restrictions, which includes exemptions in certain circumstances for "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."

[8] *In UInited States v Knipp*, ___ F4th ___, ___ (CA 6, 2025), the Court held that 18 USC 922(d)(1) was facially constitutional under the Second Amendment. "The Second Amendment protects the right to acquire a firearm only when necessary to enable the acquirer to possess or carry one." *Knipp*, ___ F4th at ___. "So the right to acquire is limited by lawful constraints on the right to possess." *Id.* at ___. Because the Sixth Circuit determined in *United States v Williams*, 113 F4th 637, 650-657 (CA 6, 2024), that 18 USC 922(g)(1), which prohibits felons from possessing firearms, was a facially constitutional exercise of "Congress's power to disarm individuals or groups it deems dangerous," the *Knipp* Court held that 18 USC 922(d)(1) was also a facially constitutional means to limit felons' ability to acquire firearms. *Knipp*, ___ F4th at ___.

knows or has reasonable cause to believe is subject to indictment for a crime that is punishable for a term exceeding one year in prison.

B. Michigan Licensing Restrictions for Individuals Subject to Indictment on Felony or Misdemeanor Charges

This subsection discusses Michigan statutory firearm licensing restrictions that apply to individuals who are subject to indictment on felony or misdemeanor charges. For exemptions from Michigan statutory firearm licensing restrictions, see MCL 28.432 and MCL 28.432a.[9]

1. Denying Issuance of License

"Except as otherwise provided in [MCL 28.422], a person shall not do either of the following:

> (a) Purchase, carry, possess, or transport a pistol in [Michigan] without first having obtained a license for the pistol as prescribed in [MCL 28.422].
>
> (b) Purchase a firearm that is not a pistol in [Michigan] without first having obtained a license for the firearm as prescribed in [MCL 28.422]. This subdivision does not apply to the purchase or acquisition of a firearm that occurred before [February 13, 2024]." MCL 28.422(1).

An individual applying for a license to purchase, carry, possess, or transport a firearm (firearm license) must be denied under MCL 28.422(3)(d) if "[a] felony charge or a criminal charge listed in [MCL 28.425b] against the individual is [] pending at the time of application."[10] MCL 28.422(3)(d).

An applicant will be denied a license to carry a concealed pistol (concealed pistol license) under MCL 28.425b(7)(f) if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)[11]]," a felony charge against the applicant is pending in Michigan or

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[9] MCL 28.432 discusses situations where the firearm licensing statute does not apply. MCL 28.432a discusses situations where the requirements to obtain a license to carry a concealed pistol do not apply.

[10] See MCL 28.425b for a list of criminal charges that preclude the applicant from obtaining a firearm license.

[11] MCL 28.425b(6) requires "the department of state police [to] verify the requirements of [MCL 28.425b(7)(d)], [MCL 28.425b(7)(e)], [MCL 28.425b(7)(f)], [MCL 28.425b(7)(h)], [MCL 28.425b(7)(i)], [MCL 28.425b(7)(j)], [MCL 28.425b(7)(k)], and [MCL 28.425b(7)(m)] through the law enforcement information network [(LEIN)] and the national instant criminal background check system [(NICS)] and [to] report to the county clerk all statutory disqualifications, if any, under this act that apply to an applicant."

elsewhere at the time of application.[12] An applicant will also be denied a concealed pistol license if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," the applicant has been charged with certain specified misdemeanors "pending against the applicant in this state or elsewhere at the time [of application]" under MCL 28.425b(7)(h) or MCL 28.425b(7)(i).[13] MCL 28.425b(11) requires "the county clerk [to] send by first-class mail a notice of statutory disqualification for a license under this act to an individual if the individual is not qualified under [MCL 28.425b(7)] to receive that license."

"[A] person who obtains a firearm in violation of . . . MCL28.422 [the firearm licensing statute], is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."[14] MCL 750.232a(1). A person who carries a concealed pistol without a license is "guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00."[15] MCL 750.227(2)-(3).

a. Court Procedures for Appealing Notice of Statutory Disqualification or Failure to Issue Receipt or Concealed Pistol License

"If the county clerk issues a notice of statutory disqualification, fails to provide a receipt that complies with [MCL 28.425b(1)] or [MCL 28.425*l*(3)], or fails to issue a license to carry a concealed pistol as provided in

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[12] MCL 28.425b(7)(f) also provides for the denial of a concealed pistol license if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," the applicant has been convicted of a felony in Michigan or elsewhere at the time of application. See Section 6.5(D) for additional information.

[13] An applicant will also be denied a concealed pistol license if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," he or she has been convicted of certain specified misdemeanors within eight years immediately preceding the date of application under MCL 28.425b(7)(h), and certain specified misdemeanors within three years immediately preceding the date of the application under MCL 28.425b(7)(i). See Section 6.6(B) for additional information.

[14] "A person who intentionally makes a material false statement on an application for a license to purchase a firearm under [MCL 28.422], is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both." MCL 750.232a(3). See also MCL 28.422(14), which also makes it a "felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both" for "[a] person [to] forge[] any matter on an application for a license under [MCL 28.422][.]"

"A person who uses or attempts to use false identification or the identification of another person to purchase a firearm is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both." MCL 750.232a(4).

[15] "A license to carry a concealed pistol that is issued based upon an application that contains a material false statement is void from the date the license is issued." MCL 28.425b(12).

this act, the department of state police fails to provide a receipt that complies with [MCL 28.425*l*(3)], or the county clerk, department of state police, county sheriff, local police agency, or other entity fails to provide a receipt that complies with [MCL 28.425b(9)], the applicant may appeal the notice of statutory disqualification, the failure to provide a receipt, or the failure to issue the license to the circuit court in the judicial circuit in which he or she resides. The appeal of the notice of statutory disqualification, failure to provide a receipt, or failure to issue a license shall be determined by a review of the record for error." MCL 28.425d(1).

b. Court Determination Against County Clerk, Entity Taking Fingerprints, or State

"If the court determines that the notice of statutory disqualification, failure to provide a receipt that complies with [MCL 28.425b(1), MCL 28.425b(9), or MCL 28.425*l*(3)], or failure to issue a license was clearly erroneous or was arbitrary and capricious, the court shall order the county clerk to issue a license or receipt as required by this act. For applications submitted after November 30, 2015, if the court determines that the notice of statutory disqualification, failure to provide a receipt that complies with [MCL 28.425b(1), MCL 28.425b(9), or MCL 28.425*l*(3)], or failure to issue a license was clearly erroneous, the court may order an entity to refund any filing fees the applicant incurred in filing the appeal, according to the degree of responsibility of that entity." MCL 28.425d(2).

"For applications submitted before December 1, 2015, if the court determines that the decision of the concealed weapon licensing board to deny issuance of a license to an applicant was arbitrary and capricious, the court shall order this state to pay 1/3 and the county in which the concealed weapon licensing board is located to pay 2/3 of the actual costs and actual attorney fees of the applicant in appealing the denial. For applications submitted on or after December 1, 2015, if the court under [MCL 28.425d(2)] determines that the notice of statutory disqualification, failure to provide a receipt that complies with [MCL 28.425b(1), MCL 28.425b(9), or MCL 28.425*l*(3)], or failure to issue a license to an applicant was arbitrary and capricious, the court shall order the county clerk, the entity taking the fingerprints, or the state to pay the actual costs and actual attorney fees of the applicant

in appealing the notice of statutory disqualification, failure to provide a receipt that complies with [MCL 28.425b(1), MCL 28.425b(9), or MCL 28.425*l*(3)], or failure to issue a license, according to the degree of responsibility of the county clerk, the entity taking the fingerprints, or the state." MCL 28.425d(3).

c. Court Determination Against Applicant's Appeal

"If the court determines that an applicant's appeal was frivolous, the court shall order the applicant to pay the actual costs and actual attorney fees of the county clerk, entity taking the fingerprints, or the state in responding to the appeal." MCL 28.425d(4).

2. Criminal Charge After Concealed Pistol License Issued

MCL 28.428(2) requires the immediate suspension of a concealed pistol license (CPL) held by a person charged with a felony or misdemeanor:

> "If a county clerk is notified by a law enforcement agency, prosecuting official, or court that an individual licensed to carry a concealed pistol is charged with a felony or charged with a misdemeanor listed in [MCL 28.425b(7)(h)] or [MCL 28.425b(7)(i)], the county clerk shall immediately suspend the individual's license until there is a final disposition of the charge for that offense. The county clerk shall send notice by first-class mail in a sealed envelope of that suspension to the individual's last known address as indicated in the records of the county clerk. The notice must include the statutory reason for the suspension, the source of the record supporting that suspension, the length of the suspension, and whom to contact for reinstating the license on expiration of the suspension, correcting errors in the record, or appealing the suspension. . . ."

"If a suspension is imposed under [MCL 28.428], the suspension must be for a period stated in years, months, or days, or until the final disposition of the charge, and state the date the suspension will end, if applicable." MCL 28.428(4).

An order or amended order suspending an individual's license is immediately effective. MCL 28.428(8). A person is not criminally liable for violating a suspension order until the individual receives notice of the suspension. *Id.* However, "nothing in MCL

28.428 states *how* an individual must be notified that his or her CPL has been revoked or suspended, only that the individual receive notice." *People v Brown (Cleophas)*, 330 Mich App 223, 234 (2019). In *Brown*, 330 Mich App at 234, "the trial court erred in holding that verbal notice [by a peace officer] was insufficient under MCL 28.428." Moreover, "the prosecution produced evidence establishing that the MCL 28.428' notice requirement was otherwise satisfied" where "[t]he uncontested evidence showed that defendant received written notice that his CPL was suspended, and nothing suggests that defendant had reason to believe that this suspension was lifted." *Brown*, 330 Mich App at 235.

Thus, where proper notice has not yet been given, an individual may avoid arrest if he or she complies with the order once informed. See MCL 28.428(9), which states that "[i]f an individual is carrying a pistol in violation of a suspension or revocation order or amended order issued under [MCL 28.428] but has not previously received notice of the order or amended order, the individual must be informed of the order or amended order and be given an opportunity to properly store the pistol or otherwise comply with the order or amended order before an arrest is made for carrying the pistol in violation of this act."[16]

a. Surrender of License Upon Suspension

"The licensee shall promptly surrender the individual's license to the county clerk after being notified that the individual's license has been revoked or suspended. An individual who fails to surrender a license as required under this subsection after the individual was notified that the individual's license was suspended or revoked is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 28.428(4). See also MCL 28.425b(16), which provides that "[i]f a license issued under this act is suspended or revoked, the license is forfeited and the individual shall return the license to the county clerk forthwith by mail or in person[,][17] . . . [and a]n individual who fails to return a license under this subsection after the individual was notified that the

[16] "If a law enforcement agency or officer notifies an individual of a suspension or revocation order or amended order issued under [MCL 28.428] who has not previously received notice of the order or amended order, the law enforcement agency or officer shall enter a statement into the [LEIN] that the individual has received notice of the order or amended order under [MCL 28.428]." MCL 28.428(10).

[17] "The county clerk shall retain a suspended or revoked license as an official record 1 year after the expiration of the license, unless the license is reinstated or a new license is issued." MCL 28.425b(16).

individual's license was suspended or revoked is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both."

b. Entry of License Suspension in LEIN

MCL 28.425b(16) requires "the county clerk [to] notify the department of state police if a license is suspended or revoked[and requires t]he department of state police [to] enter that suspension or revocation into the law enforcement information network [(LEIN)]."

See also MCL 28.428(7), which provides that "[i]f the court orders a county clerk to suspend, revoke, or reinstate a license under [MCL 28.428] or amends a suspension, revocation, or reinstatement order,[18] the county clerk shall immediately notify the department of state police in a manner prescribed by the department of state police. The department of state police shall enter the order or amended order into [LEIN]." MCL 28.428(7).

c. Acquittal or Dismissal of Charge

"If a county clerk suspended a license under [MCL 28.428(2)] and the individual is acquitted of the charge or the charge is dismissed, the individual shall notify the county clerk who shall automatically reinstate the license if the license is not expired and the individual is otherwise qualified to receive a license to carry a concealed pistol, as verified by the department of state police. A county clerk shall not charge a fee for the reinstatement of a license under [MCL 28.428(2)]." MCL 28.428(2).

d. Renewing License After Expiration of License Suspension

"Except as otherwise provided in [MCL 28.428(2) and MCL 28.428(6)], if a license is suspended under [MCL 28.428] and that license was surrendered by the licensee, upon expiration of the suspension period, the applicant may apply for a renewal license in the same manner as provided under [MCL 28.425*l*]. The county clerk or department of state police, as applicable, shall issue the

[18] MCL 28.428(1) requires "[t]he county clerk in the county in which a license was issued to an individual to carry a concealed pistol [to] suspend, revoke, or reinstate a license as required under this act if ordered by a court[.]"

applicant a receipt for the individual's application at the time the application is submitted. The receipt must contain all of the following:

(a) The name of the applicant.

(b) The date and time the receipt is issued.

(c) The amount paid.

(d) The applicant's state-issued driver license or personal identification card number.

(e) The statement, 'This receipt was issued for the purpose of applying for a renewal of a concealed pistol license following a period of suspension or revocation. This receipt does not authorize an individual to carry a concealed pistol in this state.'

(f) The name of the county in which the receipt is issued, if applicable.

(g) An impression of the county seal, if applicable." MCL 28.428(5).

6.5 Firearms and Ammunition Restrictions Resulting From Felony Conviction

Federal and Michigan statutes provide for restrictions on the purchase, possession, or receipt of firearms by individuals convicted of felony offenses. Michigan also provides for licensing restrictions for convicted felons.

Michigan's firearm restrictions are not in "'direct and positive conflict'" with the federal firearm restrictions in 18 USC 922(g). *In re Schultz*, 334 Mich App 730, 739 (2020), quoting 18 USC 927. There is no direct and positive conflict between state and federal law because "the Michigan statutes that provide for restoration of a felon's firearm rights do not interfere with the federal government's ability to enforce 18 USC 922(g) or require, authorize, or excuse its violation." *Schultz*, 334 Mich App at 739. Therefore, "[t]he restoration of firearm rights to felons under Michigan law is not preempted by the federal felon-in-possession statute." *Id.* at 740.

A. Federal Restrictions on the Possession or Receipt of Firearms or Ammunition by Convicted Felons

18 USC 922(g)(1)[19] prohibits a person convicted of a crime punishable by imprisonment for a term exceeding one year from possessing[20] or receiving firearm or ammunition:

> "(g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;[21]
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

For purposes of 18 USC 922(g)(1), "[w]hat constitutes a conviction of [a crime exceeding a one-year term of imprisonment] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 USC 921(a)(20). "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."[22] *Id.*

> **Note:** Under certain circumstances and pursuant to certain conditions, an individual may apply to have

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[19] The United States Court of Appeals for the Sixth Circuit held in *United States v Williams*, 113 F4th 637, 650-657 (CA 6, 2024) that 18 USC 922(g)(1) did not violate a person's Second Amendment right to bear arms; instead 18 USC 922(g)(1) is a facially constitutional exercise of "Congress's power to disarm individuals or groups it deems dangerous." *United States v Knipp*, ___ F4th ___, ___ (CA 6).

[20] Possession under 18 USC 922(g) encompasses both "'actual' and 'constructive' possession alike. . . . Actual possession exists when a person has direct physical control over a thing[, and c]onstructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object. [18 USC] 922(g) thus prevents a felon not only from holding his firearms himself but also from maintaining control over those guns in the hands of others." *Henderson v United States*, 575 US 622, 626 (2015) (citations omitted).

[21] 18 USC 921(a)(20) provides that a "crime punishable by imprisonment for a term exceeding one year" does not include a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 USC 921(a)(20) also excludes antitrust or similar offenses related to the regulation of business practices.

[22] Any restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. *Beecham v United States*, 511 US 368, 371 (1994).

specific felony and misdemeanor convictions set aside under MCL 780.621 or may have them automatically set aside under MCL 780.621g.[23] See MCL 780.621; MCL 780.621g. For more information on setting aside a conviction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 3.

The penalty for knowingly violating 18 USC 922(g)(1) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).[24] "[I]n a prosecution under [18 USC 922(g)] and [18 USC 924(a)(2)], the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v United States*, 588 US ___, ___ (2019) ("hold[ing] that the word 'knowingly' [contained in 18 USC 924(a)(2)] applies both to the defendant's conduct and to the defendant's status").[25]

Federal law also prohibits the sale or other disposal of firearms or ammunition to a convicted felon. See 18 USC 922(d)(1) and 18 USC 924(a)(2), which impose a fine and/or a maximum ten-year prison term against a person who sells or otherwise disposes of a firearm or ammunition to someone he or she knows or has reasonable cause to believe has been convicted of a crime punishable for more than one year in prison.[26]

A person may apply to the US Attorney General for relief from disabilities imposed under 18 USC 922(g)(1). See 18 USC 925(c). 18 USC 925(c) permits the US Attorney General to grant the requested relief "if it is established to [the US Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

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[23] MCL 780.621g, effective April 11, 2021, has been referred to as part of the Clean Slate legislation. See 2020 PA 193. It provides for the automatic setting aside of certain misdemeanor and felony convictions if all the requirements set forth in MCL 780.621g are satisfied. For more information about the automatic setting aside of convictions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Volume 3*, Chapter 3.

[24] See 18 USC 925(a)(1) for exemptions from federal firearm restrictions, which includes exemptions in certain circumstances for "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."

[25] The *Rehaif* Court "express[ed] no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other [18 USC 922(g)] provisions not at issue here." *Rehaif*, 588 US at ___. In *Rehaif*, the Court specifically addressed 18 USC 922(g)(5) (alien illegally or unlawfully in the United States); it is uncertain to what extent its findings would apply to 18 USC 922(g)(1).

[26] Crimes punishable by more than one year in prison do not include antitrust or similar offenses related to the regulation of business practices, or state two-year misdemeanors. 18 USC 921(a)(20).

"[18 USC] 922(g) does not prohibit a felon from *owning* firearms[; r]ather it interferes with a single incident of ownership . . . by preventing the felon from knowingly *possessing* his (or another person's) guns." *Henderson v United States*, 575 US 622, 626 (2015). Thus, while 18 USC 922(g) "prevents a court from instructing an agency to return guns in its custody to a felon-owner . . . [and] prevents a court from ordering the sale or other transfer of a felon's guns to someone willing to give the felon access to them or to accede to the felon's instructions about their future use[,]" it "does not affect[the felon's] right merely to sell or otherwise dispose of [the guns]." *Henderson*, 575 US at 626-628, 631 (finding that "when a court is satisfied that a felon will not retain control over his guns, [so that he could use them or direct their use,] [18 USC] 922(g) does not apply, and the court has equitable power to accommodate the felon's request[]" to transfer his guns to a third party).

B. Michigan Restrictions on the Purchase or Possession of Firearms by Convicted Felons[27]

Unless a person is convicted of a specified felony as defined in MCL 750.224f(10)(d), MCL 750.224f(1) prohibits a convicted felon from purchasing or possessing firearms until the expiration of three years after certain circumstances have been met:

> "Except as provided in [MCL 750.224f(2)], a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in [Michigan] until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation."

A felon's firearm rights need not be restored by court order if the felon was not convicted of a specified felony; a felon's firearm rights are automatically restored three years after the felon has satisfied all obligations related to his or her conviction of an unspecified felony. *In re Schultz*, 334 Mich App 730, 734-735, 740 (2020); MCL 750.224f(1).

[27] MCL 750.231 exempts certain persons and organization from certain regulations related to firearm control. However, the exemptions contained in MCL 750.231 do not apply to convicted felons under MCL 750.224f. See MCL 750.231(1).

If a person is convicted of a specified felony as defined in MCL 750.224f(10)(d), MCL 750.224f(2) prohibits a convicted felon from purchasing or possessing firearms until the expiration of five years after certain circumstances have been met:

> "A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in [Michigan] until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has paid all fines imposed for the violation.
>
> (*ii*) The person has served all terms of imprisonment imposed for the violation.
>
> (*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored under . . . MCL 28.424."[28]

The restoration of firearm rights after conviction of a specified felony requires that a court issue an order restoring the felon's firearm rights if the court "finds by clear and convincing evidence that the statute's requirements were met, as was the case [in *Schultz*]." *Schultz*, 334 Mich App at 737; MCL 28.424(4).

In *Schultz*, the defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413, which does not constitute a specified felony under MCL 750.224f(10); "UDAA is a property offense that does not involve use of physical force, a substantial risk of the use of physical force, possession of a firearm, . . . the use of an explosive, . . . possession of controlled substances[,] or a trespass against an occupied dwelling." *Schultz*, 334 Mich App at 735 (citation omitted). Consequently, the convicted felon in *Schultz* was permitted "under Michigan law, [to] possess firearms three years after all

[28] MCL 28.424(1) permits "[an] individual who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under [MCL 750.224f(2)] . . . [to] petition the circuit court in the county in which he or she resides for restoration of those rights." MCL 28.424(3)-(4) set out the procedures governing a circuit court's restoration of a convicted felon's firearms rights, including when the court must restore the convicted felon's firearms rights and the appeals process if those rights are denied.

obligations relating to the conviction [were] discharged." *Id.*; MCL 750.224f(1).

"A person who possesses, uses, transports, sells, purchases, carries, ships, receives, or distributes a firearm in violation of [MCL 750.224f(1)-(2)] is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both." MCL 750.224f(6). A person is "guilty of a felony punishable by imprisonment for not more than 10 years or by a fine of not more than $5,000.00, or both" if he or she sells a firearm or ammunition to someone whom the seller knows is either "under indictment for a felony" or "prohibited under [MCL 750.224f] from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm." MCL 750.223(3)-(4).

A convicted felon's firearm rights may be restored under Michigan law under certain circumstances even when the convicted felon would remain subject to the firearm restrictions set forth in the federal felon-in-possession statute, 18 USC 922(g). *In re Schultz*, 334 Mich App 730, 733-734 (2020) (holding that "MCL 750.224f and MCL 28.424 provide for complete relief from criminal liability under Michigan's felon-in-possession statute, regardless of potential liability under the federal [felon-in-possession] statute 18 USC 922(g)]"). However, a petitioner whose state firearm rights have been fully restored "could still be convicted of possessing a firearm under 18 USC 922(g)." *Schultz*, 334 Mich App at 737.

"Michigan's 'felon in possession' statute, MCL 750.224f, prevents a police department from delivering lawfully seized contraband firearms to the designated agent of a convicted felon." *People v Minch*, 493 Mich 87, 89 (2012). However, MCL 750.224f does not "prevent a court from appointing a successor bailee to maintain possession of a defendant's weapons during his or her period of legal incapacity." *Minch*, 492 Mich at 89-90. "The [trial] court may order the police department to turn over the firearms to an appointed successor bailee as long as the operative order is clear that the nature of the relationship between [the] defendant and the successor is that of a bailment and that [the] defendant must have no control over or access to the firearms whatsoever." *Id.* at 96 (defendant convicted of felon-in-possession could have his mother possess his firearms as a bailee, but not as an agent, until he regained the requisite legal status to possess them again).

MCL 750.224f "does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm or ammunition." MCL 750.224f(9). In certain

circumstances, a conviction may be set aside under MCL 780.621 or MCL 780.621g.[29]

C. Michigan Restrictions on the Selling or Possession of Ammunition by Convicted Felons[30]

Unless a person is convicted of a specified felony as defined in MCL 750.224f(10)(d), MCL 750.224f(3) prohibits a convicted felon from engaging in certain activities involving ammunition until the expiration of three years after certain circumstances have been met:

> "Except as provided in [MCL 750.224f(4)], a person convicted of a felony shall not possess, use, transport, sell, carry, ship, or distribute ammunition in [Michigan] until the expiration of 3 years after all of the following circumstances exist:
>
> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation or parole imposed for the violation."

If a person is convicted of a specified felony as defined in MCL 750.224f(10)(d), MCL 750.224f(4) prohibits a convicted felon from engaging in certain activities involving ammunition until the expiration of five years after certain circumstances have been met:

> "A person convicted of a specified felony shall not possess, use, transport, sell, carry, ship, or distribute ammunition in [Michigan] until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (*i*) The person has paid all fines imposed for the violation.

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[29] For additional information on setting aside a conviction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 3.

[30] MCL 750.231 exempts certain persons and organizations from certain regulations related to ammunition control. However, the exemptions contained in MCL 750.231 do not apply to convicted felons under MCL 750.224f. See MCL 750.231(1).

> (*ii*) The person has served all terms of imprisonment imposed for the violation.
>
> (*iii*) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute ammunition has been restored under . . . MCL 28.424."[31]

"A person who possesses, uses, transports, sells, carries, ships, or distributes ammunition in violation of [MCL 750.224f] is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both."[32] MCL 750.224f(7).[33]

MCL 750.224f "does not apply to a conviction that has been expunged or set aside, or for which the person has been pardoned, unless the expunction, order, or pardon expressly provides that the person shall not possess a firearm or ammunition." MCL 750.224f(9). In certain circumstances, a conviction may be set aside under MCL 780.621 or MCL 780.621g.[34]

D. Michigan Licensing Restrictions for Convicted Felons

If the county clerk determines "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)[35]]," that an applicant was convicted of a felony in Michigan or elsewhere, or that a felony charge against the applicant is pending in Michigan or elsewhere, the applicant is disqualified from obtaining a license to carry a concealed pistol.[36] MCL 28.425b(7)(f). A convicted felon is

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[31] MCL 28.424(2) permits "[an] individual who is prohibited from possessing, using, transporting, selling, carrying, shipping, or distributing ammunition under . . . [MCL 750.224f(4)] [to] petition the circuit court in the county in which he or she resides for restoration of those rights." MCL 28.424(3)-(4) set out the procedures governing a circuit court's restoration of a convicted felon's ammunition rights, including when the court must restore the convicted felon's ammunition rights and the appeals process if those rights are denied.

[32] "Any single criminal transaction where a person possesses, uses, transports, sells, carries, ships, or distributes ammunition in violation [MCL 750.224f], regardless of the amount of ammunition involved, constitutes 1 offense." MCL 750.224f(7).

[33] MCL 750.223(3)-(4), which makes it a felony "punishable by imprisonment for not more than 10 years or by a fine of not more than $5,000.00, or both[,]" for a person to sell a firearm or ammunition to someone whom the seller knows is either "under indictment for a felony" or "is prohibited under [MCL 750.224f] from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm[,]" has not yet been amended to reflect the amendment to MCL 750.224f, effective May 12, 2014, which also restricts a convicted felon's possession of ammunition. It is anticipated that MCL 750.223 will be amended to also include a person selling ammunition to a convicted felon under MCL 750.224f.

[34] For additional information on setting aside a conviction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 3.

disqualified from obtaining a concealed pistol license even if the convicted felon has had other firearm rights restored. *Howard v Mecosta Co Clerk*, 336 Mich App 426, 430-432 (2021). See MCL 28.422; MCL 28.725b(7)(f); MCL 28.426. Additionally, a person who is subject to the restrictions set out in MCL 750.224f (i.e., a convicted felon who has not satisfied the conditions for restoring his or her right to possess a firearm),[37] may not obtain a firearm license under MCL 28.422(3)(e) or a concealed pistol license under MCL 28.425b(7)(e). For exemptions from firearm licensing restrictions, see MCL 28.432 and MCL 28.432a.[38]

> **Note:** MCL 28.425b(11) requires "the county clerk [to] send by first-class mail a notice of statutory disqualification for a license under this act to an individual if the individual is not qualified under [MCL 28.425b(7)] to receive that license."

"Upon entry of a court order[39] or conviction of 1 of the enumerated prohibitions for using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm in [MCL 28.425b,] the department of state police shall immediately enter the order or conviction into the law enforcement information network [(LEIN)]." MCL 28.425b(8).

"[A] person who obtains a firearm in violation of [MCL 28.422], [the firearm licensing statute,] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."[40] MCL 750.232a(1). A person who carries a concealed pistol without a license is "guilty of a felony, punishable by

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[35] MCL 28.425b(6) requires "the department of state police [to] verify the requirements of [MCL 28.425b(7)(d)], [MCL 28.425b(7)(e)], [MCL 28.425b(7)(f)], [MCL 28.425b(7)(h)], [MCL 28.425b(7)(i)], [MCL 28.425b(7)(j)], [MCL 28.425b(7)(k)], and [MCL 28.425b(7)(m)] through the law enforcement information network [(LEIN)] and the national instant criminal background check system [(NICS)] and [to] report to the county clerk all statutory disqualifications, if any, under this act that apply to an applicant."

[36] MCL 28.425b(7)(f) provides for the denial of a concealed pistol license if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," a felony charge against the applicant is pending in Michigan or elsewhere at the time of application. See Section 6.4(B)(1) for additional information. Other reasons an applicant may be denied a concealed pistol license include if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," an applicant was convicted of certain specified misdemeanors within eight years immediately preceding the date of application under MCL 28.425b(7)(h) and certain specified misdemeanors within three years immediately preceding the date of the application under MCL 28.425b(7)(i), or the applicant has been charged with certain specified misdemeanors "pending against the applicant in this state or elsewhere at the time [of application]" under MCL 28.425b(7)(h) or MCL 28.425b(7)(i). See Sections 6.4(B) and 6.6(B) for additional information.

[37] MCL 750.224f(1) and MCL 750.224f(3) prohibit a person convicted of a felony from engaging in certain activities involving firearms or ammunition until the expiration of three years after certain circumstances have been met. MCL 750.224f(2) and MCL 750.224f(4) prohibit a person convicted of a specified felony from engaging in certain activities involving firearms or ammunition until the expiration of five years after certain circumstances have been met.For additional information on MCL 750.224f(1)-(4), including the circumstances a person convicted of a felony or a specified felony must meet, see Sections 6.5(B)-(C).

imprisonment for not more than 5 years, or by a fine of not more than $2,500.00."[41] MCL 750.227(2)-(3).

In certain circumstances, a conviction may be set aside under MCL 780.621 or MCL 780.621g.[42] In the event that an individual's conviction is set aside, the Michigan Attorney General[43] has stated: "[A] person convicted of a felony whose conviction has been set aside by order of a Michigan court in accordance with [MCL 780.621], if otherwise qualified, may not be denied a concealed pistol license under [MCL 28.425b(7)(f)]. A person convicted of one of the offenses described under [MCL 28.425b(8)], whose conviction has been set aside, may nevertheless be denied a concealed pistol license on the basis of information concerning that conviction if the [county clerk[44]] determines that denial is warranted under [MCL 28.425b(7)(n)]."[45] OAG, 2003, No 7133 (May 2, 2003).

6.6 Firearms Restrictions Resulting from Misdemeanor Conviction

Federal and Michigan statutes provide for restrictions on the purchase, possession, or receipt of firearms by individuals convicted of certain misdemeanor offenses. Michigan also provides for licensing restrictions for individuals convicted of certain specified misdemeanors.

A. Federal Restrictions for Domestic Violence Misdemeanors

18 USC 922(g)(9) prohibits a person convicted of a misdemeanor domestic violence crime from possessing or receiving firearms or ammunition:

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[38] MCL 28.432 discusses situations where the pistol licensing statute does not apply. MCL 28.432a discusses situations where the requirements to obtain a license to carry a concealed pistol do not apply.

[39] See Section 6.7 for information on firearms restrictions resulting from a court order.

[40] "A person who intentionally makes a material false statement on an application for a license to purchase a firearm under [MCL 28.422], is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both." MCL 750.232a(3). See also MCL 28.422(14), which also makes it a "felony punishable for not more than 4 years or a fine of not more than $2,000.00, or both" for "[a] person who forges any matter on an application for a license under [MCL 28.422][.]" "A person who uses or attempts to use false identification or the identification of another person to purchase a firearm is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both." MCL 750.232a(4).

[41] "A license to carry a concealed pistol that is issued based upon an application that contains a material false statement is void from the date the license is issued." MCL 28.425b(12).

[42] For additional information on setting aside a conviction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 3.

[43] Courts "are not bound by Attorney General opinions." *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 373 (2000). However, "they can be persuasive and provide insight into the historical development of a statute that may aid in construing ambiguous language." *Id.* at 373.

> "(g) It shall be unlawful for any person—
>
> * * *
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."
>
> "A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence under 18 USC 922(g)(9)], unless—
>
> (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
>
> (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
>
> (aa) the case was tried by a jury, or
>
> (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise." 18 USC 922(a)(33)(B)(*i*).
>
> "A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence under 18 USC 922(g)(9)] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or

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[44] MCL 28.425a formerly required "[e]ach county [to] have a concealed weapons licensing board." However, effective December 1, 2015 (see enacting Section 2), 2015 PA 3 amended MCL 28.425a to eliminate the county concealed weapon licensing boards and to transfer the duty of issuing and maintaining concealed pistol licenses to the county clerks. To date, the OAG opinion has not been amended to reflect the statutory amendment.

[45] Formerly MCL 28.425b(7)(o). Before June 2, 2015, MCL 28.425b(7)(n) allowed for denial of a concealed pistol license if issuance would be detrimental to the individual or public. However, effective June 2, 2015 (see enacting section 3), 2015 PA 3 deleted that language in MCL 28.425b(7)(n) and replaced it with language that now allows denial of a concealed pistol license if the applicant does not have "a valid state-issued driver license or personal identification card." To date, the OAG opinion has not been amended to reflect this statutory amendment.

restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 USC 922(a)(33)(B)(*ii*).

> **Note:** In certain circumstances, a conviction may be set aside under MCL 780.621 or MCL 780.621g. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 3*, Chapter 3, for additional information.[46]
>
> For purposes of 18 USC 921(a)(33)(B)(*ii*), restoration of civil rights after a conviction must take place according to the law of the jurisdiction where the conviction was entered. See *Beecham v United States*, 511 US 368, 371 (1994). Accordingly, a defendant convicted of a misdemeanor crime of domestic violence will fall under the 18 USC 921(a)(33)(B)(*ii*) exemption if the defendant is incarcerated. *United States v Wegrzyn*, 305 F3d 593, 595 (CA 6, 2002) (Court held that a defendant convicted of a misdemeanor crime of domestic violence under 18 USC 922(g)(9) faces the risk under MCL 750.81(2) of serving confinement in jail, which would subject the defendant to a loss of civil rights while incarcerated under MCL 168.758b and an automatic restoration of the defendant's civil rights once released; a restoration of the defendant's civil rights provides the defendant with an exemption under 18 USC 921(a)(33)(B)(*ii*)). But see, *Logan v United States*, 552 US 23 (2007), where the United States Supreme Court held that the exemption found under 18 USC 921(a)(20)[47] did not cover situations where the defendant retained his or her civil rights at all times, and "whose legal status, postconviction, remained in all respects unaltered by any state dispensation."
>
> A person who "does not have the same freedom to transport a firearm as a Michigan citizen without a domestic assault record" sufficiently triggers the "unless clause" of 18 USC 921(a)(33)(B)(*ii*). *United States v Sanford*, 707 F3d 594, 596-597 (CA 6, 2012), overruling

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[46] See *Hampton v United States*, 191 F3d 695, 702-703 (CA 6, 1999), where the petitioner could not be convicted under 18 USC 922(g)(1) when MCL 750.224f did not restrict the convicted felon's ability to possess a firearm because its restriction period had expired. But see *United States v Williams*, 134 F Supp 2d 851, 852-853 (ED Mich, 2001), where a convicted felon was subject to federal prosecution for firearms possession because he failed to comply with the restrictions imposed by MCL 750.224f, even though he had completed his sentence and his civil rights were otherwise restored under Michigan law.

[47] "[18 USC 921(a)(33)(B)(*ii*)] tracks [18 USC 921(a)(20)] in specifying expungement, set aside, pardon, or restoration of rights as dispensations that can cancel lingering effects of a conviction[, which] . . . [the] parenthetical qualification [contained in 18 USC 921(a)(33)(B)(*ii*) that specifically sets out civil rights restoration requirements] shows that the words 'civil rights restored' do not cover a person whose civil rights were never taken away." *Logan*, 552 US at 36.

> *United States v Flores*, 118 Fed Appx 49 (CA 6, 2004) (although the defendant had some of his civil rights restored after his Michigan law convictions for misdemeanor domestic violence crime of domestic assault, the defendant's "ineligibility [under MCL 28.425b(7)(h)(*ix*)[48] for a concealed weapons permit [for eight years after each domestic assault conviction] restrict[ed] [the defendant's] ability to transport firearms sufficiently to trigger the 'unless clause'" of 18 USC 921(a)(33)(B)(*ii*), which provides that "[a] person shall not be considered to have been convicted of [a misdemeanor domestic violence crime] for purposes of [the offense of possessing a firearm after a conviction for a misdemeanor crime of domestic violence] if the . . . person . . . has had civil rights restored [after the domestic violence conviction,] . . . unless the . . . restoration of civil rights expressly provide[d] that the person may not ship, transport, possess, or receive firearms").

The penalty for knowingly violating 18 USC 922(g)(9) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2). "[I]n a prosecution under [18 USC 922(g)] and [18 USC 924(a)(2)], the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v United States*, 588 US ___, ___ (2019) ("hold[ing] that the word 'knowingly' [contained in 18 USC 924(a)(2)] applies both to the defendant's conduct and to the defendant's status").[49]

A person may apply to the US Attorney General for relief from disabilities imposed under 18 USC 922(g)(9). See 18 USC 925(c). 18 USC 925(c) permits the US Attorney General to grant the requested relief "if it is established to [the US Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Federal law also prohibits the sale or other disposal of firearms or ammunition to a person who has been convicted of a misdemeanor crime of domestic violence. See 18 USC 922(d)(9) and 18 USC

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[48] Formerly MCL 28.425b(7)(h)(*xv*).

[49] The *Rehaif* Court "express[ed] no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other [18 USC 922(g)] provisions not at issue here." *Rehaif*, 588 US at ___. In *Rehaif*, the Court specifically addressed 18 USC 922(g)(5) (alien illegally or unlawfully in the United States); it is uncertain to what extent its findings would apply to 18 USC 922(g)(9).

924(a)(2), which impose a fine and/or a maximum ten-year prison term against a person who sells or otherwise disposes of a firearm or ammunition to someone he or she knows or has reasonable cause to believe "has been convicted in any court of a misdemeanor crime of domestic violence."

Federal law does not exempt "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof" from the statutory provisions of 18 USC 922(d)(9) and 18 USC 922(g)(9).

B. Michigan Restrictions Following a Misdemeanor Conviction

A person convicted of a misdemeanor involving domestic violence is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm or ammunition in Michigan "until the expiration of 8 years after all of the following circumstances exist:

> (a) The person has paid all fines imposed for the violation.
>
> (b) The person has served all terms of imprisonment imposed for the violation.
>
> (c) The person has successfully completed all conditions of probation imposed for the violation." MCL 750.224f(5).

An applicant will be denied a concealed pistol license under MCL 28.425b(7)(h) if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)[50]]," the applicant, within the last eight years immediately preceding the date of application, was convicted of, among other offenses, assault or domestic assault (MCL 750.81), aggravated assault without a weapon or aggravated domestic assault without a weapon or prior conviction (MCL 750.81a(1) or MCL 750.81a(2)), fourth degree child abuse (MCL 750.136b(7)), stalking (MCL 750.411h), and fourth degree criminal sexual conduct (MCL 750.520e), or a federal, state, or local law substantially corresponding to one of these provisions.[51] MCL 28.425b(7)(h)(*ix*).[52] MCL 28.425b(7)(i) also provides for the denial of a concealed pistol license if the county clerk

[50] MCL 28.425b(6) requires "the department of state police [to] verify the requirements of [MCL 28.425b(7)(d)], [MCL 28.425b(7)(e)], [MCL 28.425b(7)(f)], [MCL 28.425b(7)(h)], [MCL 28.425b(7)(i)], [MCL 28.425b(7)(j)], [MCL 28.425b(7)(k)], and [MCL 28.425b(7)(m)] through the law enforcement information network [(LEIN)] and the national instant criminal background check system [(NICS)] and [to] report to the county clerk all statutory disqualifications, if any, under this act that apply to an applicant."

determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)]," that the applicant was convicted of certain specified misdemeanors within three years preceding the date of the application.[53] MCL 28.425b(11) requires "the county clerk [to] send by first-class mail a notice of statutory disqualification for a license under this act to an individual if the individual is not qualified under [MCL 28.425b(7)] to receive that license."

> **Note:** For exemptions from firearm licensing restrictions, see MCL 28.432 and MCL 28.432a.[54]

"Upon entry of a court order[55] or conviction of 1 of the enumerated prohibitions for using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm in [MCL 28.425b,] the department of state police shall immediately enter the order or conviction into the law enforcement information network [(LEIN)]." MCL 28.425b(8).

A person who carries a concealed pistol without a license is "guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00." MCL 750.227(2)-(3).

6.7 Firearms Restrictions Resulting From Entry of a Court Order

In Michigan, court-ordered personal protection orders (PPOs), conditional pretrial release orders, and probation orders may, by their terms, prohibit an individual from purchasing, possessing, or receiving a firearm. See MCL 600.2950(1)(e); MCL 600.2950a(26); MCL 765.6b(3); MCL 771.3(2)(o). Federal statutory firearms restrictions also apply under 18 USC 922(g)(8), which prohibits an individual subject to certain court

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[51] MCL 28.425b(7)(f) also provides for the denial of a concealed pistol license if the county clerk determines, "based solely on the report received from the department of state police under [MCL 28.425b(6)]" at the time of the application, the applicant was convicted of a felony in Michigan or elsewhere, or a felony charge against the applicant is pending in Michigan or elsewhere. An applicant may also be denied a concealed pistol license if the county clerk determines, "based solely on the report received from the department of state police under [MCL 28.425b(6)]," the applicant was charged with certain specified misdemeanors "pending against the applicant in this state or elsewhere at the time [of application]" under MCL 28.425b(7)(h) or MCL 28.425b(7)(i). See Sections 6.4(B) and 6.5(D) for additional information.

[52] See MCL 28.425b(7)(h) for the full list of criminal convictions or pending charges that warrant denial of a concealed pistol license.

[53] See MCL 28.425b(7)(i) for the list of misdemeanor convictions and pending charges that preclude the applicant from obtaining a concealed pistol license.

[54] MCL 28.432 discusses situations where the pistol licensing statute does not apply. MCL 28.432a discusses situations where the requirements to obtain a license to carry a concealed pistol do not apply.

[55] See Section 6.7 for information on firearms restrictions resulting from a court order.

orders from possessing or receiving firearms or ammunition. See *United States v Rahimi*, 602 US ___, ___ (2024) (holding that 18 USC 922(g)(8)(C) "is consistent with the Second Amendment" because "our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not").

Under Michigan law, PPOs, extreme risk protection orders (ERPOs), and conditional release orders protecting a named person also give rise to licensing restrictions. See MCL 28.422(3)(a); MCL 28.425b(7)(d).

A. Federal Restrictions on Possession or Receipt of Firearms or Ammunition After Entry of a Court Order

18 USC 922(g)(8) prohibits a person who is subject to a court order that restrains him or her from abusing an intimate partner or intimate partner's child from possessing or receiving firearms or ammunition:

> "(g) It shall be unlawful for any person—
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> * * *
>
> (8) who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)
>
> (*i*) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (*ii*) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]

* * *

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

The penalty for knowingly violating 18 USC 922(g)(8) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).[56] "[I]n a prosecution under [18 USC 922(g)] and [18 USC 924(a)(2)], the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v United States*, 588 US ___, ___ (2019) ("hold[ing] that the word 'knowingly' [contained in 18 USC 924(a)(2)] applies both to the defendant's conduct and to the defendant's status").[57]

18 USC 922(g)(8) "fits neatly within the [regulatory] tradition" represented by the "surety and going armed laws" in our nation's history. *United States v Rahimi*, 602 US ___, ___ (2024). "[It] restricts gun use to mitigate demonstrated threats of physical violence, just as the surety and going armed laws do." *Id.* at ___. "[18 USC 922(g)(8)] only prohibits firearm possession so long as the defendant 'is' subject to a restraining order," and "[18 USC 922(g)(8)] applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another." *Rahimi*, 602 US at ___, quoting 18 USC 922(g)(8)(C)(i). "Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Rahimi*, 602 US at ___. Consequently, "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at ___.

A person may apply to the US Attorney General for relief from disabilities imposed under 18 USC 922(g)(8). See 18 USC 925(c). 18 USC 925(c) permits the US Attorney General to grant the requested relief "if it is established to [the US Attorney General's] satisfaction

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[56] See 18 USC 925(a)(1) for exemptions from federal firearm restrictions, which includes exemptions in certain circumstances for "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." Note, however, 18 USC 922(g)(8) prohibits a person who is subject to a court order that restrains him or her from abusing an intimate partner or intimate partner's child from "ship[ping] or transport[ing] in interstate or foreign commerce, or possess[ing] in or affecting commerce, any firearm or ammunition; or [] receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

[57] The *Rehaif* Court "express[ed] no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other [18 USC 922(g)] provisions not at issue here." *Rehaif*, 588 US at ___. In *Rehaif*, the Court specifically addressed 18 USC 922(g)(5) (alien illegally or unlawfully in the United States); it is uncertain to what extent its findings would apply to 18 USC 922(g)(8).

that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."

Federal law also prohibits the sale or other disposal of firearms or ammunition to a individuals subject to certain court orders. See 18 USC 922(d)(8) and 18 USC 924(a)(2), which impose a fine and/or a maximum ten-year prison term against a person who sells or otherwise disposes of a firearm or ammunition to someone he or she knows or has reasonable cause to believe "is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child[.]"[58]

B. Michigan's Restrictions on the Purchase or Possession of Firearms After Entry of a Court Order

1. Personal Protection Orders

MCL 600.2950(1)(e) (domestic relationship PPOs) and MCL 600.2950a(26) (nondomestic stalking and nondomestic sexual assault PPOs) authorize a court to restrain or enjoin a respondent from purchasing or possessing a firearm.

> **Note:** MCL 600.2950(2) and MCL 600.2950a(5) require a petitioner seeking a PPO to inform the court of the respondent's occupation before issuance of the PPO if the respondent has a concealed weapons permit and "is required to carry a weapon as a condition of his or her employment" or is a law enforcement officer specified in the statutory provisions. Neither of these provisions apply to a petitioner who does not know the respondent's occupation. MCL 600.2950(2); MCL 600.2950a(5). For additional information on firearms restrictions against law enforcement employees, see Section 6.8.

[58] 18 USC 922(d)(8) only applies "to a court order that[:] (A) was issued after a hearing of which [the [person subject to the court order] received actual notice, and at which such person had the opportunity to participate; and (B)(*i*) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (*ii*) by it terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]"

An individual subject to a state-issued domestic restraining order that finds the individual to be "a credible threat to the physical safety of [the individual's] intimate partner or [the] partner's child, or [that] explicitly prohibit[s] the use, attempted use, or threatened use of physical force against those individuals" is prohibited from possessing a firearm or ammunition under federal law. *United States v Rahimi*, 602 US ___, ___ (2024) (quotation marks omitted). See 18 USC 922(g)(8)(C)(i)-(ii).

2. Conditional Pretrial Release Orders

MCL 765.6b(1) and MCL 765.6b(3) (conditional pretrial release orders) authorize a court to release any defendant subject to protective "conditions reasonably necessary for the protection of 1 or more named persons[,]" which include "impos[ing] a condition that the defendant not purchase or possess a firearm."[59] However, the court must impose a condition that the defendant not purchase or possess a firearm "if the court orders the defendant to carry[60] or wear an electronic monitoring device as a condition of release as described in [MCL 765.6b(6).[61]]" MCL 765.6b(3).

3. Probation Orders

MCL 771.3(2)(o) (probation orders) authorizes a court to require any probationer, as a condition of his or her probation, to "[b]e subject to conditions reasonably necessary for the protection of 1 or more named persons."[62]

C. Michigan Licensing Restrictions Resulting From Entry of a Court Order

The issuance of a Michigan personal protection order (PPO) under MCL 600.2950 or MCL 600.2950a, the issuance of an order for

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[59] See also MCR 6.106(D)(2)(k), which provides that the court may impose a condition on the defendant's pretrial release that requires the defendant "not possess a firearm or other dangerous weapon[.]" For a detailed discussion of conditional pretrial release orders, see Section 3.5.

[60] MCL 765.6b(3) still contemplates an order to *carry* an electronic monitoring device, but see MCL 765.6b(6), which was amended effective June 11, 2013, to no longer authorize a court to order a defendant to *carry* an electronic monitoring device. See 2013 PA 54.

[61] MCL 765.6b(6) permits the court to "order [a] defendant to wear an electronic monitoring device as a condition of release" where "[the] defendant . . . is charged with a crime involving domestic violence, or any other assaultive crime, [and] is released under [MCL 765.6b(1) and MCL 765.6b(6).]" For additional information on a conditional pretrial release order containing a condition of wearing an electronic monitoring device, see Section 3.5.

[62] For a detailed discussion of probation orders, see Section 3.6.

conditional pretrial release under MCL 765.6b, or the issuance of an extreme risk protection order (ERPO) under MCL 691.1807, can result in restrictions on obtaining a firearm license or a license to carry a concealed pistol.

1. Restrictions on Obtaining a Firearm License

Under MCL 28.422(3)(a),[63] the following individuals are disqualified from obtaining a license to purchase, carry, or transport a firearm:

- Individuals subject to a domestic relationship PPO issued under MCL 600.2950, a nondomestic stalking PPO issued under MCL 600.2950a(1), a nondomestic sexual assault PPO issued under MCL 600.2950a(2), or an ERPO issued under MCL 691.1807. MCL 28.422(3)(a)(*iii*)-(*iv*), (*viii*).

- Individuals subject to conditional pretrial release orders issued for the protection of a named person under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.422(3)(a)(*vi*).

The firearm license disqualification does not apply unless the restrained individual received notice and an opportunity for a hearing in the court proceeding in which the PPO or conditional release order was issued.[64] MCL 28.422(3)(a).

The firearm license disqualification also does not apply unless the PPO or conditional release order was entered into the law enforcement information network (LEIN) network. MCL 28.422(3)(a). MCL 28.422b(1) requires individuals who are disqualified from obtaining a firearm license to receive notice of their disqualification from the department of state police upon entry of the order into the LEIN.[65] However, "[t]he department of state police shall not send written notice of an entry of an

[63] MCL 28.422(3)(a) lists other types of individuals who are also disqualified from obtaining a firearm license. However, discussion of those individuals is outside the scope of this benchbook. See the statute for the full list.

[64] Compare the *concealed* pistol licensing restrictions under MCL 28.425b(7)(d), which does not indicate that the restrained party must have had notice of disqualifying proceeding when the order was issued.

[65] "[T]he department of state police shall immediately send written notice of [the disqualification] to the individual who is the subject of the order or disposition by first-class mail to the last known address of the individual." MCL 28.422b(1). The notice must at least include the name of the disqualified individual, the date of the disqualifying order's entry into LEIN, a statement that the individual cannot obtain a firearm license or concealed weapon license until the order or disposition is removed from the LEIN, and a statement that the individual may request that the state police correct or expunge inaccurate information from the LEIN. *Id*. MCL 28.422b(2)-(4) provide for proceedings for correction or expungement.

order or disposition into the [LEIN] as required for a [PPO] issued under . . . MCL 600.2950 [or] [MCL] 600.2950a, or an extreme risk protection order [ERPO] issued under the [ERPO Act], until the department has received notice that the respondent of the order has been served with or has received notice of the [PPO] or [ERPO]." MCL 28.422b(5).

"[A] person who obtains a firearm in violation of . . . MCL 28.422 [the firearm licensing statute], is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."[66] MCL 750.232a(1).

2. Restrictions on Obtaining a Concealed Pistol License

Under MCL 28.425b(7)(d),[67] an applicant will be denied a concealed pistol license if the county clerk determines, "[b]ased solely on the report received from the department of state police under [MCL 28.425b(6)[68]][:]"

- the applicant is the subject of a domestic relationship PPO issued under MCL 600.2950, a nondomestic stalking PPO issued under MCL 600.2950a(1), or a nondomestic sexual assault PPO issued under MCL 600.2950a(2). MCL 28.425b(7)(d)(*iii*).
- the applicant is the subject of a conditional pretrial release order issued under MCL 765.6b, *if* the order specifies that the defendant may not purchase or possess a firearm. MCL 28.425b(7)(d)(*iv*).
- the applicant is the subject of an ERPO. MCL 28.425b(7)(d)(*vi*).

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[66] "A person who intentionally makes a material false statement on an application for a license to purchase a firearm under [MCL 28.422], is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both." MCL 750.232a(3). See also MCL 28.422(14), which also makes it a "felony punishable for not more than 4 years or a fine of not more than $2,000.00, or both" for "[a] person who forges any matter on an application for a license under [MCL 28.422][.]" "A person who uses or attempts to use false identification or the identification of another person to purchase a firearm is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both." MCL 750.232a(4).

[67] MCL 28.425b(7)(d) lists other types of individuals who are also disqualified from obtaining a concealed pistol license. However, discussion of those individuals is outside the scope of this benchbook. See the statute for the full list.

[68] MCL 28.425b(6) requires "the department of state police [to] verify the requirements of [MCL 28.425b(7)(d)], [MCL 28.425b(7)(e)], [MCL 28.425b(7)(f)], [MCL 28.425b(7)(h)], [MCL 28.425b(7)(i)], [MCL 28.425b(7)(j)], [MCL 28.425b(7)(k)], and [MCL 28.425b(7)(n)] through the law enforcement information network [(LEIN)] and the national instant criminal background check system [(NICS)] and [to] report to the county clerk all statutory disqualifications, if any, under this act that apply to an applicant."

> **Note:** MCL 28.425b(11) requires "the county clerk [to] send by first-class mail a notice of statutory disqualification for a license under this act to an individual if the individual is not qualified under [MCL 28.425b(7)] to receive that license."

The concealed pistol restrictions in MCL 28.425b(7)(d) apply regardless of whether the person subject to the order received notice and an opportunity to be heard in the court proceeding in which the PPO or conditional release order was issued. See MCL 28.425b(7)(d), which does not provide the same requirements as set out under MCL 28.422(3)(a) (specifically requiring the individual to receive notice and an opportunity to be heard when the order was issued before the pistol licensing disqualification applies).

"Upon entry of a court order[69] or conviction of 1 of the enumerated prohibitions for using, transporting, selling, purchasing, carrying, shipping, receiving or distributing a firearm in [MCL 28.425b,] the department of state police shall immediately enter the order or conviction into the law enforcement information network [(LEIN)]." MCL 28.425b(8).

A person who carries a concealed pistol without a license is "guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00." MCL 750.227(2)-(3).

6.8 Firearms and Ammunition Restrictions Against Law Enforcement Employee

A. Restrictions on Activities Involving a Firearm or Ammunition

1. State Restrictions

MCL 600.2950 (domestic relationship PPOs) and MCL 600.2950a (nondomestic stalking and nondomestic sexual assault PPOs) permit a court to enjoin or restrain any individual regardless of his or her occupation from purchasing or possessing a firearm when entering a PPO. See MCL 600.2950(1)(e); MCL 600.2950(2); MCL 600.2950a(5); MCL 600.2950a(26), which authorize a court to restrain or enjoin a respondent from purchasing or possessing a firearm and, if known, require the petitioner to inform the

[69] See Section 6.7 for information on firearms restrictions resulting from a court order.

court before issuance of a PPO if the respondent has a concealed weapons permit and "is required to carry a weapon as a condition of his or her employment, a police officer licensed or certified by the Michigan commission on law enforcement standards act, . . . MCL 28.601 to [MCL] 28.615, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment[.]"[70]

See also MCL 765.6b(3) (conditional pretrial release orders), which authorizes the court to release any defendant subject to protective "conditions reasonably necessary for the protection of 1 or more named persons[,]" which may include "impos[ing] a condition that the defendant not purchase or possess a firearm[;]"[71] MCL 771.3(2)(o) (probation orders), which authorizes the court to require any probationer, as a condition of his or her probation, to "[b]e subject to conditions reasonably necessary for the protection of 1 or more named persons."[72]

In addition, law enforcement employees convicted of a felony are also subject to the restrictions imposed on certain activities involving firearms or ammunition by convicted felons set forth in MCL 750.224f (felon-in-possession statute).[73] See MCL 750.231 (excluding MCL 750.224f from its list of statutes to which exemptions for certain persons and organizations, including specified law enforcement and military personnel, may apply).

2. Federal Restrictions

Except for firearm or ammunition restrictions resulting from a conviction of a misdemeanor crime of domestic violence under 18 USC 922(g)(9), the statutory provisions contained in 18 USC 922(g) that specifically prohibit persons convicted of certain crimes from possessing or receiving firearms or ammunition do not "apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof."[74] 18 USC 925(a)(1).

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[70] For a detailed discussion of personal protection orders (PPOs), see Chapter 5.

[71] See also MCR 6.106(D)(2)(k), which authorizes the court to impose a pretrial release condition prohibiting the defendant from "possess[ing] a firearm or other dangerous weapon[.]" For a detailed discussion of conditional pretrial release orders, see Section 3.5.

[72] For a detailed discussion of probation orders, see Section 3.6.

[73] See Sections 6.5(B)-(C) for more information on restrictions imposed under MCL 750.224f.

Note, however, 18 USC 922(g)(8) prohibits a person who is subject to a court order that restrains him or her from abusing an intimate partner or intimate partner's child from "ship[ping] or transport[ing] in interstate or foreign commerce, or possess[ing] in or affecting commerce, any firearm or ammunition; or [] receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

B. Restrictions on Issuing Firearms License

Certain law enforcement, military, and governmental employees may be exempt from the pistol licensing statute under MCL 28.432, and from the concealed pistol licensing statute under MCL 28.432a.

6.9 Michigan Restrictions on Issuing Firearms Licenses to Dangerous or Mentally Ill Individuals

The Michigan firearm licensing and concealed pistol licensing statutes each disqualify from licensure individuals who are deemed dangerous to themselves or others. See MCL 28.422(3); MCL 28.425b(7).

A. Firearm License

A firearm license must be issued to a qualified applicant[75] unless the agency or individual issuing the license "has probable cause to believe that the applicant would be a threat to himself or herself or to other individuals, or would commit an offense with the firearm that would violate a law of this or another state or of the United States." MCL 28.422(3).

B. Concealed Pistol License

A concealed pistol license must not be issued to an applicant if the county clerk determines:

- "Based solely on the report received from the department of state police under [MCL 28.425b(6)[76]], the applicant has . . . been found guilty but mentally ill of

[74] Federal law does not exempt "the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof" from the statutory provisions of 18 USC 922(d)(9), which specifically prohibit "any person [from] sell[ing] or otherwise dispos[ing] of any firearm or ammunition to any person [he or she] know[s] or ha[s] reasonable cause to believe" "has been convicted in any court of a misdemeanor crime of domestic violence." 18 USC 925(a)(1). The penalty for knowingly violating 18 USC 922(d)(9) is a fine and/or a maximum ten-year prison term. 18 USC 924(a)(2).

[75] See MCL 28.422(3), which provides for a list of the circumstances an applicant must meet in order to obtain a firearm license.

any crime [or] has . . . offered a plea of not guilty of, or been acquitted of, any crime by reason of insanity." MCL 28.425b(7)(j).

- "Based solely on the report received from the department of state police under [MCL 28.425b(6)], the applicant is . . . currently [or] has . . . been subject to an order of involuntary commitment in an inpatient or outpatient setting due to mental illness." MCL 28.425b(7)(k).

- "The applicant has [not] filed a statement under [MCL 28.425b(1)(d) stating] that the applicant does not have a diagnosis of mental illness that includes an assessment that the individual presents a danger to the applicant or to another at the time the application is made, regardless of whether the applicant is receiving treatment for that illness." MCL 28.425b(7)(*l*).[77]

- "Based solely on the report received from the department of state police under [MCL 28.425b(6)], the applicant is . . . under a court order of legal incapacity in this state or elsewhere." MCL 28.425b(7)(m).

MCL 28.425b(11) requires "the county clerk [to] send by first-class mail a notice of statutory disqualification for a license under this act to an individual if the individual is not qualified under [MCL 28.425b(7)] to receive that license."

6.10 Change in Eligibility After Concealed Pistol License Issued

"The department of state police shall notify the county clerk in the county in which a license was issued to an individual to carry a concealed pistol if the department of state police determines that there has been a change in the individual's eligibility under this act to receive a license to carry a concealed pistol [(CPL)].[78] The county clerk shall suspend, revoke, or reinstate the license as required under this act and immediately send notice of the suspension, revocation, or reinstatement

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[76] MCL 28.425b(6) requires "the department of state police [to] verify the requirements of [MCL 28.425b(7)(d)], [MCL 28.425b(7)(e)], [MCL 28.425b(7)(f)], [MCL 28.425b(7)(h)], [MCL 28.425b(7)(i)], [MCL 28.425b(7)(j)], [MCL 28.425b(7)(k)], and [MCL 28.425b(7)(m)] through the law enforcement information network [(LEIN)] and the national instant criminal background check system [(NICS)] and [to] report to the county clerk all statutory disqualifications, if any, under this act that apply to an applicant."

[77] For a complete list of eligibility requirements an individual is required to satisfy in order to receive a concealed pistol license, see MCL 28.425b(7).

[78] For a complete list of eligibility requirements an individual is required to satisfy in order to receive a concealed pistol license, see MCL 28.425b(7).

under this subsection by first-class mail in a sealed envelope to the individual's last known address as indicated on the records of the county clerk. The notice must include the statutory reason for the suspension, revocation, or reinstatement, the source of the record supporting the suspension, revocation, or reinstatement, the length of the suspension or revocation, and whom to contact for correcting errors in the record, appealing the suspension or revocation, and reapplying for that individual's license. The department of state police shall immediately enter that suspension, revocation, or reinstatement into the law enforcement information network [(LEIN)]."[79] MCL 28.428(3).

> **Note:** "The county clerk in the county in which a license was issued to an individual to carry a concealed pistol shall suspend, revoke, or reinstate a license as required under this act if ordered by a court[80] or if the county clerk is notified by a law enforcement agency, prosecuting official, or court of a change in the licensee's eligibility to carry a concealed pistol under this act." MCL 28.428(1).

"If a suspension is imposed under [MCL 28.428], the suspension must be for a period stated in years, months, or days, or until the final disposition of the charge, and state the date the suspension will end, if applicable." MCL 28.428(4).

An order or amended order suspending or revoking an individual's license is immediately effective. MCL 28.428(8). A person is not criminally liable for violating the order until he or she receives notice of the suspension or revocation. *Id.* However, "nothing in MCL 28.428 states *how* an individual must be notified that his or her CPL has been revoked or suspended, only that the individual receive notice." *People v Brown (Cleophas)*, 330 Mich App 223, 234 (2019). In *Brown*, 330 Mich App at 234, "the trial court erred in holding that verbal notice [by a peace officer] was insufficient under MCL 28.428." Moreover, "the prosecution produced evidence establishing that the MCL 28.428' notice requirement was otherwise satisfied" where "[t]he uncontested evidence showed that defendant received written notice that his CPL was suspended, and nothing suggests that defendant had reason to believe that this suspension was lifted." *Brown*, 330 Mich App at 235.

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[79] See also MCL 28.425b(16), which requires "the county clerk [to] notify the department of state police if a license is suspended or revoked[, and t]he department of state police [to] enter that suspension or revocation into the law enforcement information network [(LEIN)]."

[80] "If the court orders a county clerk to suspend, revoke, or reinstate a license under [MCL 28.428] or amends a suspension, revocation, or reinstatement order, the county clerk shall immediately notify the department of state police in a manner prescribed by the department of state police. The department of state police shall enter the order or amended order into [LEIN]." MCL 28.428(7).

Thus, where proper notice has not yet been given, an individual may avoid arrest if he or she complies with the order once informed. See MCL 28.428(9), which states that "[i]f an individual is carrying a pistol in violation of a suspension or revocation order or amended order issued under [MCL 28.428] but has not previously received notice of the order or amended order, the individual must be informed of the order or amended order and be given an opportunity to properly store the pistol or otherwise comply with the order or amended order before an arrest is made for carrying the pistol in violation of this act."[81]

A. Surrender of License Upon Suspension or Revocation

"The licensee shall promptly surrender the individual's license to the county clerk after being notified that the individual's license has been revoked or suspended. An individual who fails to surrender a license as required under this subsection after the individual was notified that the individual's license was suspended or revoked is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 28.428(4). See also MCL 28.425b(16), which provides that "[i]f a license issued under this act is suspended or revoked, the license is forfeited and the individual shall return the license to the county clerk forthwith by mail or in person[,][82] . . . [and a]n individual who fails to return a license under this subsection after the individual was notified that the individual's license was suspended or revoked is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both."

B. Renewing License After Expiration of License Suspension

"Except as otherwise provided in [MCL 28.428(2) and MCL 28.428(6)], if a license is suspended under [MCL 28.428] and that license was surrendered by the licensee, upon expiration of the suspension period, the applicant may apply for a renewal license in the same manner as provided under [MCL 28.425*l*]. The county clerk or department of state police, as applicable, shall issue the applicant a receipt for the individual's application at the time the application is submitted. The receipt must contain all of the following:

(a) The name of the applicant.

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[81] "If a law enforcement agency or officer notifies an individual of a suspension or revocation order or amended order issued under [MCL 28.428] who has not previously received notice of the order or amended order, the law enforcement agency or officer shall enter a statement into the [LEIN] that the individual has received notice of the order or amended order under [MCL 28.428]." MCL 28.428(10).

[82] "The county clerk shall retain a suspended or revoked license as an official record 1 year after the expiration of the license, unless the license is reinstated or a new license is issued." MCL 28.425b(16).

(b) The date and time the receipt is issued.

(c) The amount paid.

(d) The applicant's state-issued driver license or personal identification card number.

(e) The statement, 'This receipt was issued for the purpose of applying for a renewal of a concealed pistol license following a period of suspension or revocation. This receipt does not authorize an individual to carry a concealed pistol in this state.'

(f) The name of the county in which the receipt is issued, if applicable.

(g) An impression of the county seal, if applicable." MCL 28.428(5).

MCL 28.428(6) provides that "[i]f a license is suspended because of an order under [MCL 28.425b(7)(d)(*iii*)[83] or MCL 28.425b(7)(d)(*vi*)[84]] and that license was surrendered by the licensee, upon expiration of the order and notification to the county clerk, the county clerk shall automatically reinstate the license if the license is not expired and the department of state police has completed the verification required under [MCL 28.425b(6)]. The county clerk shall not charge a fee for the reinstatement of a license under this subsection."

6.11 Seizure and Forfeiture of Firearms Under Michigan Law

This section discusses the seizure and forfeiture of firearms in Michigan. For additional information on the seizure and forfeiture of firearms in violation of the Federal Firearms Statute, 18 USC 921 *et seq*, see 18 USC 924(d).

A. Firearm Licensing Violation

MCL 28.425f(7) authorizes a peace officer to immediately seize "[a] pistol or portable device that uses electro-muscular disruption technology carried in violation of [MCL 28.425f.]" A pistol or portable device is not subject to immediate seizure under MCL 28.425f(7) if "[t]he individual has his or her state-issued driver license or personal

[83] MCL 28.425b(7)(d)(*iii*) addresses domestic relationship PPOs issued under MCL 600.2950, nondomestic stalking PPOs issued under MCL 600.2950a(1), and nondomestic sexual assault PPOs issued under MCL 600.2950a(2).

[84] MCL 28.425b(7)(d)(*vi*) addresses extreme risk protection orders issued under MCL 691.1807.

identification card in his or her possession when the violation occurs[, and] [t]he peace officer verifies through the law enforcement information network [(LEIN)] that the individual is licensed to carry a concealed pistol." MCL 28.425f(7)(a)-(b).

> **Note:** A person violates MCL 28.425f if the person licensed to carry a pistol or portable device that uses electro-muscular disruption technology fails to:
>
> - possess the license and his or her state-issued driver license or personal identification card at all times he or she is carrying the concealed pistol or portable device, MCL 28.425f(1);
>
> - present the concealed pistol license and his or her state-issued driver license or personal identification card at the peace officer's request, MCL 28.425f(2); and
>
> - immediately disclose that he or she is carrying on him or her (or has in his or her vehicle) the pistol or portable device if stopped by a peace officer, MCL 28.425f(3).

"The plain language of MCL 28.425f permits a police officer to ask any person observed to be carrying a concealed weapon to produce his or her CPL [concealed pistol license], at any time and for any reason. MCL 750.227 also makes possession of a concealed weapon a presumptive crime, which can be rebutted by a suspect with evidence of a CPL." *People v Williams*, ___ Mich App ___. ___ (2024). Thus, "under Michigan law a police officer has reasonable suspicion to approach a person and ask for proof of a CPL after observing a bulge in a person's clothing indicative of a hidden firearm." *Id.* at ___. "MCL 28.425f places no restrictions on when and under what circumstances an officer may ask a person if he or she is carrying a concealed weapon and whether such person has a CPL." *Williams*, ___ Mich App at ___. "MCL 776.20 places the burden on the defendant to prove his or her right to carry the weapon by producing his or her CPL." *Williams*, ___ Mich App at ___.

MCL 28.433 provides for the seizure of a firearm unlawfully possessed or carried by a person in violation of the pistol licensing statute, MCL 28.422, or the conceal pistol licensing statute, MCL 28.425b:

> "When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that any pistol or other weapon or device mentioned in this act is unlawfully possessed or carried by any person, such magistrate shall, if he [or she] be

> satisfied that there is reasonable cause to believe the matters in said complaint be true, issue his [or her] warrant directed to any peace officer, commanding him to search the person or place described in such complaint, and if such pistol, weapon or device be there found, to seize and hold the same as evidence of a violation of this act."

"Subject to [MCL 28.425g] and [MCL 28.434a[85]], all pistols, weapons, or devices carried or possessed contrary to this act are declared forfeited to this state, and must be turned over to the director of the department of state police or the director's designated representative, for disposal under [MCL 28.434]."[86] MCL 28.434(1). Provisions for disposal (including notice requirements) are found at MCL 28.434(2)-(3).

"A pistol or portable device that uses electro-muscular disruption technology carried in violation of this act is subject to seizure and forfeiture in the same manner that property is subject to seizure and forfeiture under . . . MCL 600.4701 to [MCL] 600.4709."[87] MCL 28.425g. See also MCL 28.425f(7) (providing for the forfeiture of an individual's pistol or portable device for failing to timely display his or her license or documentation related to the device).[88]

B. Unlawful Possession of Firearm by Convicted Felon

MCL 750.238 provides for the seizure of a firearm unlawfully possessed or carried by a convicted felon in violation of MCL 750.224f:

> "When complaint shall be made on oath to any magistrate authorized to issue warrants in criminal cases that any pistol or other weapon or device

[85] MCL 28.434a(1)(a)-(b) permit "[a] law enforcement agency that seizes or otherwise comes into possession of a firearm or a part of a firearm subject to disposal under [MCL 28.434 to], instead of forwarding the firearm or part of the firearm to the director of the department of state police or the director's designated representative for disposal under that section, retain that firearm or part of a firearm . . . [f]or legal sale or trade to a federally licensed firearm dealer . . . [or f]or official use by members of the seizing law enforcement agency who are employed as peace officers. The law enforcement agency shall not sell a firearm or part of a firearm under this subdivision."

[86] "The department of state police is immune from civil liability for disposing of a firearm in compliance with [MCL 28.434]." MCL 28.434(4).

[87] "[MCL 28.425g] does not apply if the violation is a state civil infraction under [MCL 28.425f] unless the individual fails to present his or her license within the 45-day period described in that section." MCL 28.425g.

[88] MCL 28.425f(7) gives an individual whose pistol or device was seized 45 days to present his or her license or documentation related to the pistol or device. Upon timely presentation and unless possession is otherwise prohibited, the pistol or device must be returned. *Id.* However, failure to timely display the information may result in forfeiture. *Id.*

> mentioned in this chapter is unlawfully possessed or carried by any person, such magistrate shall, if he [or she] be satisfied that there is reasonable cause to believe the matters in said complaint be true, issue his [or her] warrant directed to any peace officer, commanding him [or her] to search the person or place described in such complaint, and if such pistol, weapon or device be there found, to seize and hold the same as evidence of a violation of this chapter."

"Except as provided in [MCL 750.239(2)] and subject to [MCL 750.239a[89]], all pistols, weapons, or devices carried, possessed, or used contrary to this chapter are forfeited to this state and shall be turned over to the department of state police for disposition as determined appropriate by the director of the department of state police or the director's designated representative."[90] MCL 750.239(1). Provisions for disposal (including notice requirements) are found at MCL 750.239(2)-(3).

[89] MCL 750.239a(1) permits "[a] law enforcement agency that seizes or otherwise comes into possession of a firearm or a part of a firearm subject to disposal under [MCL 750.239] [to], instead of forwarding the firearm or part of the firearm to the director of the department of state police or his or her designated representative for disposal under that section, retain that firearm or part of a firearm[] . . . [f]or legal sale or trade to a federally licensed firearm dealer . . . [or] [f]or official use by members of the seizing law enforcement agency who are employed as peace officers."

[90] "The department of state police is immune from civil liability for disposing of a firearm in compliance with [MCL 750.239]." MCL 750.239(4).

Chapter 7: Case Management for Safety in Cases Involving Domestic Violence

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7.1 Chapter Overview

Because cases involving allegations of domestic violence may result in more violence, the court should consider taking protective measures if and when necessary to protect the safety of a crime victim and the public. This chapter outlines some case management strategies available to the court in dealing with civil and criminal court proceedings where allegations of domestic violence exist, including offering separate waiting areas for crime victims, the confidentiality of records and/or certain information contained in the records, and using alternative dispute resolution for domestic relations cases involving domestic violence.

7.2 Committee Tips for Promoting Safety in Domestic Violence Cases

It is important for the court to promptly identify cases where domestic violence is at issue because the presence of violence raises serious safety implications for the parties involved and during court proceedings. To that end, the editorial advisory committee offers the following suggestions for promoting safety in cases involving allegations of domestic violence:

- **Identify the presence of domestic violence as soon as possible after a case is filed.**

Reasons why it is important to identify the presence of domestic violence as soon as possible after a case is filed, include:

- Identifying domestic violence early in a case allows the court to take precautions that promote the safety of the parties, their children, and court personnel. For this reason, inquiry into the presence of domestic violence should also include inquiry into the presence of any lethality factors. For information on lethality indicators, see the *Batterer Intervention Standards for the State of Michigan*.

- Identifying domestic violence early in a case allows for a complete investigation about the parties' circumstances, providing a sound factual basis for judges and referees who must issue orders governing the parties' interactions as the case progresses through the court system.

- Evidence of domestic violence or uneven bargaining positions in a domestic relations matter is a factor that prevents the court from granting the parties' jointly-filed motion to opt-out of friend of the court services. MCL 552.505a(2)(d); MCL 552.505a(4)(f).

- "Domestic violence, regardless of whether the violence was directed against or witnessed by a child[,]" is a factor the court must consider in determining the best interests of a child under the Child Custody Act, MCL 722.23(k), and MCL 722.23(j) is a best interest factor that prohibits the court from negatively considering "any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent[]" when considering the parties' "willingness and ability . . . to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."

- "The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time" is a factor the court may consider in determining the frequency, duration, and type of parenting time to be granted under MCL 722.27a(7)(d).

- "Domestic violence, regardless of whether the violence was directed against or witnessed by the child[]" is one of several factors the court must consider "[b]efore permitting a [child's] legal residence change otherwise restricted by [MCL 722.31(1)]." MCL 722.31(4)(e).

- Under the federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, courts must cooperate with federal and state child support agencies to safeguard against the disclosure of confidential information about persons subjected to domestic abuse. Note that the PRWORA expanded the use of the Federal Parent Locator Service (FPLS). See Section 7.5 for additional information on the FPLS.

- **Provide clear, consistent, ongoing information about court practices and procedures.**

To help an abused individual overcome the fear and uncertainty that many abused individuals experience when dealing with the court system, courts should provide the parties with clear, consistent, ongoing information about court practices and procedures. Such information may make abused individuals feel safer about disclosing domestic violence.

For safety planning purposes, the court should also provide the abused individual with complete information about court proceedings that include information on the timing and duration of the proceedings, what information the court may or may not keep confidential, and how a party may request nondisclosure of information deemed non-confidential (such as a party's address).

- **Minimize contact between the parties as the proceedings progress.**

Opportunities for continued abuse may arise during court proceedings affecting both parties. To help offset the potential for continued abuse during court proceedings, the court should:

- honor any no-contact provisions in court orders, such as PPOs, probation orders, or conditional release orders issued in criminal proceedings.

- arrange for separate waiting areas in the courthouse. Note that the court is required to provide a separate waiting area for victims under the Crime Victim's Rights Act when a defendant is charged with a felony, juvenile offense, or a serious misdemeanor. It is advisable to do the same in other proceedings, such as domestic relations. For additional information on the separate waiting area requirement under the CVRA, see Section 7.3.

- allow abused individuals to leave the courthouse before dismissing alleged abusers to reduce the risk of the abuser potentially harassing, harming, or following the abused individual.

- in interstate and international cases, follow statutory provisions that permit the taking of evidence while the parties are separated. See, for example, MCL 722.1111 and MCL 722.1112(1), provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which provide for alternative procedures when gathering evidence from other states through the taking of witness testimony by deposition or other means available, and by enlisting the services of other courts; MCL 552.2316(1),[1] a provision of the Uniform Interstate Family Support Act (UIFSA), which permits, in interstate and international[2] actions, the absence of a petitioner's presence at court proceedings addressing "the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage of a child."

- **Consistently use effective screening methods early in the case and continuing screening as the case progresses.**

[1] Effective January 1, 2016, the Michigan Legislature repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, to now include guidelines and procedures for establishing and collecting foreign support orders from foreign countries subject to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance adopted on November 23, 2007.

[2] Applicable to foreign countries subject to the Convention.

The court should use effective screening methods in domestic relations cases and child protective proceedings where it finds the potential for domestic violence by, at a minimum, requiring the parties to complete questionnaires and following up on questionnaire responses that trigger the potential for domestic violence, and by conducting a search for related proceedings involving domestic violence in other divisions or units of the court system (i.e. entry of a protection order or the existence of an abuse or neglect proceeding, juvenile delinquency matter, or a criminal proceeding).[3]

If a court discovers that domestic violence is present, the court should:

- make an ongoing assessment of the risk posed by the abusive party, including an inquiry into the presence of any lethality factors. For information on lethality indicators, see the *Batterer Intervention Standards for the State of Michigan*, Section 5.2, at http://www.biscmi.org/aboutus/docs/michigan_standards_final.html.
- if a protection order or another case is open involving the parties, communicate with other courts involved.
- collaborate with agencies to provide appropriate services to the parties.
- use caution when ordering mediation and arbitration. For additional information on alternative dispute resolution in cases involving domestic violence, see Section 7.6.
- use caution when awarding joint custody or unsupervised parenting time. Because the dynamics of power and control, and the threats and use of violence, do not necessarily end when the judgment of divorce is entered, there may be circumstances where joint custody or unsupervised parenting time is neither safe nor workable.
- carefully review any agreements made between the parties to ensure that they are not a product of coercion or duress.

7.3 Separate Waiting Area for Crime Victims

The Crime Victim's Rights Act (CVRA) requires "[t]he court [to] provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of

[3] For examples of screening methods created for domestic relations mediation purposes (including sample questionnaires), see the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, and the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, *Abbreviated Domestic Violence Screening Questionnaires*.

the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with [the] defendant, defendant's relatives, and defense witnesses during court proceedings." MCL 780.757 (felonies).

MCL 780.787 and MCL 780.817 contain substantially similar provisions for proceedings involving juvenile offenses and serious misdemeanors.[4]

7.4 Victim Confidentiality Concerns and Court Records

"MCR 8.119 governs a court's maintenance of court records, the public's access to those records, and the circumstances under which a court may seal, or perpetually prohibit the public's access, to those records." *Jenson v Puste*, 290 Mich App 338, 342 (2010).[5]

Court records and confidential files are not subject to requests under Michigan's Freedom of Information Act (FOIA), as the judicial branch of government is specifically exempted from that act. MCL 15.232(h)(*iv*); MCL 15.233(1). However, court records are public except as otherwise indicated by law, court rule, or court order. MCR 6.007; MCR 8.119(H)(7).[6]

Specifically, MCR 8.119(H)(7) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119(D)] is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(I)[7]], any person may inspect that record and may obtain copies as provided in [MCR 8.119(J)]."[8] However, public access to documents containing a party's personal identifying information (PII) is subject to the additional safeguards and conditions outlined in MCR 1.109(D)(9)-(10).[9] MCR 8.119(H)(3)-(5).

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[4] Serious misdemeanors, as defined in MCL 780.811(1)(a), include, among other crimes, the crimes of assault and assault and battery under MCL 750.81, assault and infliction of serious or aggravated injury under MCL 750.81a, fourth-degree child abuse under MCL 750.136b(7), internet or computer usage to make prohibited contact under MCL 750.145d, and stalking under MCL 750.411h. For additional information on domestic violence crimes, see Chapter 2.

[5] For a discussion on the confidentiality of information required under the Federal Parent Locator Service (FPLS), see Section 7.5. On the safety and privacy of crime victims generally, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[6] "[MCR 8.119] applies to all records in every trial court." MCR 8.119(A).

[7] MCR 8.119(I) pertains to sealed records. For additional information on sealing court records under MCR 8.119(I), see Section 7.4(G).

[8] See MCR 8.119(H) for information on accessing public records, and MCR 8.119(J) for information on access and reproduction fees.

[9] For FAQs related to the scope of information that qualifies as protected personal identifying information (PII) when it appears in, or is required by, certain court documents filed in a case, see the SCAO document summarizing the duties assigned to courts and court staff that are tasked with safeguarding an individual's PII and limiting access to it.

A. Access to Documents Containing a Victim's Personal Identifying Information

"[P]ersonal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April 1, 2022, except as provided by [any other court rule]." MCR 1.109(D)(9)(a). Protected personal identifying information for purposes of MCR 8.119 is not the same as the personal identifying information described in the Crime Victim's Rights Act. See MCR 1.109(D)(9); MCR 8.119; MCL 780.758; MCL 780.788; MCL 780.830. For purposes of the court records and other specified material addressed by MCR 8.119 and MCR 1.109, all of the following are identified as protected PII:[10]

- date of birth,
- social security number or national identification number,
- driver's license number or state-issued personal identification card number,
- passport number, and
- financial account numbers. MCR 1.109(D)(9)(a)(*i*)-(*v*).

For detailed information about the scope of PII and the requirements for accessing it, see MCR 1.109 and MCR 8.119. For a discussion of the court rules addressing protected PII, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 1, and *Child Protective Proceedings Benchbook*, Chapter 21.

B. Preserving Confidentiality of Victim's Home and Work Addresses and Telephone Numbers and Other Identifying Information

1. Federal Law

Federal law addressing domestic violence and stalking, 18 USC 2261 *et seq.*, prohibits a court from providing certain PPO information over the Internet if it would likely reveal the identity or location of the petitioner.[11] See 18 USC 2265(d)(3), which states:

[10] MCR 8.119 and MCR 1.109 do not include a victim's address or telephone number in their definition of personal identifying information; that information is addressed by provisions in the Crime Victim's Rights Act.

> "A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes. The prohibition under [18 USC 2265(d)(3)] applies to all protection orders for the protection of a person residing within a State, territorial, or Tribal jurisdiction, whether or not the protection order was issued by that State, territory, or Tribe."

See also SCAO Memorandum, *Internet Dissemination of Personal Protection Order Information*, which addresses the "unintended consequences" of "unknowingly or unintentionally releas[ing] victims' personally identifiable information through the Internet" as courts become more transparent in "providing online access to circuit court records[.]" The memorandum also informs the courts that 18 USC 2265(d)(3) "prohibits providing information over the Internet about [PPOs] that would be likely to reveal the identity or location of the petitioner . . . ." "[18 USC 2265(d)(3)] affects any online service that allows the viewing of petitions, registers of action, or hearing information that provides identifying information or addresses over the Internet." SCAO Memorandum, *Internet Dissemination of Personal Protection Order Information*.

2. Felony Cases

"Records are public except as otherwise indicated in court rule or statute." MCR 6.007.

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the Crime Victim's Rights Act (CVRA)

[11] See also MCR 3.705(C), which prohibits the court "from making available to the public on the Internet any information regarding the registration of, filing of a petition for, or issuance of an order under [MCR 3.705] if such publication would be likely to publicly reveal the identity or location of the party protected under the order."

provides that "information and visual representations of a victim are subject to the following:

> (a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [Freedom of Information Act (FOIA), MCL 15.231-MCL 15.246], unless the address is used to identify the place of the crime.
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused." MCL 780.758(3).

The provisions in MCL 780.758(3) "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.758(4). However, a victim's address and telephone number being maintained by a sheriff or the department of corrections are exempt from disclosure under Michigan's FOIA. MCL 780.769(2).

The CVRA also limits access to a victim's address and phone number from court files:

> "The work address and address of the victim must not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim must not be in the court file or ordinary court documents except as contained in a transcript of the trial." MCL 780.758(2).

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion must be in camera." MCL 780.758(1).

3. Serious Misdemeanor[12] Cases

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the CVRA provides that "information and visual representations of a victim are subject to the following:

> (a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [FOIA].
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt

[12] Serious misdemeanors, as defined in MCL 780.811(1)(a), include, among other crimes, a crime of assault and assault and battery under MCL 750.81, assault and infliction of serious or aggravated injury under MCL 750.81a, fourth-degree child abuse under MCL 750.136b(7), internet or computer usage to make prohibited contact under MCL 750.145d, and stalking under MCL 750.411h. For additional information on domestic violence crimes, see Chapter 2.

> from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused." MCL 780.818(2).

These provisions "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.818(3). However, a victim's address and telephone number maintained by a court or sheriff are exempt from disclosure under Michigan's FOIA. MCL 780.830.

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion must be in camera." MCL 780.818(1).

Although a victim's name, address, and telephone number must appear on certain documents related to the case, these documents "shall not be a matter of public record." MCL 780.812 (requiring "[a] law enforcement officer investigating a serious misdemeanor involving a victim [to] include with the complaint, appearance ticket, or traffic citation filed with the court a separate written statement including the name, address, and phone number of each victim[, and that] [t]his separate statement shall not be a matter of public record[]"); MCL 780.816(1) (requiring the court to send notice to the prosecuting attorney when a guilty or nolo contendere plea was accepted at arraignment "on a separate form and [to] include [on the notice] the name, address, and telephone number of the victim[, and that] [t]he notice shall not be a matter of public record[]").

4. Juvenile Offenses

In Michigan, crime victims have a constitutional "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. To protect this right, the CVRA provides that "information and visual representations of a victim are subject to the following:

> (a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [FOIA].
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
>
> (*i*) The victim's name and address.

> (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
>
> (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused." MCL 780.788(2).

These provisions "do[] not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.788(3).

A prosecutor may motion the court and ask that witnesses not be compelled to testify about a victim's identifying information:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at [the] defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion must be in camera." MCL 780.788(1).

Although a victim's name, address, and telephone number must appear on certain documents related to the case, these documents "shall not be a matter of public record." MCL 780.784 (requiring "the investigating agency that files a complaint or submits a petition seeking to invoke the court's jurisdiction for a juvenile offense [to] file with the complaint, or petition a separate written statement listing any known victims of the juvenile offense and their addresses and phone numbers[, and that] [t]his separate statement shall not be a matter of public record[]").

C. Confidentiality of Records in Juvenile Delinquency Cases

Except as otherwise required by MCR 3.903(A)(21),[13] all *case file* records under the Juvenile Code, MCL 712A.1 *et seq.*, are open to the

[13] MCR 3.903(A)(21) provides that "[u]ntil a petition is authorized, it remains on the informal calendar.

general public, while confidential files "are only open to persons having a legitimate interest."[14] MCR 3.925(D)(1)-(2). To "determin[e] whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law." MCR 3.925(D)(2).

"Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order." MCR 3.925(D)(2). Also included in the definition of *confidential file* are "records of a case brought before the court under . . . MCL 712A.1 *et seq*.[,]" which include, but are not limited to, records found in MCR 3.903(A)(3)(a)(*i*)-(*vii*). MCR 3.903(A)(3)(a). Under MCR 3.903(A)(3)(b), the contents of a juvenile's social file, including victim statements, are part of the confidential file. MCR 3.903(A)(3)(b)(*vi*).

D. Confidentiality of Records in Domestic Relations Cases

1. Friend of the Court Records[15]

"Friend of the court records are not subject to a subpoena issued under the[] Michigan Court Rules. Unless another rule specifically provides for the protection or release of friend of the court records, this rule governs." MCR 3.218(A).

The following individuals and entities are entitled to access to nonconfidential friend of the court records:

- a party, third-party custodian, guardian or conservator, guardian ad litem or the minor's attorney, lawyer-guardian ad litem, any attorney of record, and a party's personal representative of the estate, MCR 3.218(B)(1);[16]

[14] "'Persons having a legitimate interest' includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under . . . MCL 722.131 to [MCL] 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state." MCR 3.925(D)(1).

[15] In addition to the access records discussed in this sub-subsection, "[a] citizen advisory committee established under the Friend of the Court Act, MCL 552.501 *et seq.* . . . shall be given access to a grievance filed with the friend of the court, and to information related to the case, other than confidential information." MCR 3.218(D)(1). In addition, the committee *may* be given access to confidential information in limited circumstances. MCR 3.218(D)(2).

- "[a]n officer in the Judge Advocate General's office in any branch of the United States military, if the request is made on behalf of a service member on active duty otherwise identified in this subrule[,]" MCR 3.218(B)(2).[17]

"Unless the release is otherwise prohibited by law, a friend of the court office must provide access to all nonconfidential and confidential records to the following:

> (1) Other agencies and individuals as necessary for the friend of the court to implement the state's plan under Title IV, Part D of the Social Security Act, 42 USC 651 *et seq*. or as required by the court, state law, or regulation that is consistent with this state's IV-D plan.
>
> (2) The [DHHS], as necessary to report suspected abuse or neglect or to allow the [DHHS] to investigate or provide services to a party or child in the case.
>
> (3) Other agencies that provide services under Title IV-D, [P]art D of the Social Security Act, 42 USC 651 *et seq*.
>
> (4) Auditors from state and federal agencies, as required to perform their audit functions with respect to a friend of the court matter.
>
> (5) Corrections, parole, or probation officers, when, in the opinion of the friend of the court, access would assist the office in enforcing a provision of a custody, parenting time, or support order.
>
> (6) Michigan law enforcement personnel who are conducting a civil or criminal investigation related directly to a friend of the court matter, and to federal law enforcement officers pursuant to a federal subpoena in a criminal or civil investigation."[18] MCR 3.218(C).

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[16] "The friend of the court may honor a request from a person identified in [MCR 3.218(B)(1)] to release information to a governmental agency providing services to that individual, or before which an application for services is pending." MCR 3.218(B)(1).

[17] "Reference to an agency, office, officer, or capacity includes an employee or contractor working within that agency or office, or an employee or caseworker acting on behalf of that office or working in the capacity referred to." MCR 3.218(A)(4).

"A friend of the court office may refuse to provide access to a record in the friend of the court file if the friend of the court did not create or author the record. On those occasions, the requestor may request access from the person or entity that created the record." MCR 3.218(E).

Note, however, that the court has the authority to adopt administrative orders under MCR 8.112(B) that contain "reasonable regulations necessary to protect friend of the court records and to prevent excessive and unreasonable interference with the discharge of friend of the court functions." MCR 3.218(G).

MCR 3.218(F) permits "[a]ny person who is denied access to friend of the court records or confidential information [to] file a motion for an order of access with the judge assigned to the case or, if none, the chief judge."

2. Information Contained in Case Initiating Document

"The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and [MCR 1.109](E)." MCR 3.206(A)(1). "Except for matters considered confidential by statute or court rule, in all domestic relations actions, the complaint or other case initiating document must" contain the information listed in MCR 3.206(A)(2). MCR 3.206(A)(2). The filer must complete and file a case inventory listing known pending or resolved family division or tribal court cases involving "family members of the person(s) named in the case initiation document filed under [MCR 3.206(A)(2).]"[19] MCR 3.206(A)(3). See also MCR 1.109(D)(2)(b). "The case inventory is confidential, not subject to service requirements, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court." MCR 3.206(A)(3).

"In an action involving a minor, or if child support or spousal support is requested, the party seeking relief must provide to the friend of the court a verified statement[20] containing, at a

[18] "Reference to an agency, office, officer, or capacity includes an employee or contractor working within that agency or office, or an employee or caseworker acting on behalf of that office or working in the capacity referred to." MCR 3.218(A)(4).

[19] Requiring the filing party to complete and file a case inventory that lists known pending or resolved family division cases "does not apply to outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq.*, and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq.*" MCR 3.206(A)(3). See also MCR 1.109(D)(2)(b).

[20] See MCR 1.109(D)(3) for more information on verifying documents.

minimum, personal identifying, financial, and health care coverage information of the parties and minor children. A copy of the Verified Statement must be served on the other party. The Verified Statement must be completed on a form approved by the State Court Administrative Office."[21] MCR 3.206(C)(1). In addition to a verified statement, each party must submit a verified financial information form as set out in MCR 3.206(C)(2):

> "Verified Financial Information Form. Unless waived in writing by the parties, or unless a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) within 28 days following the date of service of defendant's initial responsive pleading. If a party is self-represented and his or her address is not disclosed due to domestic violence, the parties' Verified Financial Information forms will be exchanged at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this Verified Financial Information form may be addressed by the court or by motion consistent with MCR 2.313. The Verified Financial Information form does not preclude other discovery. A proof of service must be filed when Verified Financial Information forms are served."[22]

MCR 3.206(C)(3) provides for the confidentiality of the information required in the verified statement and verified financial information forms:

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[21] "If any of the information required to be in the Verified Statement or Verified Financial Information forms is omitted, the party seeking relief must explain the reasons for the omission in those forms, or in a separate statement, verified under MCR 1.109(D)(3)(b) to be filed with the court by the due date of the form." MCR 3.206(C)(4).

[22] MCR 3.206(C)(6) sets out exceptions to the service requirements of MCR 3.206(C)(1)-(2). Discussion of these exception is beyond the scope of this benchbook.

> "The information in the Verified Statement or Verified Financial Information forms is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted[23] from the copy of the Verified Statement and Verified Financial Information forms that are served on the other party. If a party excludes his or her address for good cause, that party shall either:
>
> (a) submit to electronic filing and electronic service under MCR 1.109(G), or
>
> (b) provide an alternative address where mail can be received."

See also MCR 3.229(A)(1), which requires that verified statements and disclosure forms under MCR 3.206(B) that have been filed by a party or interested party shall be identified by the party as confidential documents and "shall be served on the other parties in the case and maintained in a nonpublic file in accordance with [MCR 3.229](B)," which provides that "[a]ny item filed and identified under [MCR 3.229](A) is nonpublic and must be maintained separately from the legal file." "The nonpublic file must be made available for any appellate review." MCR 3.229(B). However, "[t]he filer waives any claim of confidentiality to any item filed under [MCR 3.229](A) that is not identified by the filer as confidential." MCR 3.229(B). According to MCR 3.229(A), in addition to verified statements and disclosure forms, other items in domestic relations cases that must be identified as confidential and maintained in a nonpublic file include:

> (2) child protective services reports;
>
> (3) psychological evaluations;
>
> (4) custody evaluations;
>
> (5) medical, mental health, and academic records of a minor;
>
> (6) any part of a confidential file under MCR 3.903(A)(3);

[23] "If any of the information required to be in the Verified Statement or Verified Financial Information forms is omitted, the party seeking relief must explain the reasons for the omission in those forms, or in a separate statement, verified under MCR 1.109(D)(3)(b) to be filed with the court by the due date of the form." MCR 3.206(C)(4).

> (7) any item designated as confidential or nonpublic by statute or court rule; and
>
> (8) any other document which, in the court's discretion, should not be part of the public record."

3. Interstate and International Actions

The Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*,[24] governs interstate and international[25] proceedings to determine parentage of a child or to enforce, establish, or modify support.[26] MCL 552.2312 provides for the confidentiality of information required to be disclosed under the UIFSA:

> "If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety, or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice."[27]

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1201 *et seq.*, governs conflicts in interstate child custody disputes. MCL 722.1209 provides for the disclosure and protection of information as follows:

- "Subject to the law of [Michigan] providing for confidentiality of procedures, addresses, and other identifying information,"[28] MCL 722.1209(1) requires

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[24] Effective January 1, 2016, the Michigan Legislature repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, to now include guidelines and procedures for establishing and collecting foreign support orders from foreign countries subject to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance adopted on November 23, 2007.

[25] Applicable to foreign countries subject to the Convention.

[26] For a full list of proceedings covered under the UIFSA, see MCL 552.2305(2) and MCL 552.2704(2).

[27] For international proceedings, see also MCL 552.2712, which restricts the use of "[p]ersonal information gathered or transmitted under this article [to] . . . only . . . the purposes for which it was gathered or transmitted."

[28] Note that MCL 722.1209(1)(b) requires the pleading or sworn statement to include "[w]hether the party knows of a proceeding that could affect the current child-custody proceeding, including a proceeding for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, identify the court, the case number, and the nature of the proceeding."

each party in a child-custody proceeding to include certain information "in its first pleading or in an attached sworn statement" as set out under MCL 722.1209(1). See MCR 3.206(B), which requires the filing party to file an UCCJEA Affidavit for a custody or parenting time dispute as required by MCL 722.1209(1).

- MCL 722.1209(5) provides for the confidentiality of information required to be disclosed under the UCCJEA:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."

E. Omitting and Restricting Information in Personal Protection Order (PPO) Cases

1. Omission of Petitioner's Address in Petition for PPO

MCR 3.703(B)(6) permits a petitioner filing for a PPO to omit from the petition "his or her residence address from the documents filed with the court," but requires the petitioner to "provide the court with a mailing address." See also MCL 600.2950(3) and MCL 600.2950a(3), the statutes governing PPOs, which contain substantially similar language. For additional information on PPOs, see Chapter 5.

2. Restricting Access to Child's Record

MCL 600.2950(1)(i) authorizes the court to issue a PPO that restrains an individual from "[h]aving access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."

MCL 722.30 provides a noncustodial parent with access to records or information regarding his or her child "unless the parent is prohibited from having access to the records or information by a protective order." "'[R]ecords or information'

includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education." *Id.*

See also MCL 380.1137a, which prohibits a "school district, local act school district, public school academy, intermediate school district, or nonpublic school" from releasing certain information protected by a PPO.

3. Restricting Access to Information Over Internet

"Pursuant to 18 USC 2265(d)(3),"[29] MCR 3.705(C) prohibits the court "from making available to the public on the Internet any information regarding the registration of, filing of a petition for, or issuance of an order under [MCR 3.705] if such publication would be likely to publicly reveal the identity or location of the party protected under the order."

4. Respondent's Information in PPO Submitted By E-Filing

The partially completed personal-protection order a petitioner must submit at the same time as he or she initiates by e-filing a petition for personal protection must include specific information about the respondent. MCR 3.703(A). The partially completed order must be completed "on a form approved by the State Court Administrative Office . . . ." *Id.* The order prepared by the petitioner, or by a person assisting the petitioner under MCL 600.2950b(4), must include "only the case caption and the known fields with identifying information, including protected personal identifying information [PII] of the respondent[.]" MCR 3.703(A). The petitioner or the person assisting the petitioner must provide "at a minimum the race, sex, and date of birth or age of the respondent . . . for LEIN entry." *Id.*

"The personal identifying information form required by MCR 1.109(D)(9)(b)(iii)[30] shall not be filed under this rule." MCR 3.703(A).

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[29] For additional information on 18 USC 2265(d)(3), see Section 7.4(A)(1).

[30] MCR 1.109(D)(9)(b)(iii) requires a party who is obligated to include PII in a public document to provide the document with redaction and accompanied by "[a] personal identifying information form [that identifies] each item of redacted information and [specifies] an appropriate reference that uniquely corresponds to each item of redacted information listed." *Id.*

F. Name Changes

MCL 711.1, MCL 711.2, MCL 711.3, and MCR 3.613 govern the process by which individuals, including survivors of domestic violence, may change their names. MCL 711.1 *et seq.* (adult or minor name changes).[31]

1. When Published Notice Is Required and Exception to Requirement

MCL 711.1(2) permits the entry of an order to change the name of an individual with or without a hearing. However, "[i]f the court decides to proceed with a hearing, the court shall set a time and place for hearing." *Id.* The court must order publication of the notice of the hearing as provided by [MCR 3.613], except as provided in MCL 711.3. MCL 711.1(2). Unless otherwise indicated in MCR 3.613, the notice of a proceeding to change a name must be published in a newspaper in the same county where the action is pending. MCR 3.613(B).

The published notice must include the following information:

- name of petitioner,
- current name of the subject of the petition,
- proposed name, and
- time, date, and place of the hearing. MCR 3.613(B).

"If the court has waived fees under MCR 2.002, it must pay the cost of any ordered publication, including any affidavit fee charged by the publisher or the publisher's agent for preparing the affidavit pursuant to MCR 2.106(G)." MCR 3.613(B). "Any case record reflecting court payment must be nonpublic." *Id.*

Proof of service must satisfy the requirements of MCR 2.106(G)(1). MCR 3.613(B).

2. Published Notice Is Prohibited and Record of Proceedings Is Confidential

MCR 3.613(C) and MCL 711.3(1) address the confidentiality of name change proceedings and when notice of such proceedings must not be published. An individual may petition the court to refrain from publishing notice of a name

[31] An individual wishing to change names must complete the form approved by the State Court Administrative Office for that purpose—SCAO Form PC 51, *Petition for Name Change*.

change proceeding, and the court must, for good cause shown, order that notice not be published and that the record of any such proceeding be confidential. MCR 3.613(C); MCL 711.3(1)(a). MCR 3.613(C) states:

> "Good cause includes but is not limited to evidence that publication or availability of a record of the proceeding could place the petitioner or another individual in physical danger or increase the likelihood of such danger, such as evidence that the petitioner or another individual has been the victim of stalking,[32] domestic violence, human trafficking, harassment, or an assaultive crime, or evidence that publication or the availability of a record of the proceeding could place the petitioner or another individual at risk of unlawful retaliation or discrimination."

"A petition that shows good cause must state the reason or reasons why the petitioner or the endangered individual fears the publication or availability of the record of the proceeding, and the court must presume that a petition shows good cause if any of the following reasons are included in the statement:

> (*i*) The petitioner or the endangered individual is a victim of an assaultive crime, domestic violence, harassment, human trafficking, or stalking.
>
> (*ii*) The petitioner or the endangered individual seeks to affirm their gender identity." MCL 711.3(1)(b).

See also MCR 3.613(C)(1), which contains substantially similar language."The court shall not require proof of an arrest or prosecution to find that a petition shows good cause." MCL 711.3(1)(c); MCR 3.613(C)(1).

"A court officer, employee, or agent that divulges, uses, or publishes, beyond the scope of the court officer's, employee's, or agent's duties with the court, information from a record made confidential under [MCL 711.3] is guilty of a misdemeanor." MCL 711.3(2). MCL 711.3(3) does not apply to a disclosure under a court order. MCL 711.3(2).

[32] For purposes of MCL 711.3, "'stalking' means that term as defined in . . . MCL 750.411h and [MCL] 750.411i." MCL 711.3(5). See Section 2.3(A) for a detailed discussion of stalking, and Section 2.3(B) for a detailed discussion of aggravated stalking.

"In cases where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file." MCR 3.613(G). Unless the court orders otherwise, "only the original petitioner may gain access to confidential files, and no information relating to a confidential record, including whether the record exists, shall be accessible to the general public." *Id*. Records made confidential under MCL 711.3 are exempt from disclosure under Michigan's FOIA.[33] MCL 711.3(3).

3. Granting or Denying Petition Requesting That Notice Not Be Published

"The court must issue an ex parte order granting or denying a petition requesting nonpublication and confidential record under [MCR 3.613(C)]." MCR 3.613(C)(2).

a. Petition Is Granted

When a court grants a petition for nonpublication, the court must:

- issue a written order, MCR 3.613(C)(3)(a),
- inform the petitioner that the court granted the petition, MCR 3.613(C)(3)(b),
- inform the petitioner of the time, date, and place of the hearing to be held on the requested name change, *id*., and
- if the subject of the petition is a minor, instruct the petitioner to notify the minor's noncustodial parent as described in MCR 3.613(E). MCR 3.613(C)(3)(c).[34]

If the noncustodial parent's address or whereabouts is unknown and cannot be determined after diligent inquiry, notice given by publication under MCR 3.613(E)(2)(a), or other method that is not directed only to the noncustodial parent, must not include the minor's existing or proposed name. MCR 3.613(C)(3)(c).

[33] MCL 15.231 to MCL 15.246.

[34] See MCR 3.613(E) for details concerning "[s]ervice on a noncustodial parent of a minor who is the subject of a petition for change of name" for noncustodial parents whose address is known as well as for noncustodial parents whose address is unknown. Details involving notice to noncustodial parents is beyond the scope of this benchbook.

b. Petition Is Denied

When a court denies a petition for nonpublication, the court must:

- issue a written order stating the reasons for denying the petition, MCR 3.613(C)(4), and
- advising the petitioner of the right

  —to ask for a hearing about the denial within 14 days after the order of denial was entered, MCR 3.613(C)(4)(a),

  —to file a notice of dismissal, MCR 3.613(C)(4)(b), or

  —to go ahead with a hearing on the name-change petition under circumstances described in MCR 3.613, MCR 3.613(C)(4)(c).

If a petitioner whose petition for nonpublication was denied wishes to proceed with a hearing on the name-change petition, the petitioner has 14 days after entry of the order denying the petition for nonpublication to submit to the court the proper SCAO-approved form for publication of a notice of name-change hearing.[35] MCR 3.613(C)(4)(c).

If the petitioner timely submits the form for publishing notice of the name-change hearing, the court must, pursuant to MCR 3.613(B), set a time, date, and place for the hearing and order publication of the information. MCR 3.613(C)(4)(c). "If the court has waived fees under MCR 2.002, it must pay the cost of any ordered publication, including any affidavit fee charged by the publisher or the publisher's agent for preparing the affidavit pursuant to MCR 2.106(G)." MCR 3.613(B). "Any case record reflecting court payment must be nonpublic." *Id.*

A hearing held under MCR 3.613(C)(4)(a) regarding the court's denial of a petition for nonpublication must be on the record. MCR 3.613(C)(7). A petitioner whose petition for nonpublication was denied and who requests a hearing about the denial under MCR 3.613(C)(4)(a) must attend the hearing. MCR 3.613(C)(8). If the petitioner does

[35] SCAO Form PC 50, *Publication of Notice of Hearing Regarding Petition for Name Change*.

not attend the hearing, the court must adjourn the hearing and reschedule it. *Id*. "If the petitioner fails to attend the rescheduled hearing, the court may adjourn and reschedule, dismiss the petition for name change, or notify the petitioner that it will publish notice of the name change proceeding if the petitioner does not file a notice of dismissal within 14 days from the date of the rescheduled hearing." *Id*.

After a hearing held under MCR 3.613(C)(4)(a), the court must provide, on the record, its reasons for granting or denying the petition for nonpublication and enter an appropriate order. MCR 3.613(C)(9).

If the petitioner fails to request a hearing regarding the denial as provided by MCR 3.613(C)(4)(a) within 14 days after the order of denial was entered, the order denying the petition for nonpublication is final. MCR 3.613(C)(5).

If the petitioner fails to request a hearing under MCR 3.613(C)(4)(a) or file a dismissal under MCR 3.613(C)(4)(b) within 14 days after the order denying the petition for nonpublication was entered, "the court may set a time, date, and place of a hearing on the petition for a name change and order publication of notice as provided in [MCR 3.613(B)], and if applicable, [MCR 3.613(E)]." MCR 3.613(C)(6).

If the petition for nonpublication is denied, and the court or the petitioner sets a time, date, and place for a hearing on the name-change petition pursuant to MCR 3.613(C)(4)(c) or MCR 3.613(C)(6), "the court must order that the record is no longer confidential." MCR 3.613(C)(10).

G. Sealing Records in Cases Involving Domestic Violence Allegations

"When considering a motion to seal court records in a civil or criminal matter[and] the motion involves an allegation of domestic violence, the court shall consider the safety of any alleged victim or potential victim of the domestic violence."[36] MCL 600.2972(1).

MCR 8.119(I) governs the procedure for sealing court records:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts

[36] For purposes of MCL 600.2972, "'domestic violence' means that term as defined in . . . MCL 400.1501." MCL 600.2972(2).

records, in whole or in part, in any action or proceeding, unless

> (a) a party has filed a written motion that identifies the specific interest to be protected,
>
> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
>
> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(2) In determining whether good cause has been shown, the court must consider,

> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public.

(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.

(4) Materials that are subject to a motion to seal a record in whole or in part must be made nonpublic temporarily pending the court's disposition of the motion.

(5) For purposes of this rule, 'court records' includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action.

(6) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

(8) Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) without a motion to seal or require that a protective order issued under MCR 2.302(C) be filed with the Clerk of the Supreme Court and the State Court Administrative Office. A protective order issued under

MCR 2.302(C) may authorize parties to file materials under seal in accordance with the provisions of the protective order without the necessity of filing a motion to seal under this rule.

(9) Any person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D)."

1. Filing Documents Under Seal

"Public documents may not be filed under seal except when the court has previously entered an order in the case under MCR 2.302(C). However, a document may be made nonpublic temporarily before an order is entered as follows:

(a) A filer may request that a public document be made nonpublic temporarily when filing a motion to seal a document under MCR 8.119(I). As part of the filing, the filer shall provide a proposed order granting the motion to seal and shall identify each document that is to be sealed under the order. The filer shall bear the burden of establishing good cause for sealing the document.

(b) Pending the court's order, the filer shall serve on all the parties:

(*i*) copies of the motion to seal and the request to make each document nonpublic temporarily,

(*ii*) each document to be sealed, and

(*iii*) the proposed order.

(c) The clerk of the court shall ensure that the documents identified in the motion are made nonpublic pending entry of the order.

(d) Before entering an order sealing a document under this rule, the court shall comply with MCR 8.119(I). On entry of the order on the motion, the

clerk shall seal only those documents stated in the court's order and shall remove the nonpublic status of any of the documents that were not stated in the order." MCR 1.109(D)(8).

2. Request to Seal a Personal Protection Order (PPO)

The court does not have the authority to seal personal protection orders (PPOs) under MCR 8.119(I)(1). See *Jenson v Puste*, 290 Mich App 338, 345 (2010), where the Court of Appeals affirmed the lower court's denial of the defendant's request for entry of a consent order to seal a PPO under MCR 8.119(I)(1) because "[MCR 8.119(I)(6)[37]] specifically prohibits a court from sealing court orders and opinions." See Chapter 5 for a detailed discussion of PPOs.

3. Access to Sealed Trial Court File During Appeal to Court of Appeals

If a party files an appeal in a case where the trial court sealed the file, the file remains sealed while in the possession of the Court of Appeals. MCR 7.211(C)(9)(a). Any requests to view the sealed filed will be referred to the trial court. *Id.*

4. Request to Seal Court of Appeals File

MCR 8.119(I) governs the procedure for sealing a Court of Appeals file. MCR 7.211(C)(9)(c). "Materials that are subject to a motion to seal a Court of Appeals file in whole or in part must be held under seal pending the court's disposition of the motion." *Id.*

H. Access to Case and Court Records[38] After Circuit Court Bindover or Remand

1. Municipal or District Court Case and Court Records Become Nonpublic After Bindover to Circuit Court

MCR 8.119(H)(10) provides that "[f]or cases bound over to the circuit court on or after July 2, 2024, all case records and court records maintained by the district or municipal court become

[37] Formerly MCR 8.119(I)(5).

[38] For purposes of MCR 8.119(H), court records are defined by MCR 1.109 and MCR 8.119(D)-(G). See MCR 1.109(A); MCR 8.119(A)-(B).

nonpublic immediately after entry of the order binding the defendant over to the circuit court."

However, "[t]he circuit court case record, which includes the records transmitted under MCR 6.110(G), and court records remain accessible as provided by [MCR 8.119]." MCR 8.119(H)(10). Under MCR 6.110(G)(ii), "[i]f an interested party requests a transcript of a district or municipal court proceeding after the case is bound over, the circuit court shall forward that request to the [lower] court for transcription . . . ," but "only if the circuit court case record is publicly-accessible."

2. Circuit Court Case and Court Records Become Nonpublic After Remand to the District or Municipal Court

MCR 8.119(H)(10) provides that "[f]or cases bound over to the circuit court and remanded to the district or municipal court on or after July 2, 2024, all case records and court records maintained by the circuit court become nonpublic immediately after entry of the order to remand."

However, "[t]he district or municipal court case record, which includes the records transmitted under MCR 6.110(J), and court records become accessible after an order to remand as provided by [MCR 8.119]." MCR 8.119(H)(10). Under MCR 6.110(J)(ii), "[i]f an interested party requests a transcript of a circuit court proceeding after the case is remanded, the district or municipal court shall forward that request to the circuit court for transcription . . . ," but "only if the district or municipal court case record is publicly-accessible."

7.5 Confidentiality of Information Required Under Federal Parent Locator Service (FPLS)

The Federal Parent Locator Service (FPLS), 42 USC 653, is a national computer matching system operated by the Federal Office of Child Support Enforcement. See generally 42 USC 652(a); 42 USC 653(a)(1). The FPLS contains two databases:

- The Federal Case Registry (FCR) of Child Support Orders, which is a national database that contains "abstracts of support orders and other information" such as "names, social security numbers or other uniform identification numbers, and State case identification numbers[.]" 42 USC 653(h).

- The National Directory of New Hires (NDNH), which is a national database that contains "information concerning the wages and unemployment compensation paid to individuals[.]" 42 USC 653(i); 42 USC 653a(g)(2).

42 USC 653(a)(2)-(3) authorizes the use of information contained in the FPLS for the following reasons:

- establishing parentage.
- establishing, setting the amount of, modifying, or enforcing child support obligations.
- enforcing any federal or state law regarding the unlawful taking or restraint of a child.
- making or enforcing a child custody or visitation determination.

The information in the FPLS is accessible to *authorized persons* who are defined separately in the federal statutes for purposes of custody and support matters. See 42 USC 653(a)(2)-(3); 42 USC 653(b).[39] However, a state's plan for child and spousal support must apply the following privacy safeguards to all confidential information handled by the state agency:

- provide "safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination[,]" 42 USC 654(26)(A);
- prohibit "the release of information on the whereabouts of [a] party or the child to another party against whom a protective order with respect to the former party or the child has been entered[,]" 42 USC 654(26)(B);
- prohibit "the release of information on the whereabouts of [a] party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child[,]" 42 USC 654(26)(C);
- "in cases in which the prohibitions under [42 USC 654(B)-(C)] apply, [provide notice to] the Secretary [of the Health and Human Services], for purposes of [42 USC 653(b)(2)], that the State has reasonable evidence of domestic violence or child

[39] See Section 7.5(B) for the definition of *authorized person*.

abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child[.]" 42 USC 654(26)(D). This notification is known as the *Family Violence Indicator*.

Note: 42 USC 653(b)(2) prohibits the Federal Office of Child Support Enforcement from disclosing FPLS information to any person "if the State has notified the Secretary [of Health and Human Services] that the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the custodial parent or the child of such parent[.]"

- for cases flagged with the Family Violence Indicator, require judicial review of requests for disclosure before information the Secretary of the Health and Human Services shared with the court is disclosed to any authorized person. 42 USC 654(26)(E).

A. Family Violence Indicator

A brief discussion on the Family Violence Indicator is contained in this subsection. For a detailed discussion, see the DHS's Combined IV-D Policy Manual (4DM), *Family Violence Indicator 4DM 135*, available at http://www.mfia.state.mi.us/olmweb/ex/4dm/135.pdf.

The Family Violence Indicator notification should be sent to the Federal Office of Child Support Enforcement if any of the following exists:

- a PPO or foreign PPO has been entered protecting that individual,
- there is a court order that provides for confidentiality of the individual's address, or denies access to the individual's address,
- the FPLS data indicates that an address is confidential,
- an individual files a sworn statement with the friend of the court setting forth specific incidents or threats of domestic violence or child abuse,
- the friend of the court becomes aware that a determination has been made in another state that a disclosure risk comparable to any of the above risk indicators exists for the individual, or
- there is "reasonable evidence of domestic violence or child abuse, and the disclosure of such information (i.e. location information) could be harmful to the parent or the child of

such parent[.]" Administrative Order 2002-03;[40] *Family Violence Indicator 4DM 135*, *supra* at p 1.

After receiving the Family Violence Indicator from the state, the Federal Office of Child Support Enforcement is prohibited from disclosing FPLS data to anyone, including an authorized person. 42 USC 653(b)(2). Instead, upon request by an authorized person, the FPLS must notify the person that: (1) the state has given notice of reasonable evidence of domestic violence or child abuse; and (2) information can only be disclosed to a court or an agent of a court "having jurisdiction to make or enforce [] a child custody or visitation determination[.]" 42 USC 653(b)(2); 42 USC 653(c)(2); 42 USC 663(d)(2)(B).

If a case is flagged with a Family Violence Indicator, 42 USC 653(b)(2)(A)-(B) requires judicial review of requests for disclosure. See also 42 USC 654(26)(E). If the court determines that disclosure could be harmful to the parent or child, it must not disclose the information. 42 USC 653(b)(2)(B)(*ii*); 42 USC 654(26)(E).

If a Family Violence Indicator is set for an individual, the Family Violence Indicator notification applies to all actions "within the statewide automated child support enforcement system concerning that same individual." AO 2002-03. In addition, "that individual's address shall be considered confidential under MCR 3.218(A)(3)(f)."[41] AO 2002-03.

When a Family Violence Indicator is set:

- "for a custodial parent in any action, the Family Violence Indicator shall also be set for all minors for which the individual is a custodial parent." AO 2002-03.
- "for any minor in any action, the Family Violence Indicator shall also be set for the minor's custodian." AO 2002-03.

The friend of the court office must cause a Family Violence Indicator to be removed in the following circumstances:

> "(a) by order of the circuit court,

[40] AO 2002-03 was permanently adopted under the Administrative Order 2002-07.

[41] *Confidential information* includes, among other items, "any information when a court order prohibits its release[.]" MCR 3.218(A)(3)(f). Note that ADM 2012-04, effective January 1, 2014, amended MCR 3.218(A)(3)(f) to eliminate the language "a party's address" from the court rule. However, the court rule as it is written would presumably still cover an abused individual's address if "a court order prohibits its release[.]" See also AO 2002-03. For additional information on access to Friend of the Court Records under MCR 3.218, see Section 7.4(D).

> (b) at the request of the protected party, when the protected party files a sworn statement with the office that the threats of violence or child abuse no longer exist, unless a protective order or other order of any Michigan court is in effect providing for confidentiality of an individual's address, or
>
> (c) at the request of a state that had previously determined that a disclosure risk comparable to the risks in paragraph two existed for the individual." AO 2002-03.

If the Family Violence Indicator is removed against an individual in any action, "the Family Violence Indicator that was set automatically for other persons and cases associated with that individual shall also be removed." AO 2002-03.

B. Authorized Person

For purposes of "establishing parentage or establishing, setting the amount of, modifying, or enforcing child support obligations," the information in the FPLS is accessible to *authorized persons* defined under 42 USC 653(c). 42 USC 653(a)(2). 42 USC 653(c) defines an *authorized person* as:

> "(1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amounts owed as child and spousal support (including, when authorized under the State plan, any official of a political subdivision);
>
> (2) the court which has authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for the support and maintenance of a child, or any agent of such court;
>
> (3) the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving [public assistance]) . . . without regard to the existence of a court order against a noncustodial parent who has a duty to support and maintain any such child; and
>
> (4) a State agency that is administering a program operated under [certain] State plan[s.]"

For purposes of "enforcing any Federal or State law with respect to the unlawful taking or restraint of a child, or making or enforcing a child custody or visitation determination," the information in the FPLS is accessible to *authorized persons* as defined in 42 USC

663(d)(2). 42 USC 653(a)(3). 42 USC 663(d)(2) defines an *authorized person* as:

> "(A) any agent or attorney of any State having an agreement under this section, who has the duty or authority under the law of such State to enforce a child custody or visitation determination;
>
> (B) any court having jurisdiction to make or enforce such a child custody or visitation determination, or any agent of such court; and
>
> (C) any agent or attorney of the United States, or of a State having an agreement under this section, who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child."

7.6 Alternative Dispute Resolution in Cases Involving Domestic Violence

"All civil cases are subject to alternative dispute resolution processes unless otherwise provided by statute or court rule." MCR 2.410(A)(1). Courts that use ADR pursuant to MCR 2.410 must develop an ADR plan by local administrative order and must meet the requirements of MCR 2.410(B). MCR 2.410(B)(1).

A. Child Protection Mediation

A brief discussion on child protection mediation as it relates to domestic violence is contained in this subsection. For additional information on child protection mediation, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 7.

"MCR 3.970 governs mediation in child protective proceedings." MCR 2.411(A)(1). See also MCR 3.970(A)(1), which provides that MCR 3.970 "applies to the mediation of child protective proceedings." "'Mediation' includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power." MCR 3.970(A)(2).

"Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B)." MCR 3.970(B).

"At any stage in the [child protective] proceedings, after consultation with the parties, the court may order that a case be submitted to mediation." MCR 3.970(C)(1). "Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation." MCR 3.970(C)(2).

In a child protection mediation, the mediator is required to make "reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court."[42] MCR 3.970(G)(2).

B. Domestic Relations Mediation

"MCR 3.216 governs mediation of domestic relation cases." MCR 2.411(A)(1). For purposes of MCR 3.216, "[d]omestic relations mediation is a nonbinding process in which a neutral third party facilitates communication between parties to promote settlement."[43] MCR 3.216(A)(2). The parties may also request an evaluative mediation, which permits a mediator, if he or she is willing to do so, to provide a written recommendation for settlement of issues that are still unresolved at the conclusion of the mediation proceeding. MCR 3.216(A)(2). MCR 3.216(I) governs evaluative mediation procedures.

A brief discussion on domestic relations mediation as it relates to domestic violence is contained in this subsection. For additional information on domestic relations mediation in general, see MCR 3.216.

"All domestic relations cases, as defined in MCL 552.502(m), and actions for divorce and separate maintenance that involve the distribution of property are subject to mediation under [MCR

[42] See the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, and the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, Abbreviated Domestic Violence Screening Questionnaires.

[43] Note that "[MCR 3.216] does not restrict the Friend of the Court from enforcing custody, parenting time, and support orders." MCR 3.216(A)(3).

3.216], unless otherwise provided by statute or court rule." MCR 3.216(A)(1). Upon stipulation by the parties, the court may order "the use of other settlement procedures." MCR 3.216(A)(4). Note that "[u]nless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the parties are subject to a [PPO] or other protective order, or are involved in a child abuse and neglect proceeding[;[44] t]he court may order mediation without a hearing if a protected party requests mediation." MCR 3.216(C)(3). See also MCL 600.1035(1). In addition, MCR 3.216(D)(3) provides bases for certain cases to be exempt from mediation.[45]

If the trial court "submits domestic relations cases to mediation under [MCR 3.216][,] [it] shall include in its alternative dispute resolution plan adopted under MCR 2.410(B) provisions governing selection of domestic relations mediators, and for providing parties with information about mediation in the family division as soon as reasonably practical." MCR 3.216(B).

1. Referral to Mediation

"On written stipulation of the parties, on written motion of a party, or on the court's initiative, the court may submit to mediation by written order any contested issue in a domestic case, including postjudgment matters." MCR 3.216(C)(1). Note, however, that "[t]he court may not submit contested issues to evaluative mediation unless all parties so request." MCR 3.216(C)(2).

"Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the parties are subject to a [PPO] or are involved in a child abuse and neglect proceeding. The court may order mediation without a hearing if a protected party requests mediation." MCR 3.216(C)(3). See also MCL 600.1035(1). In addition, certain cases may be exempt from mediation if any of the following exist:

"(a) child abuse or neglect;

(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;

[44] For additional information on mediation in child protective proceedings, see Section 7.6(A).

[45] For additional information on the required hearing under MCR 3.216(C)(3), and the list of bases for which a case may be exempt from mediation under MCR 3.216(D)(3), see Section 7.6(A)(1).

> (c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
>
> (d) reason to believe that one or both parties' health or safety would be endangered by mediation; or
>
> (e) for other good cause shown." MCR 3.216(D)(3).

According to the *Model Code on Domestic and Family Violence*, Section 408(A), pp 36-37,[46] a guide that the National Council of Juvenile and Family Court Judges developed to promote protection and safety of victims of domestic or family violence, mediation should not be ordered or referred to in the following circumstances:

> "1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.
>
> 2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:
>
> > (a) Mediation is requested by the victim of the alleged domestic or family violence;
> >
> > (b) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
> >
> > (c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

To help "identify parties involved in divorce or child custody actions for when mediation may be inappropriate because of domestic violence or child abuse, and to maximize safety in the mediation process[,]" the State Court Administrative Office and the Michigan Domestic and Sexual Violence Prevention

[46] The *Model Code on Domestic and Family Violence* is accessible at http://www.ncjfcj.org/resource-library/publications/model-code-domestic-and-family-violence.

and Treatment Board collaborated with professionals in the field to develop the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts.

Because special circumstances may exist that make it difficult to complete the full questionnaire contained in the *Model Screening Protocol*, the Michigan Domestic and Sexual Violence Prevention and Treatment Board also developed two abbreviated domestic violence screening questionnaires contained in the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts, *Abbreviated Domestic Violence Screening Questionnaires*.

2. Objections to Referral to Mediation

A party may object to a court's decision to refer the case to mediation. See MCR 3.216(D). "To object to mediation, a party must file a written motion to remove the case from mediation and a notice of hearing of the motion, and serve a copy on the attorneys of record within 14 days after receiving notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or unless the court orders otherwise." MCR 3.216(D)(1).

MCR 3.216(D)(2) requires "[a] timely motion [to] be heard before the case is mediated."

3. Confidentiality and Disclosure of Mediation Communications

The confidentiality provisions contained in MCR 2.412 apply to cases referred for domestic relations mediation under MCR 3.216. MCR 2.412(A). Under MCR 2.412, "[m]ediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in [MCR 2.412(D)]." MCR 2.412(C). The confidentiality protection provided by MCR 2.412(C) is not limited to communications made by a mediation participant; rather, the confidentiality provided by MCR 2.412(C) extends to statements made by individuals who are neither mediation participants nor parties to the mediation, if the statements were made during the "mediation process." *Tyler v Findling*, 508 Mich 364, 371 (2021). These communications include statements made *during* mediation, as well as statements made *before* the beginning of mediation, as long as the statements were made for the purpose of preparing for mediation. *Id*. It is

not necessary for a mediator to meet with the parties and their attorneys before statements made for the purpose of mediation—by participants and nonparticipants alike—become mediation communications under MCR 2.412(B)(2), and as a result, qualify for protection from disclosure under MCR 2.412(C). *Tyler*, 508 Mich at 371.

MCR 2.412(D) permits the disclosure of mediation communications in the following circumstances:

> "(1) All mediation parties agree in writing to disclosure.
>
> (2) A statute or court rule requires disclosure.
>
> (3) The mediation communication is in the mediator's report under MCR 2.411(C)(3) or [MCR 3.216(H)(7)[47]].
>
> (4) The disclosure is necessary for a court to resolve disputes about the mediator's fee.
>
> (5) The disclosure is necessary for a court to consider issues about a party's failure to attend under MCR 2.410(D)(3).
>
> (6) The disclosure is made during a mediation session that is open or is required by law to be open to the public.
>
> (7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.
>
> (8) The mediation communication is
>
> > (a) a threat to inflict bodily injury or commit a crime,
> >
> > (b) a statement of a plan to inflict bodily injury or commit a crime, or
> >
> > (c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.
>
> (9) The disclosure
>
> > (a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and

[47] Formerly MCR 3.216(H)(6).

> (b) Is included in a report about such a claim [is] sought or offered to prove or disprove such a claim; and
>
> > (*i*) Is made to a governmental agency or law enforcement official responsible for the protection against such conduct, or
> >
> > (*ii*) Is made in any subsequent or related proceeding based on the disclosure under subrule (D)(9)(b)(*i*).
>
> (10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney disciplinary process.
>
> (11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.
>
> (12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown
>
> > (a) that the evidence is not otherwise available, and
> >
> > (b) that the need for the evidence substantially outweighs the interest in protecting confidentiality."

If a mediation communication is disclosed under MCR 2.412(D), "only that portion of the communication necessary for the application of the exception may be disclosed." MCR 2.412(E)(1). "Disclosure of a mediation communication under [MCR 2.412(D)] does not render the mediation communication subject to disclosure for another purpose." MCR 2.412(E)(2). "Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation." MCR 2.412(E)(3).

4. Appeal Cannot Be Referred to Mediation

"Appeals of domestic relations actions and protection matters [before the Court of Appeals] are excluded from mediation under [MCR 7.213]." MCR 7.213(A).

C. Domestic Relations Arbitration

A brief discussion on domestic relations arbitration as it relates to domestic violence is contained in this subsection. For additional information on domestic relations arbitration in general, see the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*, and for additional information on arbitration procedures, see the Uniform Arbitration Act, MCL 691.1681 *et seq.*, and MCR 3.602.

Arbitration in domestic relations matters is subject to the provisions of the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*, the Uniform Arbitration Act, MCL 691.1681 *et seq.*, and "by court rule except to the extent those provisions are modified by the arbitration agreement or [the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*]."[48] MCL 600.5070(1).

> **Note:** "On or after July 1, 2013, th[e Uniform Arbitration Act] governs an agreement to arbitrate whenever made." MCL 691.1683. However, "[the Domestic Relations Arbitration Act] provides for and governs arbitration in domestic relations matters[,]" and the Domestic Relations Arbitration Act controls if the statutory language of the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*, conflicts with the Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 600.5070(1).[49]

1. Parties May Stipulate to Binding Arbitration

MCL 600.5071 permits parties to stipulate to binding arbitration in certain types of cases:

> "Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, may stipulate to binding

[48] "[The Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*] does not apply to arbitration in a domestic relations matter if, before March 28, 2001, the court has entered an order for arbitration and all the parties have executed the arbitration agreement." MCL 600.5070(2).

[49] Note that MCL 600.5070(1) still references the Arbitration Act, MCL 600.5001 *et seq.;* however, 2012 PA 370 repealed the Arbitration Act, effective July 1, 2013.

arbitration by a signed agreement that specifically provides for an award with respect to 1 or more of the following issues:

> (a) Real and personal property.
>
> (b) Child custody.
>
> (c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
>
> (d) Parenting time.
>
> (e) Spousal support.
>
> (f) Costs, expenses, and attorney fees.
>
> (g) Enforceability of prenuptial and postnuptial agreements.
>
> (h) Allocation of the parties' responsibility for debt as between the parties.
>
> (i) Other contested domestic relations matters."

2. Court Order to Participate in Arbitration

A court must not order the parties to participate in arbitration without informing the parties of the information in MCL 600.5072(1), including the voluntary nature of the proceedings and that "[a]rbitration is not recommended for cases involving domestic violence." MCL 600.5072(1); MCL 600.5072(1)(a); MCL 600.5072(1)(c). Before ordering arbitration, the parties must acknowledge, in writing or on the record, that he or she receive all of the information contained in MCL 600.5072(1). See the statute for the full list of information that must be given to the parties.

MCL 600.5072(4) specifically prohibits arbitration under the Domestic Relations Arbitration Act in child abuse or neglect cases.

In domestic violence cases, arbitration is also prohibited unless each party submits a valid waiver. See MCL 600.5072(2)-(3). Specifically, MCL 600.5072(2)-(3) provide:

> "(2) If either party is subject to a [PPO] involving domestic violence or if, in the pending domestic relations matter, there are allegations of domestic

> violence or child abuse, the court shall not refer the case to arbitration unless each party to the domestic relations matter waives this exclusion.[50] A party cannot waive this exclusion from arbitration unless the party is represented by an attorney throughout the action, including the arbitration process, and the party is informed on the record concerning all of the following:
>
> (a) The arbitration process.
>
> (b) The suspension of the formal rules of evidence.
>
> (c) The binding nature of arbitration.
>
> (3) If, after receiving the information required under subsection (2), a party decides to waive the domestic violence exclusion from arbitration, the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record."

The validity of a party's voluntary submission to binding arbitration requires record evidence that the prearbitration disclosures mandated by MCL 600.5072(1) were satisfied. *Johnson v Johnson (William)*, 276 Mich App 1, 9-10 (2007) (lower court erroneously entered a default judgment against plaintiff based on plaintiff's failure to participate in arbitration when plaintiff was not advised of the limited availability of appellate review, it was unclear whether the agreement to arbitrate included determining spousal support or alimony, it was unclear whether the agreement to arbitrate was voluntarily made, and the parties were not advised that the arbitration fee was unnecessary if they chose to continue with trial).

3. Arbitrator Requirements

In order to be appointed as an arbitrator, the individual must meet all of the following qualifications:

> "(a) [Be] an attorney in good standing with the state bar of Michigan.

[50] Note that MCL 600.5072(4) specifically excludes child abuse or neglect cases from arbitration under the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*

> (b) Has practiced as an attorney for not less than 5 years before the appointment and has demonstrated an expertise in the area of domestic relations law.
>
> (c) *Has received training in the dynamics of domestic violence and in handling domestic relations matters that have a history of domestic violence*." (Emphasis added).

4. Record of Arbitration Hearing

MCL 600.5077 governs the recording of an arbitration hearing:

> "(1) Except as provided by [MCL 600.5077], court rule, or the arbitration agreement, a record shall not be made of an arbitration hearing under [the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.*]. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision. The parties may provide in the arbitration agreement that a record be made of those portions of a hearing related to 1 or more issues subject to arbitration.
>
> (2) A record shall be made of that portion of a hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition."

Chapter 8: Impact of Domestic Violence on Domestic Relations Cases

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8.1 Chapter Overview

Because the court must consider acts of domestic violence when considering marital property divisions, spousal support awards, and child custody determinations, this chapter touches on the impact domestic violence has on domestic relations cases. This chapter also discusses how the court's findings of domestic violence in domestic relations cases impacts the filing of subsequent tort actions.

Because the parties to relationships involving domestic violence frequently cross jurisdictional lines in their efforts to perpetrate or escape abuse, this chapter also touches on interstate enforcement of child-custody orders and international abductions.

This chapter assumes the reader's basic familiarity with Michigan domestic relations procedures. A discussion of divorce proceedings, child custody and parenting time proceedings, third-party custody and visitation, and child protective proceedings are all beyond the scope of this benchbook.[1]

8.2 Effect of Abusive Conduct on Marital Property Division

The parties' conduct during the marriage is one of several factors the court must consider in reaching an equitable division of marital assets in a divorce proceeding.[2] *Sparks v Sparks*, 440 Mich 141, 157-160 (1992) ("the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance").[3]

In weighing a party's conduct, the trial court's purpose is to reach an equitable division of the marital property, not to punish the party found at fault for the breakdown of the marriage.[4] *McDougal v McDougal*, 451

[1]For a detailed discussion of child protective proceedings, see the Michigan Judicial Institute's (MJI) *Child Protective Proceedings Benchbook*. MJI does not maintain a publication related to general domestic relations proceedings; however, MJI does maintain several quick reference materials related to domestic relations, including checklists and flowcharts.

[2] "Notwithstanding Michigan's no-fault divorce law, fault is still a consideration in the division of marital property." *Zecchin v Zecchin,* 149 Mich App 723, 727 (1986), citing *Davey v Davey*, 106 Mich App 579, 581 (1981).

[3] The Michigan Supreme Court set out the following factors the trial court must consider, where "relevant to the circumstances of the particular case[,]" when it is considering an equitable division of marital assets in a divorce: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Sparks,* 440 Mich at 159-160, citing *Perrin v Perrin,* 169 Mich App 18, 22 (1988).

Mich 80, 90-91 (1996) (despite finding the defendant-husband at fault for the breakdown of the marriage because of misconduct during the marriage, which included an assault against the plaintiff-wife, the trial court awarded the plaintiff-wife a disproportionate amount of marital property where other elements, such as the eight-year duration of the marriage, each party's contribution to the marital estate, the 22-year age difference between the paries, the defendant-husband's terminal illness, the plaintiff-wife's employment, and the defendant-husband's retirement, did not support the plaintiff-wife receiving "far more of the parties' financial assets than [was] equitable").

The court may use evidence of a party's daily behavior while he or she is intoxicated as a basis for determining marital fault. *Welling v Welling*, 233 Mich App 708, 710-711 (1999) (unequal division of marital assets was not inequitable where, among other elements the court considered, "[t]he trial court's determination of fault was based on evidence relating to [the] defendant[-husband's] behavior while he was drinking, [which included verbal abuse towards the plaintiff-wife and their children,] and [the] defendant[-husband] was not determined to be at fault merely because he was an alcoholic"). The Court found "inapposite" the defendant-husband's contention that his conduct while intoxicated was not intentional or wrongful: "[i]n determining 'fault' as one of the factors to be considered when fashioning property settlements, courts are to examine 'the conduct of the parties during the marriage.' The question [in this case] is whether one of the parties to the marriage is more at fault, in the sense that one of the parties' conduct presented more of a reason for the breakdown of the marital relationship than did the conduct of the other. Clearly, [the] defendant[-husband's] conduct in this case, . . . did present a greater reason for the breakdown of the relationship. This is the obvious conclusion even if we assume that [the] defendant[-husband's] behavior was not 'intentional' or 'wrongful.' The effect of the conduct on plaintiff and the marital relationship was highly detrimental, regardless of the reasons behind it." *Id.* at 711-712, quoting *Sparks*, 440 Mich at 157. Because of the defendant's behavior and the presence of other factors supporting the trial court's decision, awarding sixty percent of the marital assets to the plaintiff-wife was equitable. *Welling*, 233 Mich App at 713.

In determining fault, "[t]he focus must be on the conduct of the parties leading to the separation rather than on who left whom." *Zecchin v Zecchin*, 149 Mich App 723, 728 (1986) (the plaintiff-husband's voluntary departure from the family home at the defendant-wife's request did not justify the trial court finding the defendant-wife at fault for the breakdown of the marriage where the court records showed that the

[4] MCL 552.6(3) requires the court to enter a divorce judgment if it finds "that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved."

"parties' marriage had been faltering for several years and that there had been an earlier separation").

8.3 Effect of Abusive Conduct on Spousal Support Awards

The trial court has discretion to order spousal support to be paid "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case."[5] MCL 552.23(1).

The parties' conduct during the marriage is one of several factors the court must consider when determining whether alimony should be awarded in a divorce proceeding.[6] *Cloyd v Cloyd*, 165 Mich App 755, 758-759, 761 (1988) (trial court should have awarded the plaintiff-wife alimony where "the factors considered by the trial court[, which included one incident where the defendant-husband hit the plaintiff-wife in the face, pulled out a gun, and choked their son, and another incident where the defendant-husband threw the plaintiff-wife on the bed, tore buttons off her clothing, pulled out a gun, bruised her arm, and ripped the phone from the wall,] clearly weigh[ed] in favor of awarding alimony to [the] plaintiff[-wife]"). But see *Loutts v Loutts*, 298 Mich App 21, 32 (2012), where "[t]he trial court correctly noted that the fact that [the] defendant[-wife] obtained a personal protection order against [the] plaintiff[-husband] did not 'automatically import a finding of domestic violence.'"[7]

A party to a divorce proceeding "should not lose [his or] her marital right to support to which [he or] she would have been entitled had the marriage continued and which [he or] she was compelled to forgo because of [his or her spouse's] conduct." *Johnson v Johnson (Marie)*, 346 Mich 418, 420, 429-430 (1956) (trial court did not abuse its discretion in awarding the plaintiff-wife alimony where the plaintiff-wife "was forced

[5] Note that in interstate and international cases, the Uniform Interstate Family Support Act (UIFSA), MCL 552.2316(1), permits the absence of a petitioner's presence at court proceedings addressing "the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage of a child." For purposes of international cases, the UIFSA applies to foreign countries subject to the Convention.

[6] The Court of Appeals set out the following factors the trial court must consider when determining whether alimony should be awarded in a judgment of divorce: "(1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the ability of the parties to work; (4) the source and amount of property awarded to the parties; (5) the age of the parties; (6) the ability of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the health of the parties; (10) the prior standard of living of the parties and whether either is responsible for the support of others; and (11) general principles of equity." *Cloyd*, 165 Mich App at 759, citing *Vance v Vance*, 159 Mich App 381 (1987).

[7] In *Loutts*, 298 Mich App at 32, "the first domestic violence charge against [the] plaintiff[-husband] was dismissed[,] and [the] plaintiff[-husband] was acquitted of the second charge."

into [filing for divorce] by the defendant[-husband's] [extreme and repeated] cruelty").[8]

Committee Tip:

If ordering spousal support and the abusive party is the payor, the court must issue an order of income withholding for the spousal support payments, unless good cause exists otherwise. MCL 552.604(1); MCL 552.604(3)(a). Utilizing the income withholding option may help combat continued abuse through communications included with direct mailing of support checks.

Because abusers may use parenting time as an opportunity to harass, threaten, or assault a former partner, the court should consider refraining from linking parenting time orders to support payments in cases involving domestic violence. See generally MCL 722.27a(7)(c)-(d), which permits a court to consider whether the exercise of parenting time presents a reasonable likelihood of abuse of a parent or abuse/neglect of a child.

The court should remind the parties that, in Friend of the Court cases, it is the Friend of the Court's responsibility to initiate enforcement proceedings for an arrearage of a support order. See MCL 552.511; MCR 3.208(B). Note that parties should not be allowed to opt out of Friend of the Court services if there is evidence of domestic violence. MCL 552.505a(2)(d).

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[8] In *Johnson (Marie)*, 346 Mich at 420-421, the "extreme and repeated cruelty" from which the court relied on in awarding the plaintiff-wife alimony included the plaintiff-wife's allegations contained in the complaint for divorce, which accused the defendant-husband of being "a man of violent temper [who] addressed [the plaintiff-wife] and the[ir] children with vile, opprobrious, profane[,] and obscene language; that [the] defendant[-husband] [had] temper tantrums, during which time he would rave and shout at [the] plaintiff[-wife] and the[ir] children; that [the] defendant[-husband] [had] continually accused [the] plaintiff[-wife] of being mentally ill; that [the] defendant[-husband] [] made excessive demands upon [the] plaintiff[-wife] for marital intercourse; that [the] defendant[-husband] [was] of an extremely jealous nature to a degree that equal[ed] almost a mania; that [the] defendant[-husband] insisted that [the] plaintiff[-wife] be treated by only female physicians; that [the] defendant[-husband] was very severe in his discipline of their children, particularly so in forcing them to train for sports."

8.4 Effect of Domestic Abuse on Child Custody Determinations

The principle authority for resolving child custody disputes in Michigan is the Child Custody Act of 1970, MCL 722.21 *et seq.* MCL 722.24(1). The Child Custody Act directs that in establishing parental rights and duties as to custody and parenting time of a minor child, "the best interests of the child control." MCL 722.25(1). See also MCL 722.27(1); MCL 722.27a(1). "Domestic violence,[9] regardless of whether the violence was directed against or witnessed by the child[,]" is one of several best interests factors the court must consider in determining the best interests of a child under the Child Custody Act, MCL 722.23(k).[10] Note, however, that MCL 600.2950(1)(*l*)[11] provides the court with the authority to issue a personal protection order (PPO) that affects a respondent's custody or parenting time without consideration of the best interests factors, MCL 722.23.[12] See *Brandt v Brandt*, 250 Mich App 68, 70-71 (2002) (trial court had the authority to issue a PPO restricting the respondent-father's contact with his children under MCL 600.2950(1)(*l*), without applying the best interests factors under the Child Custody Act because the trial court was not making a child custody determination, but rather issuing an emergency order that temporarily awarded the plaintiff-mother custody of the children and granted the respondent-father parenting time "until the divorce proceeding was initiated so that the children might be protected from physical violence or emotional violence or both").

> **Note:** The Federal Parent Locator Service (FPLS), 42 USC 653, which is a national computer matching system operated by the Federal Office of Child Support Enforcement, may be used to obtain and transmit information for making or enforcing a child custody or parenting time determination. 42 USC 653(a).[13]

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[9] The Child Custody Act, MCL 722.21 *et seq.*, does not define the term *domestic violence;* however, the Court of Appeals held "that 'domestic violence' as used by MCL 722.23(k) includes 'domestic violence' as defined in MCL 400.1501," for purposes of the Domestic Violence Prevention and Treatment Act (DVPTA). *Brown v Brown*, 332 Mich App 1, 12 (2020). Specifically, the Court recognized "that it is generally improper to construe a statute by referring to a definition provided in an unrelated statute," but noted that "the dictionary definitions of 'domestic violence' closely match the definition provided in MCL 400.1501," and that definition "is clearly consistent with the Child Custody Act's overriding goal of promoting the best interests of the children involved in custody disputes." *Brown*, 332 Mich App at 11-12. For a general discussion on defining domestic violence, see Section 1.1.

[10] For a complete list of the twelve best interests factors the court is required to consider under the Child Custody Act, see MCL 722.23.

[11] Formerly MCL 600.2950(1)(j).

[12] For a detailed discussion of the interplay between PPOs and existing custody and parenting time orders, see Section 5.6(D), and for a detailed discussion of PPOs in general, see Chapter 5.

[13] See Section 7.5 for additional information on the FPLS.

According to the *Model Code on Domestic and Family Violence*, Section 402, p 33, a guide that the National Council of Juvenile and Family Court Judges developed to promote protection and safety of victims of domestic violence or family violence, the court should consider the following before it issues custody or visitation in domestic violence cases:

> "Sec. 402. Factors in determining custody and visitation.
>
> 1. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence:
>
> > (a) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence.
> >
> > (b) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person.
>
> 2. If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation."

A. Impact of Domestic Violence on Child Custody Disputes

"In order to resolve a child custody dispute, a trial court must evaluate the best interests of the child in light of the factors in MCL 722.23[.]" *McIntosh v McIntosh*, 282 Mich App 471, 478 (2009). Specifically, MCL 722.23(k) requires the court to "consider[], evaluate[], and determine[]" whether "[d]omestic violence [is present], regardless of whether the violence was directed against or witnessed by the child[,]" and MCL 722.23(j) prohibits the court from negatively considering "any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent[]" for purposes of evaluating the parties' "willingness and ability . . . to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."

1. Joint Custody[14] Determination

"In [child] custody disputes between parents, the parents shall be advised of joint custody[, and] [a]t the request of either parent, the court shall consider an award of joint custody, and

shall state on the record the reasons for granting or denying a request."[15] MCL 722.26a(1).

"The court shall determine whether joint custody is in the best interest of the child by considering[:]"

- the best interests of the child factors as set out under MCL 722.23, and
- "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1).

The *Model Code on Domestic and Family Violence*, Sections 401 and 403, p 33-34, provide the following presumptions concerning custody of the child(ren) in domestic relations cases involving domestic violence:

> "Sec. 401. Presumptions concerning custody.
>
> In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.
>
> * * *
>
> Sec. 403. Presumption concerning residence of child.
>
> In every proceeding where there is at issue a dispute as to the custody of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that it is in the best interest of the

[14] "'[J]oint custody' means an order of the court in which 1 or both of the following is specified: (a) [t]hat the child shall reside alternatively for specific periods with each of the parents[;] (2) [t]hat the parents shall share decision-making authority as to the important decisions affecting the welfare of the child." MCL 722.26a(7). "Although not specifically designated in the statute, [MCL 722.26a(7)(a)] is commonly referred to as joint physical custody, and [MCL 722.26a(7)(b)] is referred to as joint legal custody[.]" *Dailey v Kloenhamer*, 291 Mich App 660, 670 (2011). Although the CCA distinguishes between physical custody and legal custody, caselaw has indicated since 2003 that "custody" logically refers to both physical custody and legal custody. *Merecki v Merecki*, 336 Mich App 639, 647 (2021). There is no distinction between the legal standard required to change physical custody and the standard to change legal custody. *Id*. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 509-514 (2003).

[15] "In other cases[,] joint custody may be considered by the court." MCL 722.26a(1).

> child to reside with the parent who is not a perpetrator of domestic or family violence in the location of that parent's choice, within or outside the state."

2. Modifying Child Custody Determination

To modify a child custody determination, the court must determine "'that the party seeking the change has demonstrated either a proper cause shown[16] or a change of circumstances'"[17] before the trial court reconsiders the best interests of the child factors.[18] *Vodvarka v Grasmeyer*, 259 Mich App 499, 508 (2003), quoting *Dehring v Dehring*, 220 Mich App 163, 165 (1996).

The *Model Code on Domestic and Family Violence*, Section 404, p 34, provides that "[i]n every proceeding in which there is at issue the modification of an order for custody or visitation of a child, the finding that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstances."

3. Standard of Review Regarding Best Interest Factors

"To expedite the resolution of a child custody dispute by prompt and final adjudication[,]" MCL 722.28 requires that deference be given to the trial court's decision regarding child custody, unless the trial court "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." See also *Fletcher v Fletcher*, 447 Mich 871, 877 (1994) (holding that in child custody cases, "[f]indings of fact are to be reviewed under the 'great weight' standard, discretionary rulings are to be reviewed for 'abuse of discretion,' and questions of law for 'clear legal error'"). Because "[t]he great

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[16] "[T]o establish 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors." *Vodvarka*, 295 Mich App at 512.

[17] "To establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 295 Mich App at 513.

[18] See also MCL 722.27(1)(c), which provides, in part, that the court may "[s]ubject to [MCL 722.27(3), modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to . . . MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(3) addresses the filing of a motion for change of custody during the time a parent was on deployment.

weight of the evidence standard applies to all findings of fact [in child custody cases,] . . . a trial court's findings on each [best interest] factor should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Id.* at 889. See also *Sabatine v Sabatine*, ___ Mich ___, ___ (2024) (holding that the Court of Appeals erred by reversing the parenting time provisions in the trial court's divorce judgment, because "the trial courts . . . are typically in the best position to analyze the factual complexities of child-custody cases," and "the Court of Appeals failed to give proper deference to the trial court's findings of fact").

The following cases illustrate the trial court's evaluation of the domestic violence best interest factor, MCL 722.23(k), when making its child custody determination:[19]

- Court of Appeals upheld the trial court's determination that the domestic violence factor, MCL 722.23(k), was neutral to both the plaintiff-mother and the defendant-father where "[t]he trial court's factual finding that [the plaintiff-mother testifying to three alleged acts of domestic violence and the defendant-father testifying to a different version of each act] did not amount to domestic violence[.]" *Kessler v Kessler*, 295 Mich App 54, 67 (2011).

- Court of Appeals upheld the trial court's determination that the domestic violence factor, MCL 722.23(k), favored the defendant-mother where the trial court found that "[t]here was evidence that there was at least one incident of domestic violence in the home perpetrated by the [plaintiff-]father against the [defendant-]mother[;] . . . [t]here was at least one conviction for domestic violence in the history of [the plaintiff-father's and the defendant-mother's] relationship[, resulting from a physical altercation between the plaintiff-father and the stepson; and] . . . [t]here was no other testimony of domestic violence perpetrated by the [defendant-]mother against the [plaintiff-]father" outside of the plaintiff-father's testimony that the defendant-mother threw glass at him on one occasion. *McIntosh*, 282 Mich App at 481-482 (internal quotation marks omitted).

[19] Note that the cases discussed address the domestic violence factor, MCL 722.23(k), which was added to the best interests of the child factors, MCL 722.23, on November 29, 1993. Before the statutory amendment, the courts analyzed acts of domestic violence under other factors, such as the mental and physical health factor, MCL 722.23(g), and the willingness and ability of each parent to facilitate and encourage a close relationship between the child and other parent factor, MCL 722.23(j). See, e.g., *Harper v Harper*, 199 Mich App 409, 419 (1993); *Bowers v Bowers (Bowers II)*, 198 Mich App 320, 332-333 (1993).

- Court of Appeals upheld the trial court's determination that the domestic violence factor, MCL 722.23(k), favored the plaintiff-father where "[b]oth parents admitted [to] spanking the child[, but] . . . the child witnessed [the] defendant[-mother] physically attack [the] plaintiff[-father]" when she "knock[ed] [the] plaintiff[-father] on the arm with an iron[,]" "thr[e]w[] cold coffee at [the] plaintiff[-father] while the child was nearby[,]" "[the] defendant[-mother] did not deny these allegations of domestic violence[,]" and the defendant-mother "lock[ed] the child in his room overnight as punishment with a can in which to relieve himself[.]"[20] *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 457 n 26, 459 (2005).

- Court of Appeals upheld the trial court's determination that the domestic violence factor, MCL 722.23(k), favored the defendant-mother where the plaintiff-father's corporal punishment—spanking the children with a PVC pipe and leaving red marks and sometimes bruises—inflicted physical injury on members of his household and also inflicted mental harm because it combined "cruelty and serious physical harm with expressions of love[.]" *Brown v Brown*, 332 Mich App 1, 13 (2020). Further, plaintiff's conduct constituted domestic violence even if the corporal punishment was carried out on the basis of religious beliefs and without malicious intent. *Id.* Additionally, the trial court did not err by considering the plaintiff-father's abusive treatment of family pets when considering domestic violence; while "[h]armful or abusive conduct toward an animal is not *per se* domestic violence," it "can constitute domestic violence under either MCL 400.1501(d)(*i*) or MCL 400.1501(d)(*iv*),[21] if done for the purpose of distressing or coercing a person emotionally bonded to that pet." *Brown*, 332 Mich App at 14-15.

"[T]he trial court's error [in failing to consider the domestic violence factor, MCL 722.23(k), when determining a child custody dispute] was harmless [where] the isolated instances in which [the] plaintiff[-father] allegedly argued with [the] defendant[-mother] d[id] not support a finding of domestic

[20] "While [the] defendant[-mother] also raised allegations that [the] plaintiff[-husband] had been violent toward her in the past[by "push[ing] her on several occasions and [] physically block[ing] her retreat during arguments[,]" . . . her testimony [was found] to be incredible." *MacIntyre (On Remand)*, 267 Mich App at 459, 459 n 34.

[21] MCL 400.1501(d) defines *domestic violence* for purposes of the Domestic Violence Prevention and Treatment Act (DVPTA). The Court in *Brown* held that the term *domestic violence* as used by MCL 722.23(k) included the DVPTA's definition. *Brown*, 332 Mich App at 12.

violence." *Winn v Winn (Winn I)*, 234 Mich App 255, 260 n 4 (1999), vacated on other grounds *Winn v Winn (Winn II)*, 459 Mich 1002 (1999).[22]

"Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 'and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing.'" *Foskett v Foskett*, 247 Mich App 1, 10, 12-13 (2001), quoting *Bowers v Bowers (Bowers I)*, 190 Mich App 51, 56 (1991) ("the trial court abused its discretion by changing the children's custodial environment without the attendant clear and convincing evidence presented to justify the substance of the trial court's ultimate decision and disposition" where "[t]he only conceivable explanation to account for the stark difference between the evidence presented on the record that amounted to nothing more than mere *allegations* of the [plaintiff-]mother's violent conduct and the trial court's *conclusions* that the mother ha[d] a 'volatile,' 'nasty' temper and further exhibit[ed] signs of mental illness, [was] the intervening *in camera* interview with the children that was not, in any way, made part of the reviewable record").[23]

A trial court is required to consider a child's reasonable preference as to custody when determining what is in the child's best interests if the court finds the child to be of a sufficient age to express a preference. *Quint v Quint*, ___ Mich App ___, ___ (2024). Six-year-old children are presumed to be able to express a reasonable preference. *Id.* at ___. If the court concludes that the child could not express a preference, it must explain why it drew such a conclusion. *Id.* at ___. In *Quint*, the trial court declined to consider the reasonable preference of the seven-year-old child involved in the dispute under MCL 722.23(*i*) because the parties did not request a child interview and the trial court had reservations about interviewing a child that age. *Quint*, ___ Mich App at ___. The Court of Appeals reasoned that "[a]lthough child-custody proceedings differ from child-protective proceedings, there are certain material similarities, including a focus on the best interests of the child," and, thus, "judicial prudence favors applying the plain-error standard to an unpreserved claim in a child-custody proceeding." *Id.* at ___. In applying the plain-error test, the *Quint* Court found that,

[22] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[23] In *Foskett*, 247 Mich App at 7, "[a] review of the record establishe[d] nothing more than allegations of verbal and physical abuse within the [plaintiff-]mother's home with the exception of one isolated incident[, where] [t]he record [was] clear that on *one* occasion, [the] plaintiff[-mother] and her boyfriend apparently had a verbal altercation to which the police responded. However, . . . no charges relative to this incident were instituted."

although not a *party* to a custody dispute, the child has a substantial right conferred by the legislature "to have his or her own voice heard in a child-custody proceeding," and "even if the child's preference does not carry the day, there is independent value in knowing on some level that one's voice has been heard." *Id.* at ___.[24]

B. Impact of Domestic Violence on Parenting Time Determinations

1. Determining Parenting Time Terms

"Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, [MCL 722.27a(7)[25]], are relevant to parenting time decisions." *Shade v Wright*, 291 Mich App 17, 31 (2010). See also MCL 722.27a(1), which requires:

- "parenting time [to] be granted in accordance with the best interests of the child[,]" as set out under MCL 722.23,[26] and with a presumption that it is "in the best interests of a child for the child to have a strong relationship with both of his or her parents[,]" and

- "[e]xcept as otherwise provided in [MCL 722.27a], parenting time [to] be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time."

  Note: Although "[c]ustody decisions require findings under all of the best interest factors, . . . parenting time decisions may be made with findings on only the contested issues." *Shade*, 291 Mich App at 31-32 (where an order modifying parenting time does not result in a change of custody, the trial court does not need to address the child custody best interest factors in MCL

[24] Notably, *Quint* involved a change in legal custody only, but "our Legislature draws no distinction between legal and physical custody for purposes of the 12 best-interest factors in MCL 722.23." *Quint v Quint*, ___ Mich App ___, ___ (2024). The *Quint* Court recognized that a young child might not have a *reasonable* preference as to which parent decides what school the child attends or what doctors the child sees, but added that "our Legislature directs courts to consider these best-interest factors, [MCL 722.26a(1)(a)], and it does not exclude certain factors from the question of legal custody, [MCL 722.26a(7)]." *Quint*, ___ Mich App at ___. See n 14 for additional information about custody.

[25] Formerly MCL 722.27a(6).

[26] See Section 8.4(A)(3) for a discussion on the trial court's evaluation of the bests interests of the child factors under MCL 722.23.

722.23; where "it [is] clear from the trial court statement's on the record that the trial court was considering the minor child's best interests in modifying [the parent's] parenting time[,]" a trial court may not need to explicitly address the parenting time factors in MCL 722.27a).

MCL 722.27a(7)[27] sets out certain factors the court may consider "when determining the frequency, duration, and type of parenting time to be granted[,]" which include, among others:[28]

- "The reasonable likelihood of abuse or neglect of the child during parenting time." MCL 722.27a(7)(c). See *Sturgis v Sturgis*, 302 Mich App 706, 714-715 (2013), reversing the trial court's order reinstating the defendant's parenting time upon holding that "the trial court's findings with regard to a reasonable likelihood of abuse or neglect were against the great weight of the evidence and that the court committed a palpable abuse of discretion" where the court record "strongly suggest[ed] a 'reasonable likelihood of abuse or neglect of the child during parenting time[, and]' . . . [the] defendant's history of violence, repugnant disciplinary tactics, and outright denial of culpability, indicate[d] a strong likelihood of continued abuse[.]"

  Note: In *Sturgis*, 302 Mich App at 712, 714-715,"[t]he record reveal[ed] that [the] defendant ha[d] at least two prior criminal sexual conduct convictions, . . . he failed to register as a sex offender as required by state law[,]" he had his parental rights terminated over two other children due to abuse,[29] his "two children now at issue . . . clearly exhibited behavioral and emotional problems resulting from [the] defendant's conduct[,]" and the defendant's son expressed that he did not want to "be in [the] defendant's care[.]"

- "The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time."MCL 722.27a(7)(d).

[27] Formerly MCL 722.27a(6).

[28] For a complete list of factors the court may consider when ordering parenting time, see MCL 722.27a(7).

[29] For information on the prior termination cases against the defendant, see *In re Stephens*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket Nos. 271015 and 271016); *In re Sturgis*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2008 (Docket Nos. 280118, 280119).

- "The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent." MCL 722.27a(7)(h).

"If the parents of a child agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the child." MCL 722.27a(2).

"A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3).

MCL 722.27a(9)[30] sets out certain reasonable terms or conditions a court may include in a parenting time order in order to "facilitate the orderly and meaningful exercise of parenting time by a parent," which include, among others:[31]

- restricting "the presence of third persons during parenting time." MCL 722.27a(9)(c).

- requiring parenting time to occur "in the presence of a third person or agency." MCL 722.27a(9)(f). See also *Booth v Booth*, 194 Mich App 284, 293 (1992), mod on other grounds by *Eddie v Eddie*, 201 Mich App 509, 511-512 (1993)[32] ("trial court did not abuse its discretion in ordering supervised visitation" where the defendant-father admitted to striking his five-year-old child with a belt on at least one occasion, and the plaintiff-mother testified that the defendant-father hit their child when he was six or seven weeks old and that the defendant-father was placed in jail for physically abusing the plaintiff-mother).

  Note: In cases involving PPOs, The *Michigan Parenting Time Guideline*, p 26, a publication by the State Court Administrative Office, Friend of the Court Bureau, promulgated for use in the

[30] Formerly MCL 722.27a(7).

[31] For a complete list of conditions a court may include in a parenting time order, see MCL 722.27a(9).

[32] For more information on the precedential value of an opinion with negative subsequent history, see our note.

> Michigan Friend of the Court offices, requires "[the] parenting time exchanges [to] occur (if permitted by the order) in a manner which ensures the order is not violated."[33]

MCL 722.27a(10) requires parenting time orders to contain a provision that prohibits a parent from exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Abduction, unless both parents provide the court with written consent permitting otherwise. For additional information on Hague Convention, see Section 8.6(B)(2).

Committee Tip:

In drafting an order for parenting time in domestic violence cases, the court might consider the following options to enhance safe enforcement of its orders:

- *Avoid non-specific provisions such as "reasonable parenting time," "parenting time as agreed by the parties," or "parenting time to be arranged later." The parenting time order terms should be stated unambiguously, with pick-up and drop-off locations, times, and days of the week clearly stated.*
- *Provide for supervised parenting time with the supervising third-parties clearly identified.*
- *Provide safe, neutral locations for parenting time, whether supervised or unsupervised.*
- *Specify how the parties may communicate with each other to make arrangements for parenting time.*
- *Arrange parenting time so that the parties will not meet.*
- *If the parties must meet to transfer the child(ren), require that the transfer take place in the presence of a third party and in a protected setting.*
- *Build in automatic return dates for the court to review how the parenting time order is working.*

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[33] For a detailed discussion of the interplay between PPOs and existing custody and parenting time orders, see Section 5.6(D), and for a detailed discussion of PPOs in general, see Chapter 5.

According to the *Model Code on Domestic and Family Violence*, Section 405, pp 34-35, the court should consider the following before it issues visitation in domestic violence cases:

> "Sec. 405. Conditions of visitation in cases involving domestic and family violence.
>
> l. A court may award visitation by a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.
>
> 2. In a visitation order, a court may:
>
> (a) Order an exchange of a child to occur in a protected setting.
>
> (b) Order visitation supervised by another person or agency.
>
> (c) Order the perpetrator of domestic or family violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or other designated counseling as a condition of the visitation.
>
> (d) Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding the visitation.
>
> (e) Order the perpetrator of domestic or family violence to pay a fee to defray the costs of supervised visitation.
>
> (f) Prohibit overnight visitation.
>
> (g) Require a bond from the perpetrator of domestic or family violence for the return and safety of the child.[34]
>
> (h) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic or family violence, or other family or household member.
>
> 3. Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential.

> 4. The court may refer but shall not order an adult who is a victim of domestic or family violence to attend counseling relating to the victim's status or behavior as a victim, individually or with the perpetrator of domestic or family violence as a condition of receiving custody of a child or as a condition of visitation.
>
> 5. If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation."

2. Appointing Parenting Coordinator

"A parenting coordinator is a person appointed by the court for a specified term to help implement the parenting time orders of the court and to help resolve parenting disputes that fall within the scope of the parenting coordinator's appointment."[35] MCL 722.27c(1).

MCL 722.27c(2) provides the court with authority to appoint a parenting coordinator where "the parties and the parenting coordinator agree to the appointment and its scope." The court must "consider any history of a coercive or violent relationship between the parties" before ordering appointment of a parenting coordinator, and the court must "ensure that the order appointing the parenting coordinator provides adequate protection to the victim of a coercive or violent relationship." *Id.*

a. Court Order Appointing Parenting Coordinator

"The order appointing a parenting coordinator shall include all of the following:

> (a) An acknowledgment that each party has had the opportunity to consult with an attorney and a domestic violence counselor.

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[34] In its list of "reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent," MCL 722.27a(9) includes "requir[ing] that a party post a bond to assure compliance with a parenting time order." MCL 722.27a(9)(g). When requiring a parent to post a bond, a court must have considered and determined "whether a parent's inability to post a bond or difficulty in doing so would preclude their ability to engage in parenting time." *Butters v Butters (Butters I)*, 342 Mich App 460, 473 (2022) (case did not involve domestic violence but raised the issue of requiring a bond to ensure compliance with the court's parenting time orders), vacated in part on other grounds by *Butters v Butters (Butters II)*, 510 Mich 1096 (2022). A court's determination requires an analysis of a party's income and consideration of the reasons for requiring a bond rather than another method to promote compliance with a court's order. *Butters I*, 342 Mich App at 473, 474.

[35] "The parenting coordinator is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as parenting coordinator." MCL 722.27c(6).

(b) An acknowledgment that the parenting coordinator is neutral; that the parenting coordinator may have ex parte communications with the parties, their attorneys, and third parties; that, except as provided in [MCL 722.27c(9)[36]], communications with the parenting coordinator are not privileged or confidential; and that by agreeing to the order, the parties are giving the parenting coordinator authority to make recommendations regarding disputes.

(c) A specific duration of the appointment. The order shall provide that the parenting coordinator may resign at any time due to nonpayment of his or her fee. The order may include a provision for extension of the parenting coordinator's term by consent of the parties for specific periods of time.

(d) An explanation of the costs of the parenting coordinator, and each party's responsibility for those costs, including any required retainer and fees for any required court appearances. The order may include a provision allowing the parenting coordinator to allocate specific costs to 1 party for cause.

(e) The scope of the parenting coordinator's duties in resolving disputes between the parties. These may include any of the following:

(*i*) Transportation and transfers of the child between parents.

(*ii*) Vacation and holiday schedules and implementation.

(*iii*) Daily routines.

(*iv*) Activities and recreation.

(*v*) Discipline.

(*vi*) Health care management, including determining and recommending

[36] MCL 722.27c(9) provides that "[t]he parenting coordinator is not required to disclose information if disclosure will compromise the safety of a party or a child."

appropriate medical and mental health evaluation and treatment, including psychotherapy, substance use disorder and batterer intervention treatment or counseling, and parenting classes, for the child and the parents. The parenting coordinator shall designate whether any recommended counseling is or is not confidential. The parenting coordinator can recommend how any health care provider is chosen.

(*vii*) School-related issues.

(*viii*) Alterations in the parenting schedule, as long as the basic time-sharing arrangement is not changed by more than a specified number of days per month.

(*ix*) Phase in provision of court orders.

(*x*) Participation of other persons in parenting time.

(*xi*) Child care and babysitting issues.

(*xii*) Any other matters submitted to the parenting coordinator jointly by the parties before his or her appointment expires.

(f) Authorization for the parenting coordinator to have access that may include all of the following:

(*i*) Reasonable access to the child.

(*ii*) Notice of all proceedings, including requests for examinations affecting the child.

(*iii*) Access to a specific therapist of any of the parties or the child, provided that a proper release is executed.

(*iv*) Access to school, medical, and activity records.[37]

[37] A minor's medical, mental health, and academic records that have been identified by the filer as confidential must be kept in a nonpublic file maintained separately from the legal file. See MCR 3.229(A)(5); MCR 3.229(B).

(*v*) Copies of specific evaluations and psychological test results performed on any child or any parent, custodian, guardian, or other person living in the parent's households, including, but not limited to, friend of the court reports and psychological evaluations.[38]

(*vi*) Access to the child's principal, teachers, and teachers' aides.

(*vii*) The right to interview the parties, attorneys, or the child in any combination, and to exclude any party or attorney from an interview.

(*viii*) The right to interview or communicate with any other person the parenting coordinator considers relevant to resolve an issue or to provide information and counsel to promote the best interests of the child.

(g) The dispute resolution process that will be used by the parenting coordinator, explaining how the parenting coordinator will make recommendations on issues and the effect to be given to those recommendations. The process must ensure that both parties have an opportunity to be heard on issues under consideration by the parenting coordinator and an opportunity to respond to relevant allegations against them before a recommendation is made. The parties may agree that on specific types of issues they must follow a parenting coordinator's recommendations until modified by the court." MCL 722.27c(3).

b. Duties of Parenting Coordinator

Make reasonable inquiry. In addition to the duties set out in the order appointing a parenting coordinator under MCL 722.27c(3),[39] MCL 722.27c(7) requires the "parenting

[38]Psychological evaluations and custody evaluations, in addition to other items filed in domestic relations cases, that have been identified by the filer as confidential must be kept in a nonpublic file maintained separately from the legal file. See MCR 3.229(A)(3)-(4); MCR 3.229(B).

[39] See Section 8.4(B)(2)(a) for the duties set out under MCL 722.27c(3).

coordinator [to] make [a] reasonable inquiry [into] whether either party has a history of a coercive or violent relationship with the other party."[40] "If the parenting coordinator determines that there is a history of a coercive or violent relationship between the parties, the parenting coordinator shall not bring the parties within proximity of each other unless the party at risk from violence or coercion requests it and the parenting coordinator determines with that party what reasonable steps, if any, can be taken to address concerns regarding coercion or violence." MCL 722.27c(8).

Make recommendations. "The parenting coordinator shall make his or her recommendations in writing and provide copies of the recommendation to the parties in the manner specified in the parenting coordination order. If a party attaches the recommendation to a motion or other filing, the court may read and consider the recommendation, but the recommendation is not evidence unless the parties stipulate that it is." MCL 722.27c(10).

"The parenting coordinator is not required to disclose information if disclosure will compromise the safety of a party or a child[,]" and "[t]he parenting coordinator shall not recommend relief that is less protective than any other order related to the parties." MCL 722.27c(9); MCL 722.27c(11).

Report suspected child abuse/child neglect. MCL 722.27c(13) requires the parenting coordinator to immediately report any suspected child abuse or child neglect to the DHS. See MCL 722.623, which sets out the mandatory reporting requirements under the Child Protection Law where child abuse or child neglect is suspected.

c. Parenting Coordinator Testimony

"Subject to the Michigan rules of evidence, the court may allow the testimony of the parenting coordinator if the court finds the testimony useful to the resolution of a pending dispute." MCL 722.27c(12). Note, however, that the parenting coordinator must not testify to "statements

[40] "A reasonable inquiry [into whether either party has a history of a coercive or violent relationship with the other party] includes the use of the domestic violence screening protocol for mediation provided by the state court administrative office." MCL 722.27c(7). See Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts.

received from a child involved in the parenting coordination if the parenting coordinator believes the disclosure would be damaging to the child." *Id.* See also MCL 722.27c(9) ("The parenting coordinator is not required to disclose information if disclosure will compromise the safety of a party or a child.").

d. Cessation of Parenting Coordinator Appointment

"The court may terminate the appointment of the parenting coordinator if the court finds that the appointment is no longer helpful to the court in resolving parenting disputes or if the process is no longer safe for a party or a child." MCL 722.27c(4).

MCL 722.27c(5) also permits "[t]he parenting coordinator [to] resign at any time, with notice to the parties and to the court."[41]

C. Impact of Criminal Sexual Conduct Convictions on Child Custody and Parenting Time Determinations

If a child is conceived "as the result of acts for which 1 of the child's biological parents is convicted of criminal sexual conduct as provided in . . . MCL 750.520a to [MCL] 750.520e and [MCL] 750.520g, or a substantially similar statute of another state or the federal government, or is found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration, the court shall not [award custody or grant parenting time] to that biological parent."[42] MCL 722.25(2); MCL 722.27a(4).

"A parent may assert an affirmative defense of the provisions of [MCL 722.25(2) or MCL 722.27a(4)] in a proceeding brought by the offending parent regarding a child described in [MCL 722.25(2) or MCL 722.27a(4), respectively]." MCL 722.25(5); MCL 722.27a(5).

1. Exceptions to Absolute Prohibition

The absolute prohibitions provided for under MCL 722.25(2) and MCL 722.27a(4) do not apply if:

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[41] "If the court finds that a party has refused to pay its share of the parenting coordination costs as a means to force the parenting coordinator to resign, the court may use contempt sanctions to enforce payment of the parenting coordinator's fee." MCL 722.27c(5).

[42] For additional information on criminal sexual conduct, see Section 2.4.

- the biological parent was convicted under MCL 750.520d(1)(a) of third degree criminal sexual conduct for sexual penetration of a victim who was at least 13 years of age and under 16 years of age; or

- "after the date of the conviction, or the date of the finding in a fact-finding hearing described in this subsection, the biological parents cohabit and establish a mutual custodial environment for the child." MCL 722.25(2); MCL 722.27a(4).

"An offending parent is not entitled to custody of a child described in [MCL 722.25(2)] without the consent of that child's other parent or guardian." MCL 722.25(3).

"[I]f an individual is convicted of criminal sexual conduct as provided in . . . MCL 750.520a to [MCL] 750.520e and [MCL] 750.520g[,] and the victim is the individual's child, the court shall not [award custody of or grant parenting time with] that child or a sibling of that child to that individual, unless *both* the child's other parent, and if the court considers the child or sibling to be of sufficient age to express his or her desires, the child or sibling consent to the [custody or parenting time]." MCL 722.25(6); MCL 722.27a(6) (emphasis added).

2. Child Support or Maintenance Obligations

"Notwithstanding other provisions of [the Child Custody Act of 1970 (CCA)], [MCL 722.25(2)] does not relieve an offending parent of any support or maintenance obligation to the child. The other parent or the guardian of the child may decline support or maintenance from the offending parent." MCL 722.25(4).

3. Stepparent Conviction

Where a defendant-stepparent is convicted of criminal sexual conduct against his or her stepchild, the stepchild is not considered the defendant-stepparent's child for purposes of MCL 722.27a(6).[43] *DeVormer v DeVormer*, 240 Mich App 601, 605-608 (2000). In *id.* at 606-608, the trial court erroneously denied the defendant-stepfather's motion for parenting time with his biological child (the victim-stepchild's half sibling) under MCL 722.27a(6) because the victim, the defendant-stepfather's stepchild, could not be considered the defendant-stepfather's child for purposes of MCL 722.27a(6). Specifically,

[43] Formerly MCL 722.27a(6).

> "[The] [d]efendant[-stepfather] admits that he has been convicted of an enumerated offense of criminal sexual conduct. The question is whether the victim of the offense of which he was convicted, [the] defendant[-stepfather's] stepdaughter, is his 'child' under the statute. [MCL 722.27a(6)] does not define the term 'child,' but it is defined in [MCL 722.22(d)[44]] as 'minor child and children.' This definition does not address the issue presented in this case.
>
> * * *
>
> [T]he statutory language in [MCL 722.27a(6)] is [not] ambiguous. The Legislature specified that in order for the statute to apply, the child victim must be 'the individual's child.' The Legislature chose this narrow term rather than the broad terms it used to describe the relationship between the perpetrator and the victim in the [criminal sexual conduct] statutes. . . . [U]nder [MCL 722.27a(6)], in order for parenting time to be granted to an individual convicted of criminal sexual conduct involving that individual's child, the 'child's *other parent*' must consent. This phrase implies that there are only two parents of the child, suggesting either a biological parental relationship or a legal parental relationship, such as adoption, exists between the individual and the child victim. For all these reasons, . . . [MCL 722.27a(6)] can be interpreted only one way, and, therefore, it is not ambiguous. Under the plain language of the statute, [the] plaintiff[-mother's] daughter is not [the] defendant[-stepfather's] child for purposes of [MCL 722.27a(6)]." *DeVormer*, 240 Mich App at 605-608 (internal citations omitted).

D. Impact of Domestic Violence on Child Custody and Parenting Time Violations

A brief discussion on child custody and parenting time enforcements is contained in this subsection. For a more detailed discussion on civil remedies available to enforce parenting time orders, see the Friend of the Court Act, MCL 552.501 *et seq.*, and the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 *et seq.*

[44] Formerly MCL 722.22(c).

"A custody or parenting time order violation is any act or failure to act that interferes with a parent's right to interact with a child as governed by the court order [MCL 552.602(e)]. This includes a custodial parent's violation of parenting time provisions, and a noncustodial parent's violation of custody or parenting time provisions."[45] SCAO Memorandum, *SCAO Administrative Memorandum 2002-11 Guidelines for Enforcement of Custody and Parenting Time Violations*, p 1.[46]

It is the Friend of the Court's (FOC) responsibility to initiate proceedings to enforce an order or judgment for custody or parenting time. MCR 3.208(B). "The [FOC] has discretion to use any of the enforcement remedies available for a parenting time violation." *SCAO Administrative Memorandum 2002-11 Guidelines for Enforcement of Custody and Parenting Time Violations*, *supra* at p 3. "Selection of an enforcement remedy should [] be influenced by the safety concerns that arise when one party has committed a crime against a child or the other party, or has violated another court order (such as a [PPO]) in exercising or asserting custody or parenting time rights." *Id.*

Unless the parties opt out of FOC services, the FOC is required to "open and maintain a friend of the court case for a domestic relations matter" and must "administer and enforce the obligations of the parties to the friend of the court case as provided in [the Friend of the Court Act, MCL 552.501 *et seq.*]"[47] MCL 552.505a(1). The parties to a domestic relations matter may file a motion with their initial pleadings to opt out of receiving FOC services, and the court must allow the parties to opt out unless, among other reasons,[48] "[t]here exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party's child." MCL 552.505a(2)(d).

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[45] If a child custody or parenting time order is violated, the Federal Parent Locator Service (FPLS), 42 USC 653, which is a national computer matching system operated by the Federal Office of Child Support Enforcement, may be used to obtain and transmit information for making or enforcing a child custody or parenting time determination. 42 USC 652(a); 42 USC 653(a). See Section 7.5 for additional information on the FPLS.

[46] See also MCL 552.502(j), which defines a "'custody or parenting time order violation' [as] an individual's act or failure to act that interferes with a parent's right to interact with his or her child in the time, place, and manner established in the order that governs custody or parenting time between the parent and the child and to which the individual accused of interfering is subject."

[47] "The friend of the court may inactivate its case and is not required to perform activities under the Friend of the Court Act, MCL 552.501 *et seq.*, and the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*. when the case is no longer eligible for federal funding because a party fails or refuses to take action to allow the friend of the court's activities to receive federal funding or because the federal child support case is closed pursuant to Title IV, Part D of the Social Security Act, 42 USC 651 *et seq*." MCR 3.208(D).

[48] See MCL 552.505a(2) for a complete list.

If the FOC opens a friend of the court case, "[t]he parties to [the] friend of the court case may file a motion for the court to order the office of the [FOC] to close their friend of the court case." MCL 552.505a(4). The court must issue an order closing the friend of the court case unless, among other reasons,[49] "[t]here exists in the friend of the court case evidence of domestic violence or uneven bargaining positions and evidence that a party to the friend of the court case has chosen to close the case against the best interest of either the party or the party's child." MCL 552.505a(4)(f).

Committee Tip:

In response to concerns about domestic violence in proceedings to enforce custody or parenting time orders, the court should consider the following:

• Conduct ongoing screening for domestic violence in contested custody cases.

• Where domestic violence is present, deter disputes over custody and parenting time by drafting specific orders that adequately address the abuse.

• Do not require the parties to negotiate, arbitrate, or mediate their dispute, and carefully scrutinize any agreements resulting from these dispute resolution methods.

• Inform the parties that enforcement of the court's order is the FOC's responsibility.

• Refrain from modifying an existing custody or parenting time order until investigation of the case is complete.

E. Impact of Domestic Violence on Change of Legal Residence

MCL 722.31(1) restricts the court from changing a child's legal residence after issuance of a court order governing custody:

> "A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section,[50] a parent of a child whose custody is governed by court order shall not change a

[49] See MCL 552.505a(4) for a complete list.

> legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued."[51]
>
> > **Note:** The 100-mile limitation in MCL 722.31(1) refers to radial miles rather than road miles. See *Bowers v Vandermeulen-Bowers*, 278 Mich App 287, 292-295 (2008) (trial court properly permitted the use of a map and ruler to measure the distance between the parties' two residences).

"Domestic violence,[52] regardless of whether the violence was directed against or witnessed by the child[]" is one of several factors the court must consider "[b]efore permitting a [child's] legal residence change otherwise restricted by [MCL 722.31(1)]." MCL 722.31(4)(e).[53]

"If [the statutory restrictions of MCL 722.31] appl[y] to a change of a child's legal residence and the parent seeking to change that legal residence needs to seek a safe location from the threat of domestic violence, the parent may move to such a location with the child until the court makes a determination under [MCL 722.31]." MCL 722.31(6).

Note, however, "while the Child Custody Act permits a child to have a 'legal residence with each parent,'" "[n]owhere does the Child Custody Act indicate that a child may have dual domiciles[;]" rather, "the Child Custody Act is consistent with the notion that a child may have only a single domicile at any given point in time." *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 507, 515-516 (2013) ("hold[ing] that a child of divorced parents who may have more than one legal residence, nevertheless still has only one domicile at a given point in

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[50] Exceptions to MCL 722.31(1)'s 100-mile restrictions include: (1) the other parent consenting to the move, MCL 722.31(2); (2) child custody orders granting sole legal custody to one parent, MCL 722.31(2); (3) the child's residences are currently more than 100 miles apart, MCL 722.31(3); (4) the change of legal residence resulting in the child's residences being closer together, MCL 722.31(3); and (5) the change of legal residence complies with any modification provisions previously agreed to by the parents as set out in the child custody or parenting time order, MCL 722.31(5).

[51] "[T]he appropriate residence on which to focus when applying the 100-mile rule is '*the child's legal residence at the time of the commencement of the action in which the order [governing custody] is issued*[;]' . . . a parent . . . subsequently relocat[ing] a child's legal residence *after* the issuance of the order governing custody does not change the residence that is the focus of the 100-mile rule." *Eickelberg v Eickelberg*, 309 Mich App 694, 699 (2015) (quoting MCL 722.31(1) and finding that the court erroneously "focus[ed] on the number of miles [the] defendant[-father] moved from his most recent address . . ., rather than focusing on the number of miles [the] defendant[-father] moved from 'the child's legal residence *at the time of the commencement of the action*[]'").

[52] The Child Custody Act, MCL 722.21 *et seq.*, does not define the term *domestic violence.* For a general discussion on defining domestic violence, see Section 1.1.

[53] For a complete list of the factors the court must consider in determining whether to permit a child's legal residence change, see MCL 722.31(4).

time"). "Because parents are legally bound by the terms of [a] [child] custody order," they lose the capacity to choose the child's domicile. *Id.* at 508-509. Accordingly, "[a] child's domicile is established by operation of law and [] [a] custody order is thus determinative of the child's domicile for all purposes." *Id.* at 481. "Where a court order sets a child's custody or domicile by operation of law, the factual circumstances or the parents' or child's intentions are irrelevant to the domicile determination[;]" rather, "the relevant consideration is which parent has *physical custody* under the terms of the order."[54] *Id.* at 511-512.

8.5 Effect of Domestic Violence Findings in Divorce Judgment on Subsequent Tort Actions

"[I]t is well established in Michigan that one spouse may maintain an action against the other for certain torts committed during their marriage[.]" *Gubin v Lodisev*, 197 Mich App 84, 88 (1992), citing *Hosko v Hosko*, 385 Mich 39 (1971). However, two legal principles sometimes preclude relitigation of the same claim or issue: res judicata and collateral estoppel. See generally *McCoy v Cooke*, 165 Mich App 662, 664-667 (1988). "[R]es judicata[] . . . precludes relitigation of the same claim while collateral estoppel precludes relitigation of the same issue." *Id.* at 666.

Res judicata does apply to cases where a spouse files a separate tort claim seeking damages for violent conduct that is alleged to have occurred during the marriage. *Goldman v Wexler*, 122 Mich App 744, 748 (1983). Specifically,

> "The prior action between [the plaintiff-ex-wife and the defendant-ex-husband] was one for divorce based on the Michigan no-fault divorce statute. MCL 552.1 *et seq.* The present action is for a battery which is alleged to have occurred during the course of the marriage. Although we agree that fault continues to be a consideration in property division disputes in a divorce action, *Davey v Davey*, 106 Mich App 579, 581 (1981), we cannot agree, nor does [the] defendant[-ex-husband] seriously contend, that both claims constituted but a single cause of action. Consequently, this

[54] "By way of example, a child's domicile will be with a parent if the custody order grants that parent primary or sole physical custody, or expressly establishes domicile with that parent through a domicile provision, regardless of whether the parents share joint legal custody." *Grange Ins Co of Mich*, 494 Mich at 512. However, "[i]n the unusual event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom [the child] is living at the time." *Id.* at 513 n 78. Note that an order of joint physical custody does not automatically constitute an order granting both parents an equal division of physical custody. *Id*. See MCL 722.26a(7).

> claim is neither barred by nor merged into the divorce judgment." *Goldman*, 122 Mich App at 747-748.

Collateral estoppel precludes parties from relitigating the issue whether the abuse occurred if the issue was decided during divorce proceedings. See *McCoy*, 165 Mich App at 664. A finding of fault in a divorce proceeding for purposes of marital property division that includes consideration of a party's abusive conduct towards his or her ex-spouse during the marriage does not bar subsequent tort claims for the abuse, but does bar relitigating whether the abuse actually occurred. *Id.* at 664, 667 (defendant-ex-husband was collaterally estopped from "relitigat[ing] [] the issue [of] whether a battery occurred[] [s]ince the trial judge in the divorce proceeding expressly resolved this issue by finding that [the] defendant[-ex-husband] repeatedly battered [the] plaintiff[-ex-wife]"); *Goldman*, 122 Mich App at 746, 748 ("[the] [d]efendant[-ex-husband's] reliance on collateral estoppel [was] . . . misplaced" where "it appears that, if the issue of whether [the] defendant[-ex-husband] battered [the] plaintiff[-ex-wife] was in fact decided in the [divorce] proceeding, it was resolved that a battery did occur[, and] [i]f that is the case, [the] defendant[-ex-husband] is now bound by that determination").[55]

A claim for fraud associated with the very existence of the marriage cannot not be maintained independently from a divorce action. *Gubin*, 197 Mich App at 87, 92 (where the plaintiff-wife's tort claim against the defendant-husband is for fraudulent inducement to marry, the claim is "so intimately involved with the marriage contract that it cannot be separated[;]" thus, the "plaintiff[-wife's] right to recovery is not based on an independent tort but upon the fraudulent inducement to marry[, and] [h]er right to an award is limited to those amounts that can be awarded in a divorce action"). See also MCL 600.2901(4).

"[A] settlement agreement . . . is a contract and is to be construed and applied as such." *Gramer v Gramer*, 207 Mich App 123, 125 (1994). Thus, "[a] property settlement agreement [entered into by the parties to a divorce proceeding and] . . . incorporated by reference into the judgment of divorce[,]" which "purports to settle all claims arising from the marriage and divorce[,] [will] bar[] future or existing tort claims brought by one spouse against another" absent a showing of factors such as fraud or duress or ambiguous language. *Id.* at 124, 126 (the plaintiff-ex-husband was barred from raising subsequent claims of false arrest, false imprisonment, malicious prosecution, and abuse of process following the judgment of divorce where the "language in the parties' property settlement agreement, which was incorporated by reference into the

[55] "As this Court directed in *Goldman*, [122 Mich App at 749,] [the] defendant[-ex-husband] may raise as an affirmative defense the issue whether and to what extent the divorce judgment compensated [the] plaintiff[-ex-wife] for any injuries she suffered as a result of the batteries." *McCoy*, 165 Mich App at 667-668.

judgment of divorce[,]" "unambiguously express[ed] the parties' intention to resolve . . . 'all matters of property, *and all other claims or rights* between [the parties] . . . .'"). See also *Goldman*, 122 Mich App at 749 ("[i]f [a party to a divorce proceeding] intended that all claims which grew out of the marriage be thereafter foreclosed by the divorce judgment, a release providing for the same should have been incorporated into that judgment").

8.6 Parental Abductions or Flight

In cases where domestic violence is present, both the abuser and the victim may be at risk for taking physical control over his or her child in violation of a court order for custody or parenting time.

If a child is abducted or restrained, the Federal Parent Locator Service (FPLS), 42 USC 653, which is a national computer matching system operated by the Federal Office of Child Support Enforcement, may be used to obtain and transmit information for enforcing any federal or state law regarding the unlawful taking or restraint of a child. 42 USC 652(a); 42 USC 653(a).[56]

A. Interstate Enforcement of Child-Custody Orders

1. Parental Kidnapping Prevention Act (PKPA)

This sub-subsection provides a general overview of the Parental Kidnapping Prevention Act (PKPA), 28 USC 1738A. For additional information on the PKPA, see 28 USC 1738A.

The PKPA "extend[s] full faith and credit requirements to child custody orders[.]" *Thompson v Thompson*, 484 US 174, 183, 187 (1988) (the PKPA is addressed to state courts and does not provide a private cause of action in federal court to determine the validity of conflicting custody decrees). Specifically,

> "The [PKPA] imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the [PKPA]. In order for a state court's custody decree to be consistent with the provisions of the [PKPA], the State must have jurisdiction under its own local law and one of five conditions set out in [28 USC] 1738A(c)(2) must be met. Briefly put, these

[56] See Section 7.5 for additional information on the FPLS.

> conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the [PKPA], no other State may exercise concurrent jurisdiction over the custody dispute, [28 USC] 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree." *Thompson*, 484 US at 175-177.

"Although the title of the [PKPA] refers to 'parental kidnapping,' and concerns about parents taking children out of a state in violation of a custody order were doubtless an important impetus for the enactment of the statute, [the PKPA] applies to any custody determination[.]" *In re Clausen*, 442 Mich 648, 656, 658-659, 664 n 20 (1993) (the PKPA precluded the Michigan court from exercising jurisdiction in the adoptive parents' action for modification of Iowa court orders that terminated the adoptive parents' rights as temporary guardians, denied the adoptive parents' their adoption petition, and directed that the biological parents retain custody).

2. Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)[57]

This sub-subsection provides general guidance as to when a Michigan court may exercise jurisdiction in a child custody dispute under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* For additional information on the UCCJEA, see MCL 722.1101–MCL 722.1406, and the National Conference of Commissioners on Uniform State Laws website and the Michigan Judicial Institute's UCCJEA checklists.

The UCCJEA prescribes the court's powers and duties in a child-custody proceeding that involves this state and a proceeding or party outside of this state.[58]

[57] The PKPA preempts the UCCJEA where the two authorities conflict. See generally *People v Hegedus*, 432 Mich 598, 620-621 (1989) ("[p]reemption of state action . . . may be found if a conflict exists between the state and federal laws"). Note that "[t]he PKPA is a procedural and jurisdictional statute, [and] does not impose principles of substantive law on the states." *In re Clausen*, 442 Mich at 670 n 24.

> **Note:** The UCCJEA contains provisions regarding filing and registering a state's custody decrees, judgments, and orders; communication between courts of different states; petition requirements; notice and service of process; evidence; and enforcement of another state's decree, judgment, or order. Subchapter 3.200 of the Michigan Court Rules, which governs domestic relations actions, applies to actions for custody or parenting time under the UCCJEA; the subchapter also applies to an expedited proceeding to register a foreign judgment or order under the UCCJEA, and to any ancillary or subsequent proceedings related to custody, parenting time, or support. MCR 3.201(A).

"[T]he trial court [is] required to find that it [has] jurisdiction under the UCCJEA in order to make a custody determination." *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 336 (2018). "To exercise jurisdiction, the trial court was required to find that either Michigan was a home state, that another home state had decided not to exercise jurisdiction, that all other states having jurisdiction had declined on the ground that Michigan was a more appropriate forum, or that no other home state existed." *Id.* at 336-337 (finding that "the focus of the UCCJEA concerns a child's actual presence, not his or her intent to remain" in Michigan; "[t]herefore, regardless of whether the children properly could be considered residents of Michigan because they intended to return there, the trial court erred when it found that it had jurisdiction over the parties' custody dispute under the UCCJEA" because "the children had 'lived with' a parent in India for more than six consecutive months . . . immediately before [the] plaintiff filed [the] action," and thus India, not Michigan, "qualifie[d] as the children's home state under the UCCJEA"). For information on when a court has jurisdiction, see MCL 722.1201 (initial child-custody determination), MCL 722.1202 (continuing jurisdiction), MCL 722.1203 (modifying out-of-state child custody determination); and MCL 722.1204 (temporary emergency jurisdiction).

A Michigan trial court is not required to afford full faith and credit to another state's child-custody order when the other state lacked subject-matter jurisdiction over the case under the UCCJEA. *Nock v Miranda-Bermudez*, 347 Mich App 623, 632, 633 (2023) (California lacked subject-matter jurisdiction over a

[58] In 2002, the Michigan Legislature adopted the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, and repealed the Uniform Child Custody Jurisdiction Act, MCL 600.651 *et seq*. MCL 722.1406(1). The UCCJEA took effect April 1, 2002. MCL 722.1406(2).

custody dispute when the defendant filed for custody in California more than six months after the plaintiff moved the children with her to Michigan, making Michigan the home state for purposes of the UCCJEA and authorizing the Michigan trial court to issue orders concerning custody of the parties' children).

The UCCJEA defines a *child custody proceeding* as "a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue." MCL 722.1102(d). Child custody proceedings include proceedings for:

- divorce, separate maintenance, and separation;
- neglect, abuse, and dependency;
- guardianship matters;
- paternity and termination of parental rights; and
- protection from domestic violence.[59] MCL 722.1102(d).

In the first pleading in a child custody case or in an attached sworn statement, and in a petition for enforcement of a child custody determination, each party must state, among other things, whether he or she knows of a proceeding that could affect the child custody case or enforcement proceeding, including a "proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and if so, identify the court, the case number, and the nature of the proceeding." MCL 722.1209(1)(b) (jurisdiction). See also MCL 722.1307(2)(c) (enforcement), which contains substantially similar language. See MCR 3.206(B), which requires the filing party to file an UCCJEA Affidavit for a custody or parenting time dispute as required by MCL 722.1209(1).

> **Note:** The parties have a continuing duty to keep the court informed of any proceedings "in this or another state that could affect the current child-custody proceeding." MCL 722.1209(4).

"If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in

[59] For purposes of the UCCJEA, a "[c]hild-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [A]rticle 3 [(the enforcement article) of the UCCJEA, MCL 722.1301–MCL 722.1316]." MCL 722.1102(d).

which the court considers the party's or child's health, safety, and liberty and determines that disclosure is in the interest of justice." MCL 722.1209(5).

For purposes of the UCCJEA, "[a] child-custody proceeding that pertains to an Indian child as defined in the Indian [C]hild [W]elfare [A]ct [(ICWA), 25 USC 1901 *et seq.*], is not subject to [the UCCJEA] to the extent that the proceeding is governed by the [ICWA]." MCL 722.1104(1). Where the UCCJEA does apply to an Indian child:

- a Michigan court must treat a tribe in the same manner it would treat another state for the purposes of the general and jurisdictional provisions of the UCCJEA contained in MCL 722.1101–MCL 722.1210. MCL 722.1104(2).
- a child-custody determination made by the tribe must be recognized and enforced under the enforcement provisions of the UCCJEA contained in MCL 722.1301–MCL 722.1316 if the tribe's child-custody determination was made "under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA][.]" MCL 722.1104(3).

a. Temporary Emergency Jurisdiction

For purposes of child custody proceedings, a Michigan court may exercise temporary emergency jurisdiction over a child in certain circumstances.[60] See MCL 722.1204. A Michigan court obtains temporary emergency jurisdiction when the child is present in this state and:

- the child has been abandoned; or
- the child, the child's sibling, or the child's parent is being mistreated or abused or being threatened with mistreatment or abuse. MCL 722.1204(1).

MCL 722.1204(1) "requires that a child be 'present in this state' for it to apply." *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 336 (2018) (because the children were not present in Michigan at the time the custody dispute commenced, MCL 722.1204(1) was not applicable).

[60] For information on when a court has jurisdiction in other circumstances and for other purposes, see MCL 722.1201 (initial child-custody determination), MCL 722.1202 (continuing jurisdiction), and MCL 722.1203 (modifying out-of-state child custody determination).

A Michigan court with jurisdiction to make a child-custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum."[61] MCL 722.1207(1).[62] "Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child" is one of several factors the court must consider when "determining whether it is an inconvenient forum[.]" MCL 722.1207(2)(a).

If a court has temporary emergency jurisdiction over a child and a proceeding has been commenced in or a custody determination has been made by another state's court that is eligible for enforcement under the UCCJEA,[63] the Michigan court must immediately communicate with the court in the other state in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration for the temporary order." MCL 722.1204(4). A Michigan court must engage in this communication before the Michigan court may decline to exercise jurisdiction over the child. *In re J Thornhill*, ___ Mich ___, ___ (2023). Without having communicated with another state involved with a child's custody before deciding against exercising temporary emergency jurisdiction, "the court lacked sufficient knowledge to make a meaningful determination as to whether to exercise emergency jurisdiction in light of the abuse in Michigan." *Id.* at ___. Specifically, the Michigan court "did not know whether the emergency was over or ongoing [and it] did not know . . . whether [the other state's] courts intend[ed] to exercise jurisdiction over the minor child in light of the abuse in Michigan or whether they believe[d] that Michigan [was] the more appropriate forum for any proceedings." *Id.* at ___.

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[61] "The issue of inconvenient forum may be raised upon the motion of a party, the court's own motion, or the request of another court." MCL 722.1207(1). "If [the] court . . . determines that it is an inconvenient forum and that a court of anther state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." MCL 722.1207(3).

[62] See also MCL 722.1202(2), which permits a court with "exclusive, continuing jurisdiction under [MCL 722.1202] [to] decline to exercise its jurisdiction if the court determines that it is an inconvenient forum under [MCL 722.1207]."

[63] The court must be "a court of a state having jurisdiction under [MCL 722.1201 to MCL 722.1203.]" MCL 722.1204(3).

In addition, the Michigan court's order must specify a time period during which it will remain in effect. MCL 722.1204(3). The time period must be adequate to allow a person to seek an order from the other state's court. *Id.*

If there is no previous child-custody determination eligible for enforcement or no commencement of a child custody proceeding in another state, entry of the Michigan court's order during the temporary emergency will remain in effect until entry of an order by another court having jurisdiction. MCL 722.1204(2). If a child-custody proceeding has not been, or is not, commenced in another state's court with jurisdiction over the matter, the determination made by the Michigan court during the temporary emergency becomes the final child-custody determination, if the Michigan court intends its determination to be final and Michigan becomes the child's home state. *Id.*

b. Unjustifiable Conduct

MCL 722.1208(1) requires, in certain circumstances, the court to decline jurisdiction if it finds out that the petitioner has engaged in *unjustifiable conduct*:

> "Except as otherwise provided in [MCL 722.1204 (temporary emergency jurisdiction)] or by other [Michigan] law . . ., if a [Michigan] court . . . has jurisdiction under [the UCCJEA][64] because a person invoking the court's jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless the court finds 1 or more of the following:
>
> > (a) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.
> >
> > (b) A court of the state otherwise having jurisdiction under [MCL 722.1201] to [MCL 722.1203] determines that [Michigan] is a more appropriate forum under [MCL 722.1207].

[64] See MCL 722.1201–MCL 722.1203, which set out a state court's basis for jurisdiction under the UCCJEA.

> (c) No court of another state would have jurisdiction under [MCL 722.1201] to [MCL 722.1203]." MCL 722.1208(1).

"If a [Michigan] court . . . declines to exercise its jurisdiction under [MCL 722.1208(1)], the court may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under [MCL 722.1201] to [MCL 722.1203]." MCL 722.1208(2).

"Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under [MCL 722.1208]. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under [MCL 722.1208]." National Conference of Commissioners on Uniform State Laws, *Uniform Child Custody Jurisdiction and Enforcement Act (1997)*, Section 208, Comment, p 43.

c. Warrant to Take Physical Custody of Child

On a petitioner's request,[65] a Michigan court may issue a warrant to take a child into custody if it appears likely that a child will suffer imminent physical harm or will be removed from the state. MCL 722.1310(2). "A warrant to take physical custody of a child must include at least the following: (a) [a] recitation of the facts upon which a conclusion of serious imminent physical harm or imminent removal from the jurisdiction is based[,] (b) [a]n order directing law enforcement officers to take physical custody of the child immediately[,] (c) [p]rovisions for the placement of the child pending final relief." MCL 722.1310(3). "A warrant issued under [MCL 722.1310] must include the statements required in an enforcement

[65] "Upon the filing of a petition seeking enforcement of a child-custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is likely to suffer serious imminent physical harm or be removed from th[e] state." MCL 722.1310(1).

petition by [MCL 722.1307][,]" which requires, among others, a statement on "[w]hether a proceeding has been commenced that could affect the current proceeding, including a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and if so, identify the court, case number, and nature of the proceeding." MCL 722.1307(2)(c); MCL 722.1310(2).

> **Note:** If the court issues a warrant, the court must hold a hearing on the petition for enforcement of a child-custody determination the "next judicial day after the warrant is executed." MCL 722.1310(2).

d. Promoting Safety in Domestic Violence Cases Under the UCCJEA

In interstate cases involving domestic violence, the court can decrease the risk of violence by utilizing procedures available under the UCCJEA:

- **Maintain separation of the parties while gathering evidence.**

The UCCJEA permits "an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state." MCL 722.1111(2). The court may also "request the appropriate court of another state to do any of the following:

> (a) Hold an evidentiary hearing.
>
> (b) Order a person to produce or give evidence under procedures of that state.
>
> (c) Order that an evaluation be made with respect to custody of a child involved in a pending proceeding.
>
> (d) Forward to the [Michigan] court . . . a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and an evaluation prepared in compliance with the request.
>
> (e) Order a party to a child-custody proceeding or a person having physical custody of the child to appear in the

proceeding with or without the child." MCL 722.1112(1).

- **Ensure safety of parties ordered to appear at a hearing.**

  The court may order a party to a child-custody proceeding to appear before the court personally with or without the child. MCL 722.1210(1)-(2).[66] The court may also order a person who is in Michigan and who has physical custody of the child to physically appear with the child. MCL 722.1210(1). Under the UCCJEA, "[t]he court may enter any orders necessary to ensure the safety of the child or of a person ordered to appear under [MCL 722.1210]." MCL 722.1210(3).

3. Uniform Child Abduction Prevention Act (UCAPA)

This sub-subsection provides a general overview of the Uniform Child Abduction Prevention Act (UCAPA), MCL 722.1521 *et seq*. For additional information on the UCAPA, see MCL 722.1521–MCL 722.1532.

The UCAPA authorizes the court to impose child abduction prevention measures in child-custody proceedings.[67] See MCL 722.1524(1); MCL 722.1528(2). MCL 722.1522(a) defines *abduction* as "the wrongful removal or wrongful retention of a child."[68]

The UCAPA defines *child-custody proceeding* as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue." MCL 722.1522(d). Child-custody proceedings include proceedings for:

- divorce;
- dissolution of marriage;
- separation;
- neglect;
- abuse;

[66] Ordering a party to appear who is outside of Michigan requires "that a notice [be] given in accordance with [MCL 722.1108]" that directs the party to appear personally with or without the child and "declar[es] that failure to appear may result in a decision adverse to the party." MCL 722.1210(2).

[67] "In applying and construing this uniform act, a court shall consider the need to promote uniformity of the law with respect to its subject matter among states that enact it." MCL 722.1531

[68] Note that the wrongful removal or wrongful retention of a child "does not include actions taken to provide for the safety of a party or the child." MCL 722.1522(o)-(p).

- dependency;
- guardianship;
- paternity;
- termination of parental rights; or
- protection from domestic violence. MCL 722.1522(d).

a. Initiation of Proceedings

Under the UCAPA, MCL 722.1524 permits:

> "(1) A court on its own motion [to] order abduction prevention measures in a child-custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.
>
> (2) A party to a child-custody determination or another individual or entity having a right under the law of this state or any other state to seek a child-custody determination for the child [to] file a petition seeking abduction prevention measures to protect the child under this act.
>
> (3) A prosecutor or the attorney general [to] seek a warrant to take physical custody of a child under [MCL 722.1529] or other appropriate prevention measures."

b. Filing of Petition Where Court has Jurisdiction

"A petition under [the UCAPA] may be filed only in a court that has jurisdiction to make a child-custody determination with respect to the child at issue under the [UCCJEA][.]" MCL 722.1525(1).

"[I]f the court finds a credible risk of abduction[,]" a Michigan court has temporary emergency jurisdiction under the UCCJEA, MCL 722.1204. MCL 722.1525(2).

For additional information on a Michigan court exercising temporary emergency jurisdiction over a child under the UCCJEA, see Section 8.6(A)(2)(a).

c. Petition Requirements

"A petition under [the UCAPA] shall be verified and include a copy of any existing child-custody determination, if available. The petition shall specify the risk factors for abduction, including the relevant factors described in [MCL 722.1527[69]]. Subject to [MCL 722.1209(5)[70]], . . . if reasonably ascertainable, the petition must contain all of the following:

> (a) The name, date of birth, and gender of the child.
>
> (b) The customary address and current physical location of the child.
>
> (c) The identity, customary address, and current physical location of the respondent.
>
> (d) A statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child, and the date, location, and disposition of the action.
>
> (e) A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location, and disposition of the case.
>
> (f) Information regarding any protection order previously entered involving either party or the child.
>
> (g) Any other information required to be submitted to the court for a child-custody determination under . . . MCL 722.1209." MCL 722.1526.

[69] See Section 8.6(A)(3)(d) for the risk factors set out under MCL 722.1527.

[70] MCL 722.1209(5) provides that "[i]f a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."

d. Risk Factors for Potential Child Abduction

"In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent has done any of the following or that any of the following apply to the petitioner or respondent:

(a) Previously abducted or attempted to abduct the child.

(b) Threatened to abduct the child.

(c) Except for planning activities related to providing for the safety of a party or the child while avoiding or attempting to avoid domestic violence, recently engaged in activities that may indicate a planned abduction, including any of the following:

(*i*) Abandoning employment.

(*ii*) Selling a primary residence.

(*iii*) Terminating a lease.

(*iv*) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities.

(*v*) Applying for a passport or visa or obtaining travel documents for the respondent, a family member, or the child.

(*vi*) Applying for or obtaining an enhanced driver license or enhanced official state personal identification card for the respondent, a family member, or the child.

(*vii*) Seeking to obtain the child's birth certificate or school or medical records.

(d) Engaged in domestic violence, stalking, or child abuse or neglect.

(e) Refused to follow a child-custody determination.

(f) Lacks strong familial, financial, emotional, or cultural ties to this state or the United States.

(g) Has strong familial, financial, emotional, or cultural ties to another state or country.

(h) Is likely to take the child to a country to which any of the following apply:

(*i*) The country is not a party to the Hague convention on the civil aspects of international child abduction[71] and does not provide for the extradition of an abducting parent or for the return of an abducted child.

(*ii*) The country is a party to the Hague convention on the civil aspects of international child abduction but 1 or more of the following apply:

(A) The Hague convention on the civil aspects of international child abduction is not in force between the United States and the country.

(B) The country is noncompliant according to the most recent compliance report issued by the United States department of state.

(C) The country lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague convention on the civil aspects of international child abduction.

(*iii*) The country poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children.

[71] For information on the Hague Convention on the Civil Aspects of International Abduction, see Section 8.6(B)(2). For a country's status as a party to the Hague Convention on the Civil Aspects of International Abduction, see http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24.

(*iv*) The country has laws or practices that would do 1 or more of the following:

(A) Enable the respondent, without due cause, to prevent the petitioner from contacting the child.

(B) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status, or religion.

(C) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of the child's gender, nationality, or religion.

(*v*) The country is included by the United States department of state on a current list of state sponsors of terrorism.

(*vi*) The country does not have an official United States diplomatic presence in the country.

(*vii*) The country is engaged in active military action or war, including a civil war, to which the child may be exposed.

(i) Is undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally.

(j) Has had an application for United States citizenship denied.

(k) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver license, or other government-issued identification card or has made a misrepresentation to the United States government.

(*l*) Has used multiple names to attempt to mislead or defraud.

> (m) Has engaged in any other conduct the court considers relevant to the risk of abduction." MCL 722.1527(1).

e. Hearing on Petition

"If, at a hearing on a petition under [the UCAPA] or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order." MCL 722.1528(2).

If the court finds during the hearing that "the respondent's conduct was intended to avoid domestic violence or imminent harm to the child or the respondent, the court shall not issue an abduction prevention order." MCL 722.1527(2).

f. Issuing an Abduction Prevention Order

"If a petition is filed under [the UCAPA], the court may enter an order."[72] MCL 722.1528(1). If the court issues an abduction prevention order, the order must "include the provisions required by [MCL 722.1528(1)] and measures and conditions, including those in [MCL 722.1528(3)-(5)], that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties and the safety of the parties and the child." MCL 722.1528(2).

When issuing the order, the court must take into consideration "the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect."[73] MCL 722.1528(2).

MCL 722.1528(1) sets out certain information that must be included in the abduction prevention order:

> "(a) The basis for the court's exercise of jurisdiction.

[72] For purposes of the UCAPA, "petition includes a motion or its equivalent." MCL 722.1522(i).

[73] The court must not issue an abduction prevention order if the court finds that "the respondent's conduct was intended to avoid domestic violence or imminent harm to the child or the respondent." MCL 722.1527(2).

> (b) The manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding.
>
> (c) A detailed description of each party's custody and visitation rights and residential arrangements for the child.
>
> (d) A provision stating that a violation of the order may subject the party in violation to civil and criminal penalties.
>
> (e) Identification of the child's home state or country of habitual residence at the time of the issuance of the order."

MCL 722.1528(3)-(4) set out additional information that *may* be included in the abduction prevention order:

> "(3) An abduction prevention order may include 1 or more of the following:
>
> > (a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with all of the following:
> >
> > (*i*) The travel itinerary of the child.
> >
> > (*ii*) A list of physical addresses and telephone numbers at which the child can be reached at specified times.
> >
> > (*iii*) Copies of all travel documents.
> >
> > (b) A prohibition of the respondent directly or indirectly doing any of the following:
> >
> > (*i*) Removing the child from this state, the United States, or another geographic area without permission of the court or the petitioner's written consent.
> >
> > (*ii*) Removing or retaining the child in violation of a child-custody determination.
> >
> > (*iii*) Removing the child from school or a child care or similar facility.

(*iv*) Approaching the child at any location other than a site designated for supervised visitation.

(c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state.

(d) With regard to the child's passport, any of the following:

(*i*) A direction that the petitioner place the child's name in the United States department of state's child passport issuance alert program.

(*ii*) A requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child.

(*iii*) A requirement that the respondent surrender to the court or the petitioner's attorney his or her enhanced driver license or enhanced official state personal identification card issued in the child's name.

(*iv*) A prohibition on the respondent applying on behalf of the child for a new or replacement passport or visa.

(e) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide 1 or more of the following:

(*i*) To the United States department of state office of children's issues and the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child.

(*ii*) To the court, 1 or both of the following:

(A) Proof that the respondent has provided the information in subparagraph (*i*).

(B) An acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child.

(*iii*) To the petitioner, proof of registration with the United States embassy or other United States diplomatic presence in the destination country and with the central authority for the Hague convention on the civil aspects of international child abduction, if that convention is in effect between the United States and the destination country, unless 1 of the parties objects.

(*iv*) A written waiver under 5 USC 552a, popularly known as the privacy act, with respect to any document, application, or other information pertaining to the child authorizing its disclosure to the court and the petitioner.

(f) On the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child-custody determination issued in the United States.

(4) In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that do 1 or more of the following:

(a) Limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary and order the respondent to pay the costs of supervision.

(b) Require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial

> deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney fees and costs if there is an abduction.
>
> (c) Require the respondent to obtain education on the potentially harmful effects to the child from abduction."

g. Steps That May be Taken to Prevent Imminent Abduction

"To prevent imminent abduction of a child," MCL 722.1528(5) permits the court to "do 1 or more of the following:

> (a) Issue a warrant to take physical custody of the child under [MCL 722.1529[74]] or other law of this state.
>
> (b) Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child, or enforce a custody determination under this act or other law of this state.
>
> (c) Grant any other relief allowed under law of this state."

"The remedies provided in [the UCAPA] are cumulative and do not affect the availability of other remedies to prevent abduction." MCL 722.1528(6).

h. Ex Parte Warrant to Take Physical Custody of Child

"If a petition under [the UCAPA] alleges and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed,[75] the court may issue an ex parte warrant to take physical custody of the child." MCL 722.1529(1). "If feasible, before issuing an ex parte warrant and before determining the placement of

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[74] MCL 722.1529 permits the court to "issue an ex parte warrant to take physical custody of the child" where the "petition . . . alleges and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed[.]" For additional information on issuing an ex parte warrant, see Section 8.6(A)(3)(h).

[75] Note that "wrongful removal [of a child] does not include actions taken to provide for the safety of a party or the child." MCL 722.1522(o).

the child after the warrant is executed, the court may order a search of the relevant databases of the national crime information center system and similar state databases to determine if either the petitioner or [the] respondent has a history of domestic violence, stalking, or child abuse or neglect." MCL 722.1529(4).

> **Note:** "A warrant to take physical custody of a child, issued [in Michigan] or another state, is enforceable throughout [Michigan]." MCL 722.1529(6).

In issuing the ex parte warrant under MCL 722.1529(1), the warrant must:

> "(a) Recite the facts on which a determination of a credible risk of imminent wrongful removal of the child is based.
>
> (b) Direct law enforcement officers to take physical custody of the child immediately.
>
> (c) State the date and time for the hearing on the petition.
>
> (d) Provide for the safe interim placement of the child pending further order of the court." MCL 722.1529(3).

"If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize officers to make a forcible entry at any hour." MCL 722.1529(6).

The respondent must be served with the petition and ex parte warrant "when or immediately after the child is taken into physical custody." MCL 722.1529(5). The respondent must be given an opportunity "to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on the date is impossible[; i]f a hearing on the next judicial day is impossible, the court shall hold the hearing on the first judicial day possible." MCL 722.1529(2).

If the court determines after a hearing on the petition is held that "[the] petitioner sought an ex parte warrant under [MCL 722.1529(1)] for the purpose of harassment

or in bad faith, the court may award the respondent reasonable attorney fees, costs, and expenses." MCL 722.1529(7).

"[The UCAPA] does not affect the availability of relief allowed under other [Michigan law]." MCL 722.1529(8).

i. Entry of Abduction Prevention Order

"An abduction prevention order remains in effect until the earliest of the following:

(a) The time stated in the order.

(b) The emancipation of the child.

(c) The child's attaining 18 years of age.

(d) The time the order is modified, revoked, vacated, or superseded by a court with jurisdiction under [the UCCJEA], or other applicable law of this state." MCL 722.1530.

B. International Abductions

A brief discussion on international abductions is contained in this subsection. For additional information on international abductions, see the United States Department of State International Parental Child Abduction website.

When a child is brought into the United States from another country, two civil remedies are available in Michigan courts to secure access to the child:

- The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, which requires Michigan courts to enforce foreign nation custody decrees that meet the UCCJEA's jurisdictional and notice standards. MCL 722.1105(2).

- The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), implemented by the International Child Abduction Remedies (ICAR), 42 USC 11601 *et seq.*, which permits a party in a foreign nation to seek the return of a child under 16 who has been wrongfully taken from the nation of his or her habitual residence and brought to the United States. The Hague Convention also provides for the enforcement of visitation rights to children in the United States. Hague Convention, Article 4; 42 USC 11601(a)(4).

1. Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA)[76]

For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.*, a Michigan court must treat a foreign country in the same manner it would treat another state for the purposes of the general and jurisdictional provisions of the UCCJEA contained in MCL 722.1101-MCL 722.1210. MCL 722.1105(1).[77]

A child-custody determination made in a foreign country must be recognized and enforced under the enforcement provisions of the UCCJEA contained in MCL 722.1301–MCL 722.1316 if the foreign child-custody determination was made "under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA][,]" unless "the child-custody law of [the] foreign country violates fundamental principles of human rights." MCL 722.1105(2)-(3).

> **Note:** For purposes of the UCCJEA, "[a] child-custody proceeding that pertains to an Indian child as defined in the Indian [C]hild [W]elfare [A]ct [(ICWA), 25 USC 1901 *et seq.*], . . . is not subject to [the UCCJEA] to the extent that the proceeding is governed by the [ICWA]." MCL 722.1104(1). Where the UCCJEA does apply to an Indian child:

- a Michigan court must treat the tribe in the same manner it would treat another state for the purposes of the general and jurisdictional provisions of the UCCJEA contained in MCL 722.1101–MCL 722.1210. MCL 722.1104(2).
- a child-custody determination made by the tribe must be recognized and enforced under the enforcement provisions of the UCCJEA contained in the MCL 722.1301–MCL 722.1316 if the tribe's child-custody determination was made "under factual circumstances in substantial conformity with the jurisdictional standards of [the UCCJEA][.]" MCL 722.1104(3).

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[76] The Hague Convention preempts the UCCJEA where the two authorities conflict. See *People v Hegedus*, 432 Mich 598, 620-621 (1989) ("[p]reemption of state action . . . may be found if a conflict exists between the state and federal laws").

[77] For additional information on the UCCJEA as it applies to interstate cases, see Section 8.6(A)(2).

MCL 722.1302(1) permits Article 3 (the enforcement article) of the UCCJEA, MCL 722.1301–MCL 722.1316, to "be invoked to enforce 1 or both of the following:

> (a) A child-custody determination.
>
> (b) An order for the return of a child made under the Hague [C]onvention on the [C]ivil [A]spects of [I]nternational [C]hild [A]bduction."[78]

MCL 722.1314 addresses specific enforcement procedures in cases arising under the UCCJEA:

> "In a case arising under [the UCCJEA] or involving the Hague [C]onvention on the [C]ivil [A]spects of [I]nternational [A]bduction, a prosecutor or the attorney general[79] may take any lawful action, including resort to a proceeding under [Article 3 (the enforcement article) of the UCCJEA, MCL 722.1301–MCL 722.1316,] or another available civil proceeding, to locate a child, obtain the return of a child, or enforce a child-custody determination if there is 1 or more of the following:
>
> > (a) An existing child-custody determination.
> >
> > (b) A request from a court in a pending child-custody proceeding.
> >
> > (c) A reasonable belief that a criminal statute has been violated.
> >
> > (d) A reasonable belief that the child has been wrongfully removed or retrained in violation of the Hague [C]onvention on the [C]ivil [A]spects of [I]nternational [C]hild [A]bduction."
> >
> > > **Note:** "At the request of a prosecutor or the attorney general acting under [MCL 722.1314], a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and to assist the prosecutor or attorney

[78] For additional information on the Hague Convention on the Civil Aspects of International Abduction, see Section 8.6(B)(2).

[79] "A prosecutor or the attorney general acting under [MCL 722.1314] acts on behalf of the court and shall not represent a party to a child-custody determination." MCL 722.1314(2).

> general with responsibilities under [MCL 722.1314]." MCL 722.1315.

2. Hague Convention on the Civil Aspects of International Abduction (Hague Convention)

This sub-subsection provides a general overview of the Hague Convention on the Civil Aspects of International Abduction (Hague Convention). For additional information on the Hague Convention, see the Hague Convention on Private International Law, *Child Abduction Section*, website, and the Hague Convention on International Child Abduction, *Text and Legal Analysis*, 51 Fed Reg 10494 (1986).

"[C]hild abduction and retention cases are actionable under the [Hague] Convention if they are international in nature (as opposed to interstate), and provided the [Hague] Convention has entered into force for both countries involved."[80] Hague Convention on International Child Abduction, *Text and Legal Analysis*, 51 Fed Reg 10494, *supra* at p 7.

The United States is among several countries that agreed to implement a multilateral treaty, the Hague Convention on the Civil Aspects of International Abduction (Hague Convention), to "establish[] legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights."[81] 42 USC 11601(a)(4). The International Child Abduction Remedies (ICAR), 42 USC 11601 *et seq.*, was enacted to implement the Hague Convention.

Article 3 of the Hague Convention explains what constitutes wrongful removal or retention:

> "The removal or the retention of a child is to be considered wrongful where –
>
> > *a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident[82] immediately before the removal or retention; and

[80] For a discussion on interstate enforcement of child custody orders, see Section 8.6(A).

[81] "For information on how to proceed if [a] child has been abducted to a particular country," see http://www.travel.state.gov/content/childabduction/en/from.html.

> *b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *Convention on the Civil Aspects of International Child Abduction* (full text).

For purposes of the ICAR, "the terms 'wrongful removal or retention' and 'wrongfully removed or retained', as used in the [Hague] Convention, include a removal or retention of a child before the entry of a custody order regarding that child[.]" 42 USC 11603(f)(2).

Under Article 4 of the Hague Convention, the Hague Convention applies "to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights,[and] [t]he [Hague] Convention [] cease[s] to apply when the child attains the age of 16 years."*Convention on the Civil Aspects of International Child Abduction* (full text), *supra*.

See *Abbott v Abbott*, 560 US 1, 14-15 (2010), where the United States Supreme Court determined that a parent has a right of custody for purposes of the Hague Convention where he or she has a *ne exeat*[83] right of authority to consent before the other parent takes a child to another country.

> **Note:** The *Abbott* Court found that the breach of a *ne exeat* right gives rise to a return remedy "because these rights depend on the child's location being the country of habitual residence." *Abbott*, 560 US at 13-14. However, a return is not automatic. *Id.* See Section 8.6(B)(2)(b) for exceptions.

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[82] "'[H]abitual residence' should not simply be equated with the last place that the child lived[;]" rather, "a determination of habitual residence must take into account whether the child has been physically present in a country for an amount of time 'sufficient for acclimatization.'" *Harkness v Harkness*, 227 Mich App 581, 596 (1998) (even though the children were living in the United States at the time the petition for return of the children was filed in Germany under the Hague Convention, the trial court did not err when it determined that the children's habitual residence was in Germany where the trial court noted that the last place the parties resided together as a family was in an apartment in Germany, the parties still had most of their belongings in that apartment, and "the [trial] court found no indication that the parties intended to abandon that residence and to establish a new residence in the United States").

[83] "In effect a *ne exeat* right imposes a duty on one parent that is a right in the other." *Abbott*, 560 US at 6.

a. Petition for Relief

The Hague Convention provides for administrative and judicial methods of relief:

- Articles 8 and 21 of the Hague Convention permit "[a]ny person, institution[,] or other body claiming that a child has been removed or retained in breach of custody rights [to] apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child" or "for organi[z]ing or securing the effective exercise of rights of access[.]" *Convention on the Civil Aspects of International Child Abduction* (full text). Information on the United State's Central Authority is accessible at http://www.hcch.net/en/states/authorities/details3/?aid=133.

- 42 USC 11603(b) permits "[a]ny person seeking to initiate judicial proceedings under the [Hague] Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."

  Note: 42 USC 11603(a) provides the federal district courts and state courts with "concurrent original jurisdiction of actions arising under the [Hague] Convention."

  42 USC 11603(g) requires the federal and state courts to give full faith and credit to the "judgment of any other such court ordering or denying the return of a child, pursuant to the [Hague] Convention, in an action brought under [the ICAR]."

"The remedies established by the [Hague] Convention and [the ICAR] shall be in addition to remedies available under other laws or international agreements." 42 USC 11603(h).

b. Burden of Proof

42 USC 11603(e)(1) addresses a petitioner's burden of proof:

> "A petitioner in an action brought under [42 USC 11603(b)] shall establish by a preponderance of the evidence--
>
> > (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the [Hague] Convention;[84] and
> >
> > (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights." 42 USC 11603(e)(1).

42 USC 11603(e)(2) addresses the respondent's burden of proof when opposing an action for the return of a child. The respondent must prove that one of several exceptions to the mandatory return of a child apply. See *id.* The different exceptions and burdens of proof are discussed below. If the respondent fails to establish the existence of an exception, the child must be returned to his or her place of habitual residence. *Convention on the Civil Aspects of International Child Abduction* (full text). See also, 42 USC 11601(a)(4), which requires "[c]hildren who are wrongfully removed or retained within the meaning of the [Hague] Convention [] to be promptly returned unless one of the narrow exceptions set forth in the [Hague] Convention applies."

> **Note:** The return of a child to a foreign country pursuant to a return order under the Hague Convention does not render an appeal of that order moot where "there is a live dispute between the parties over where the[] child will be raised, and there is a possibility of effectual relief for the prevailing parent." *Chafin v Chafin*, 568 US 165, 180 (2013).

The Hague Convention and the ICAR provide the following exceptions to the mandatory return of a child:

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[84] See also *Harkness v Harkness*, 227 Mich App 581, 587 (1998) ("to establish that her children were being wrongfully retained in the United States, [the Hague Convention required the] petitioner[-mother] [] to prove the following three elements: (1) the children were 'habitual residents' of Germany immediately before their retention in the United States, (2) [the] petitioner[-mother] had either sole or joint rights of custody concerning the children under German law, and (3) at the time the children were retained in the United States, [the] petitioner[-mother] was exercising those custodial rights").

- "[T]here is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A).

  Note: "The person opposing the child's return [under Article 13(b) of the Hague Convention] must show that the risk to the child is grave, not merely serious. . . . An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard [him or her] against further victimization, and the abusive parent then petitions for the child's return under the [Hague] Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm." Hague Convention on International Child Abduction, *Text and Legal Analysis*, 51 Fed Reg 10494, *supra* at p 21.

- "The return of the child under the provisions of Article 12 [of the Hague Convention] may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, Article 20. See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*. The respondent must prove this basis for refusing to return the child by clear and convincing evidence. 42 USC 11603(e)(2)(A).

- If more than one year has elapsed from the date of the alleged wrongful removal or retention, the court must order the return of the child, unless the respondent proves by a preponderance of the evidence that the child has now settled in his or her new environment. Hague Convention, Article 12; 42 USC 11603(e)(2)(B). See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*. "[T]he 1-year period in Article 12 of the Hague Convention is not subject to equitable tolling." *Lozano v Montoya Alvarez*, 572 US 1, 18

(2014). Thus, even where an abducting parent conceals a child's location from the petitioning parent, and the petitioner cannot file a petition until after the one-year period, return of the child is not automatic. *Id.* at 15-16 (although the abducting parent concealed the child's location from the petitioning parent for more than 16 months, return of the child was not required where the lower court determined that the child was settled in her new home with the respondent).

- The petitioner was not exercising his or her custody rights "at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention[.]" Hague Convention, Article 13(a). See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*. The respondent must prove this basis for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B).

- The court "finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views." Hague Convention, Article 13. See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*. The respondent must prove this ground for refusing to return the child by a preponderance of the evidence. 42 USC 11603(e)(2)(B).

  Article 13 of the Hague Convention also requires the court to "take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*.

  But see, Article 17 of the Hague Convention, which provides that a court cannot refuse to return a child solely on the basis of an order awarding custody to the parent who took the child entered in the state to which the child was taken. See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*.

c. Judicial Determination

The court must decide a case filed under the ICAR in accordance with the Hague Convention. 42 USC 11603(d). Once proceedings have been initiated, Article 7(b) of the Hague Convention provides for appropriate "provisional

measures[,]" which must be taken by the Central Authorities "to[, among other things,] prevent further harm to the child or prejudice to interested parties[.]" See *Convention on the Civil Aspects of International Child Abduction* (full text), *supra*.

42 USC 11604(a) empowers courts exercising jurisdiction under the Hague Convention to "take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." A court's authority to take such measures is limited by a requirement that the "applicable requirements of State law" be satisfied before a child is removed from the person having physical custody. 42 USC 11604(b).

"[A]fter receiving notice of a wrongful retention, [the court] 'shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under [the Hague] Convention or unless an application under [the Hague] Convention is not lodged within a reasonable time following receipt of notice.'" *Tyszka v Tyszka*, 200 Mich App 231, 235 (1993) (the trial court erred when it determined custody of the children in the divorce judgment following a "determin[ation] that the children had been wrongfully retained in this country by the[] [plaintiff-]father and that they should be returned to the[] [defendant-]mother in France[;]" "the issue of custody should be resolved by a French tribunal with subject-matter jurisdiction").

3. Required Provision in Parenting Time Orders

The Child Custody Act, MCL 722.27a(10), requires parenting time orders to contain a provision that prohibits a parent from "exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Abduction[,]" unless both parents provide the court with written consent permitting otherwise.

C. Committee Tips for Preventing Parental Abduction or Flight

The court can discourage parental abduction or flight by identifying cases where children are at risk and by taking preventative measures. The editorial advisory committee offers the following suggestions for preventing parental abduction or flight:

- **Provide appropriate provisions for the safe exercise of parental rights.**

A parent will not be as likely to take control over their child(ren) in violation of a custody or parenting time order that contains appropriate provisions for the safe exercise of parental rights.

- **Screen contested child custody cases to assess the risk of parental abduction or flight.**

In assessing the risk for parental abduction or flight, the court should consider the following factors:

  - whether the presence of domestic violence exists.
  - whether a parent has previously abducted or threatened to abduct a child or has a history of hiding the child.
  - whether the parties' marriage has a history of instability.
  - whether a parent believes that the other parent has abused, neglected, or molested the child.
  - whether a parent has citizenship or ties to a nation that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

- **Provide specific provisions in the custody or parenting time order.**

The court should include specific provisions in its custody or parenting time order that adequately address the violence between the parties and state possible penalties for violating the court's order. The court should also take preventative measures when issuing its custody or parenting time order that avoids orders for joint custody where there is hostility between the parties, provides for supervised parenting time with supervision by a neutral third party, and includes provisions in its custody or parenting time order that facilitates enforcement by courts in other jurisdictions.

Chapter 9: Extreme Risk Protection Orders—Red Flag Law

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9.1 Initiating an Action for Issuance of an Extreme Risk Protection Order (ERPO)

Specified individuals may file a petition for an ERPO to limit a respondent's possession, control, or ability to acquire a firearm under certain circumstances.[1] See MCL 691.1801 *et seq.*, Extreme Risk Protection Order Act (ERPO Act—Red Flag Law).[2]

A. Who May File an ERPO Action

The following individuals may file an action requesting that the court issue an ERPO:

- A respondent's spouse.
- A respondent's former spouse.
- An individual having a child in common with the respondent.
- An individual who has or has had a dating relationship with the respondent.
- An individual residing with or who has resided in the same household with the respondent.
- A respondent's family member.
- A respondent's guardian.
- A law enforcement officer.
- A health care provider if doing so would not violate HIPAA (Health Insurance Portability and Accountability Act of 1996, Public Law 104-191), regulations promulgated under HIPAA (45 CFR 160 and 164), or physician-patient confidentiality. MCL 691.1805(2)(a)-(i); MCR 3.716(A)(2)(a)-(g).

[1] "When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *United States v Rahimi*, 602 US ___, ___ (2024).

[2] There are no fees for filing a complaint under the ERPO Act. MCR 3.716(A)(1). The fee prescribed in MCL 600.2529(1)(a) for civil actions does not apply to ERPO actions. MCL 600.2529(1)(a).

B. Requirements of Petition/Complaint

An ERPO action must be filed in the family division of circuit court. MCL 691.1805(1); MCR 3.716(A)(1). Petitioner must file a summons and complaint on forms approved by the State Court Administrative Office (SCAO). MCL 691.1805(3); MCR 3.716(A)(1).

1. Venue

If the respondent is an adult, venue is proper in any county in Michigan, without regard to the residency or location of any party. MCL 691.1805(8)(a); MCR 3.716(F)(1).

If the respondent is a minor, venue is proper in either the petitioner's or respondent's county of residence. MCL 691.1805(8)(b); MCR 3.716(F)(2).

If the respondent does not live in Michigan, venue is proper in the county where the petitioner resides. MCL 691.1805(8)(c); MCR 3.716(F)(3).

2. Content

"The complaint must state facts that show that issuance of an [ERPO] is necessary because the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MCL 691.1805(3); see also MCR 3.716(B)(3).

An individual may file an action under the ERPO Act regardless whether the respondent owns or possesses a firearm. MCL 691.1805(4); MCR 3.716(A)(1).

3. Respondent's Identity

If the petitioner knows that the respondent is one of the following individuals, the petitioner must state the fact in the complaint:

- An individual who is required to carry a pistol as a condition of employment and who has been issued a license to carry a concealed pistol.
- A police officer licensed or certified under MCOLES (Michigan Commission On Law Enforcement Standards Act), MCL 28.601 *et seq*.

- A sheriff or deputy sheriff.
- A member of the Department of State Police.
- A local corrections officer.
- An employee of the Department of Corrections.
- A federal law enforcement officer who carries a pistol during the normal course of the officer's employment.
- An officer of the Federal Bureau of Prisons. MCL 691.1805(5)(a)-(h); MCR 3.716(B)(4)(a)-(b).

4. Respondent's Firearms

If a petitioner knows or believes that a respondent owns or possesses firearms, the petitioner must state that information in the complaint. MCL 691.1805(6); MCR 3.716(B)(5). The petitioner must identify the firearms to the extent possible and provide the location of the firearms and any other information that would help a law enforcement officer find the firearms. MCL 691.1805(6); MCR 3.716(B)(5).

C. Address of Petitioner Is Confidential

In an ERPO action, the court clerk must maintain the petitioner's address as confidential in the court file. MCL 691.1805(7); MCR 3.716(C). The petitioner's address must not be disclosed in any pleading or paper or otherwise, and the clerk must give notice of hearing to the petitioner using the confidential address for any motion filed by the respondent or any other hearing scheduled by the court. MCL 691.1805(7); MCR 3.716(C).

D. False Statement In Complaint or In Support of Complaint

The following penalties apply to a petitioner who knowingly and intentionally makes a false statement to the court in the complaint or in support of the complaint:

- **First offense:** a petitioner is guilty of a misdemeanor punishable for not more than 93 days of imprisonment, a fine of not more than $500, or both. MCL 691.1819(4)(a).
- **Second offense:** a petitioner is guilty of a felony punishable for not more than four years of imprisonment, a fine of not more than $2,000, or both. MCL 691.1819(4)(b).

- **Third or subsequent offense:** a petitioner is guilty of a felony punishable for not more than five years of imprisonment, a fine of not more than $20,000, or both. MCL 691.1819(4)(c).

E. Other Relief Available to Petitioner

The ERPO Act does not limit a petitioner's ability to request relief under MCL 600.2950 (domestic relationship PPOs) and MCL 600.2950a (nondomestic relationship PPOs). MCL 691.1820(a). Nor does the ERPO Act limit a petitioner's ability to file a petition under MCL 330.1434 (petition asserting that an individual is a person requiring treatment under the Mental Health Code). MCL 691.1820(b).

9.2 Hearings for Extreme Risk Protection Orders

A. Expedited Hearings

When a action for an ERPO is filed in a court, the court must expedite and give priority to a hearing to determine whether an ERPO will be issued. MCL 691.1806(1); MCR 3.718(D)(1). The court must also expedite and give priority to any other hearings required by the ERPO Act. MCL 691.1806(1); MCR 3.718(D)(1)

B. Notice

Except as provided in MCL 691.1807(2),[3] a respondent must receive notice of a hearing scheduled to determine whether an ERPO will be issued. MCL 691.1806(2); MCR 3.718(D)(4). A respondent must be given an opportunity to be heard at the hearing. MCL 691.1806(2).

C. Change of Venue

The court may order a change of venue for an action under the ERPO Act for any reason permitted by the court rules, including, but not limited to, the convenience of the parties and witnesses. MCL 691.1806(3). When deciding on whether to change venue, the court may consider the location of firearms possessed or owned by a respondent. *Id.*

[3] MCL 691.1807(2) addresses circumstances under which a court may issue an ERPO without first giving notice to the respondent.

D. Video Conferencing

Proceedings under the ERPO Act may be conducted using video conferencing technology or other communication equipment according to the provisions of the court rules and administrative orders. MCL 691.1806(4); MCR 3.718(D)(5).

9.3 Determining Whether to Issue an Extreme Risk Protection Order

A court must issue an ERPO if the court, by a preponderance of the evidence, determines "that the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MCL 691.1807(1); MCR 3.718(D)(6).

A. Considerations

To determine whether to issue an ERPO, MCR 3.718(D)(8) requires the court to consider all of the following:

- Any history of use of physical force, or attempted or threatened use of physical force, against the respondent or another individual, regardless whether the violence or threatened violence involved a firearm. MCL 691.1807(1)(a).

- Any evidence that the respondent has a serious mental illness or serious emotional disturbance, as defined in MCL 330.1100d, that makes the respondent dangerous to respondent's self or another individual. MCL 691.1807(1)(b).

- Any of the following orders against the respondent, no matter if the orders are existing or if the orders were previously entered:

  - An ERPO.

  - A PPO under MCL 600.2950 or MCL 600.2950a.

  - A pretrial release order.

  - A probation order.

  - A parole order.

    - Any other injunctive order. MCL 691.1807(1)(c)(*i*)-(*vi*).

- Any violation of a previous or existing ERPO. MCL 691.1807(1)(d).

- Any violation of a previous or existing PPO under MCL 600.2950 or MCL 600.2950a. MCL 691.1807(1)(e).

- Any previous conviction of, criminal charges pending against, or previous or pending juvenile delinquency petitions against the respondent for committing or attempted to commit any of these offenses:

    - Misdemeanor violation of MCL 750.81.

    - Violation of MCL 750.411h or MCL 750.411i or a similar offense in another jurisdiction.

    - An offense involving the element of assault.

    - An offense involving the element of threatening person or property.

    - An offense that is a crime committed against the person or property of a spouse or intimate partner, as defined in MCL 600.2950k(3).

    - An offense involving animal abuse or cruelty.

    - A serious misdemeanor as defined in MCL 780.811. MCL 691.1807(1)(f)(*i*)-(*vii*).

- Any evidence of recent unlawful use of controlled substances. MCL 691.1807(1)(g).

- Any recent alcohol abuse. MCL 691.1807(1)(h).

- Any previous unlawful possession, use, display, or brandishing of a deadly weapon. MCL 691.1807(1)(i).

- Any evidence that respondent acquired or attempted to acquire a deadly weapon or ammunition within the previous 180 days. MCL 691.1807(1)(j).

- Any additional information found reliable by the court, including a respondent's statement or relevant information about the respondent from the respondent's family and members of the respondent's household. MCL 691.1807(1)(k).

- Any other facts the court considers relevant. MCL 691.1807(1)(*l*).

B. Decision on Issuing an ERPO

The court must immediately state in writing the specific reasons for its decision to issue an ERPO or its refusal to issue an ERPO. MCL 691.1807(7); MCR 3.718(D)(8). If there is a hearing, the court must also immediately state on the record its specific reasons for issuing an ERPO or refusing to issue an ERPO. MCL 691.1807(7); MCR 3.718(D)(8).

9.4 Issuing an Extreme Risk Protection Order Without Notice to a Respondent

The court may issue an ERPO without giving written or oral notice to a respondent "if the court determines by clear and convincing evidence from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an [ERPO] can be issued." MCL 691.1807(2); MCR 3.718(A)(2)(b). If the petitioner has requested the court to issue an ERPO without notice to the respondent, the court must decide the issue within one business day. MCL 691.1807(2); MCR 3.718(A)(1).

A. Hearing Requested After ERPO Issued Without Notice

If the court issues an ERPO under MCL 691.1807(2), including an order described in MCL 691.1807(4) (law enforcement officer requests an immediate emergency ERPO), the court must, if the restrained individual (respondent) requests it, hold a hearing on the ERPO under MCL 691.1807(1) pursuant to Michigan court rules:

- Unless MCL 691.1807(3)(b) applies, a hearing must be held no later than 14 days after the ERPO is served on the restrained individual or after the restrained individual receives actual notice of the ERPO. MCL 691.1807(3)(a); MCR 3.718(D)(3)(a).

- If respondent is permitted or required to carry a pistol as part of the respondent's employment and has a concealed weapon permit, or respondent is a member of law enforcement listed in MCL 691.1805(5), a hearing must be held no later than 5 days after the restrained individual is served or receives actual notice of the ERPO. MCL 691.1807(3)(b); MCR 3.718(D)(3)(b).

B. Immediate Emergency ERPO

A law enforcement officer may request that an immediate emergency ERPO be issued without written or oral notice to a

respondent "if the officer is responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm." MCL 691.1807(4); MCR 3.718(B)(1).

The officer may request an ERPO under MCL 691.1807(4) verbally by telephone and the judge or magistrate on duty in that jurisdiction may issue the ERPO. MCL 691.1807(4); MCR 3.718(B)(1). If the ERPO is issued, the petitioner must file with the court a sworn petition in writing that details the facts and circumstances within one business day of the ERPO's entry. MCL 691.1807(4); MCR 3.718(B)(2)(b).

The court that issues the ERPO, if it is not the circuit court, must provide the circuit court with a copy of the petition. MCL 691.1807(4).

9.5 Service of an Extreme Risk Protection Order[4]

Unless an ERPO must be personally served by a law enforcement officer as required by MCL 691.1813(2) and MCR 3.719(B)(2), an ERPO must be served on the restrained individual in person, by registered or certified mail, return receipt requested, delivered to the individual's last known address, or by any other means decided by the court and allowed under Michigan court rules. MCL 691.1813(1); MCR 3.719(B)(1).

If a court has ordered a restrained individual to immediately surrender any firearms, the ERPO must be served personally by a law enforcement officer. MCL 691.1813(2); MCR 3.719(B)(2). If the restrained individual has not been served, a law enforcement officer who knows of the ERPO may, at any time, serve a true copy of the order on the restrained individual. MCL 691.1813(2). The law enforcement officer is also permitted, at any time, to advise a restrained individual who has not received personal service of the ERPO of the order's existence, the specific conduct enjoined, the penalties for violating the order, and where the restrained individual may get a copy of the ERPO. *Id.*

The individual who serves the restrained individual with an ERPO or the law enforcement officer who gives the restrained individual oral notice of the ERPO must file proof of service or proof of oral notice with the clerk of the issuing court and the petitioner. MCL 691.1813(3); MCR 3.719(C).

[4]The service of process provisions found in MCL 600.1908 for civil actions do not apply to ERPO actions. MCL 600.1908(3).

9.6 Motion to Modify or Rescind an Extreme Risk Protection Order

An individual restrained by an ERPO may file a motion at any time to modify or rescind the order and request a hearing under the court rules. MCL 691.1807(5); MCR 3.720(A)(1)(a). The restrained individual may file one motion during the first six months of the order and one motion during the next six months of an order in effect under MCL 691.1809(1)(k). MCL 691.1807(5); MCR 3.720(A)(1)(b). If an ERPO has been extended under MCL 691.1817 or MCL 691.1819, a restrained individual may file one motion to modify or rescind the order in the first six months and one motion during the next six months. MCL 691.1807(5); MCR 3.720(A)(1)(b).

If a restrained individual files more than one motion during the first or second six-month period, the court must review the motion before holding a hearing on the motion. MCL 691.1807(5); MCR 3.720(A)(1)(b). Under those circumstances a court may summarily dismiss a motion without a response from the petitioner and without a hearing. MCL 691.1807(5); MCR 3.720(A)(1)(b).

At a hearing on a restrained individual's motion to modify or rescind an ERPO, "the restrained individual must prove by a preponderance of the evidence that the restrained individual no longer poses a risk to seriously physically injure another individual or the restrained individual by possessing a firearm." MCL 691.1807(6); MCR 3.720(A)(1)(c).

9.7 Surrender of Firearms After an Extreme Risk Protection Order Is Issued

If a court issues an ERPO under MCL 691.1807, the court must determine when a respondent must surrender the respondent's firearms. MCL 691.1807(8). The court may order that the respondent immediately surrender any firearms, or the court may require the respondent to surrender any firearms within a 24-hour period. *Id.*

If a respondent is ordered to immediately surrender any firearms, the court must issue an anticipatory search warrant, "subject to and contingent on the failure or refusal of the restrained individual, following the service of the order, to immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control[.]" *Id.*; MCR 3.718(C). The anticipatory search warrant would "authoriz[e] a law enforcement agency to search the location or locations where the firearm, or firearms, or concealed pistol license is believed to be and to seize any firearm or concealed pistol license discovered during the search in

compliance with [MCL 780.651 to MCL 780.659]."[5] MCL 691.1807(8); MCR 3.718(C).

There is a presumption that the respondent will be allowed 24 hours in which to surrender any firearms unless the petitioner is a law enforcement officer or health care provider. MCL 691.1807(8); MCR 3.719(A)(4).

If the court issues an ERPO under MCL 691.1807, "the court may, in its discretion, allow the restrained individual to surrender any firearms to a licensed firearm dealer on the list prepared under [MCL 691.1818]." MCL 691.1807(9); MCR 3.719(A)(4).

> **Note:** An individual subject to a state-issued domestic restraining order that finds the individual to be "a credible threat to the physical safety of [the individual's] intimate partner or [the] partner's child, or [that] explicitly prohibit[s] the use, attempted use, or threatened use of physical force against those individuals" is prohibited from possessing a firearm or ammunition under federal law. *United States v Rahimi*, 602 US ___, ___ (2024) (quotation marks omitted). See 18 USC 922(g)(8)(C)(i)-(ii).

9.8 Contents of an Extreme Risk Protection Order

If the court issues an ERPO under MCL 691.1807, the court must include all of the following in the ERPO:

> "(a) That the restrained individual shall not purchase or possess a firearm. That if the individual has been issued a license under [MCL 28.422], that the individual has not used and that is not yet void, the individual shall not use it and shall surrender it to the law enforcement agency designated under [MCL 691.1809(1)(g)].
>
> (b) That the restrained individual shall not apply for a concealed pistol license and, if the restrained individual has been issued a license to carry a concealed pistol, the license will be suspended or revoked under [MCL 28.428], once the order is entered into the law enforcement information network and that the individual shall surrender the license as required by [MCL 28.428].

[5] MCL 780.651 *et seq.*, governs the issuance and execution of search warrants.

(c) That the restrained individual shall, within 24 hours or, at the court's discretion, immediately after being served with the order, surrender any firearms in the individual's possession or control to the law enforcement agency designated under [MCL 691.1809(1)(g)] or, if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under [MCL 691.1818].

(d) If the petitioner has identified any firearms under [MCL 691.1805(6)], a specific description of the firearms to be surrendered or seized.

(e) If the order is issued under [MCL 691.1807(2)], a statement that, if requested by the restrained individual, a hearing will be held within 14 days or 5 days, as applicable under [MCL 691.1807(3)], after the restrained individual is served with or receives actual notice of the order and that the restrained individual may appear at the hearing and request the court to modify or rescind the order.

(f) A statement that the restrained individual may file a motion to modify or rescind the order as allowed under [the ERPO Act] and that motion forms and filing instructions are available from the clerk of the court.

(g) A designation of the law enforcement agency that is responsible for forwarding the order to the Federal Bureau of Investigation under [MCL 691.1815(1)]. The law enforcement agency designated under [MCL 691.1809(1)(g)] must be an agency within whose jurisdiction the restrained individual resides.

(h) Directions to a local entering authority or the law enforcement agency designated under [MCL 691.1809(1)(g)] to enter the order into the law enforcement information network.

(i) A statement that violation of the order will subject the restrained individual to immediate arrest, the contempt powers of the court, an automatic extension of the order, and criminal penalties, including imprisonment for up to 1 year for an initial violation and up to 5 years for a subsequent violation.

(j) A statement that the restrained individual has a right to seek the advice of an attorney.

(k) An expiration date that is 1 year after the date of issuance.

> (*l*) If the court has ordered the restrained individual to surrender the individual's firearms immediately, a statement that the law enforcement agency designated under [MCL 691.1809(1)(g)] must proceed to seize the restrained individual's firearms after the restrained individual is served with or receives actual notice of the [ERPO], after giving the restrained individual an opportunity to surrender the individual's firearms." MCL 691.1809(1)(a)-(*l*); see also MCR 3.719(A)(1)-(12).

9.9 Effective Date and Enforceability of an Extreme Risk Protection Order

An ERPO is effective and enforceable immediately after it is issued by the court. MCL 691.1809(2). An ERPO is enforceable anywhere in Michigan by a law enforcement agency that receives a true copy of the order, is shown a copy of the order, or has verified the order's existence on the LEIN (Law Enforcement Information Network) or on an information network maintained by the FBI. *Id.*

9.10 Providing Restrained Individual With a Firearm

"An individual who knowingly places a firearm in the possession of an individual who is restrained under an [ERPO] is guilty of a felony punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 691.1819(5).

9.11 Restrained Individual's Duties After an Extreme Risk Protection Order Is Issued

A restrained individual must take action as specified in MCL 691.1810 not later than one business day after receiving a copy of an ERPO issued against the individual or receiving actual notice of the order. MCL 691.1810(1); MCR 3.719(D)(1). After receipt of a copy of the order or actual notice of the order, the restrained individual must file certain documents or evidence with the issuing court. *Id.*

A. Individual Possessed or Controlled a Firearm That Was Surrendered or Seized After ERPO Issued

If the restrained individual possessed or controlled any firearms when the ERPO was issued, the individual must file with the court that issued the ERPO one or more documents or other evidence verifying that all firearms that had previously been in the restrained individual's possession or control were surrendered to or seized by

the local law enforcement agency designated under MCL 691.1809(1)(g). MCL 691.1810(1)(a); MCR 3.719(D)(1)(a)(*i*). The individual must also file evidence that any concealed pistol license was surrendered to the county clerk as required by the ERPO and MCL 28.248. MCL 691.1810(1)(a); MCR 3.719(D)(1)(a)(*ii*).

The restrained individual must "verify to the court that at the time of the verification the individual does not have any firearms or a concealed pistol license in the individual's possession or control." MCL 691.1810(1)(a); MCR 3.719(D)(1)(a)(*iii*).

B. Individual Did Not Possess or Control a Firearm When ERPO Issued and Individual Does Not Possess or Control a Firearm at the Time of Verification

If the restrained individual did not possess or control any firearms or have a concealed pistol license at the time the ERPO issued, the individual must file a document or other evidence with the issuing court verifying both of the following:

- "At the time the order was issued, the individual did not have a firearm or a concealed pistol license in the individual's possession or control." MCL 691.1810(1)(b)(*i*); MCR 3.719(D)(1)(b)(*i*).

- "At the time of the verification, the individual does not have a firearm or a concealed pistol license in the individual's possession or control." MCL 691.1810(1)(b)(*ii*); MCR 3.719(D)(1)(b)(*ii*).

C. Notice to Law Enforcement Agency of Individual's Failure to Comply Within One Business Day

If a restrained individual fails to satisfy the filing requirements in MCL 691.1810(1) within one business day after being served with the ERPO or having received actual notice of the order, the clerk of the issuing court must inform the local law enforcement agency designated in MCL 691.1809(1)(g) of that fact. MCL 691.1810(2); MCR 3.719(D)(2)(a).

If a local law enforcement agency is notified under MCL 691.1810(2) that a restrained individual has failed to satisfy the filing requirements in MCL 691.1810(1), the law enforcement agency must "make a good-faith effort to determine whether there is evidence that the restrained individual has failed to surrender a firearm or concealed pistol license in the restrained individual's possession or control as required." MCL 691.1810(3).

D. Compliance Hearing

A compliance hearing must be scheduled and held not later than five days after an ERPO is served on the restrained individual or after the restrained individual receives actual notice of the order. MCL 691.1810(4); MCR 3.719(D)(2)(b).

The court may cancel the compliance hearing if the restrained individual satisfies the filing requirements before the hearing is held. MCL 691.1810(4); MCR 3.719(D)(2)(b). If the restrained individual has failed to comply with the filing requirements or fails to appear at the compliance hearing, the court must issue a bench warrant and a search warrant under MCL 780.651 to MCL 780.659[6] to seize any firearms. MCL 691.1810(4); MCR 3.719(D)(2)(b). The court may also hold the restrained individual in contempt. MCL 691.1810(4); MCR 3.719(D)(2)(b).

E. Alleged Possession or Control of a Firearm or Concealed Pistol License While an ERPO Is in Effect

A prosecuting attorney for the county in which the ERPO was issued or a law enforcement officer may file an affidavit at any time during an effective ERPO "alleging that the restrained individual has a firearm or a concealed pistol license in the individual's possession or control." MCL 691.1810(5); MCR 3.721(B)(1).

If an affidavit so alleging is filed, the court must decide if probable cause exists to believe that the restrained individual possesses or controls a firearm or concealed pistol license. MCL 691.1810(5). If the court finds probable cause, the court may issue an arrest warrant or the court may order a hearing. MCL 691.1810(5); MCR 3.721(B)(1). The court must also issue a search warrant under MCL 780.651 to MCL 780.659.[7] MCL 691.1810(5); MCR 3.721(C). The search warrant must describe the firearm(s) or concealed pistol license believed to be in the restrained individual's possession or control. MCL 691.1810(5); MCR 3.721(C). The warrant must also authorize a designated law enforcement agency to search the location(s) where a firearm or concealed pistol license is believed to be and to seize any firearms or concealed pistol license discovered by the search. MCL 691.1810(5); MCR 3.721(C).

[6] MCL 780.651 *et seq.*, governs the issuance and execution of search warrants.

[7] MCL 780.651 *et seq.*, governs the issuance and execution of search warrants.

9.12 Refusing or Failing to Comply with an Extreme Risk Protection Order

A. Imprisonment and Fines

The failure or refusal to comply with an ERPO is subject to the following penalties, in addition to any penalties that may be imposed for another criminal offense arising from the same conduct. MCL 691.1819(1).

- **First offense:** an individual is guilty of a felony punishable by not more than one year of imprisonment, a fine of not more than $1,000, or both. MCL 691.1819(1)(a).
- **Second offense:** an individual is guilty of a felony punishable by not more than four years of imprisonment, a fine of not more than $2,000, or both. MCL 691.1819(1)(b).
- **Third or subsequent offense:** an individual is guilty of a felony punishable by not more than five years of imprisonment, a fine of not more than $20,000, or both. MCL 691.1819(1)(c).

B. Extension of the ERPO

If a court or a jury determines that a restrained individual refused or failed to comply with an ERPO, the issuing court must issue an extended ERPO effective for one year after expiration of the ERPO with which the individual refused or failed to comply. MCL 691.1819(2); MCR 3.720(B)(2).

C. Contempt

"The court may also enforce an [ERPO] by charging the restrained individual with contempt of court under [MCL 600.1701 to MCL 600.1745]." MCL 691.1819(3); MCR 3.721(A).

9.13 Court Clerk's Responsibilities

After an ERPO is issued, the clerk of the issuing court must do specified tasks immediately after the order is issued. MCL 691.1811(1); MCR 3.719(E). No proof of service on the restrained individual is required. MCL 691.1811(1). Following the issue of an ERPO, the court clerk must:

- Provide a true copy of the order to the designated law enforcement agency under MCL 691.1809(1)(g). MCL 691.1811(1)(a).

- Provide at least two true copies of the order to the petitioner. MCL 691.1811(1)(b).

- If the restrained individual is identified in the complaint as an individual described in MCL 691.1805(5)[8] and the individual's employer is known, notify the individual's employer of the order.[9] MCL 691.1811(1)(c).

- Notify the Department of State Police and the county clerk in the restrained individual's county of residence of the ERPO for purposes of performing their duties under MCL 28.421 to MCL 28.435 (concealed weapons act). MCL 691.1811(1)(d).

- Inform the petitioner that the petitioner may provide the designated law enforcement agency under MCL 691.1809(1)(g) with a true copy of the order to be immediately provided to the FBI and entered into the LEIN.[10] MCL 691.1811(1)(e); MCR 3.719(D)(2)(a).

The clerk of the court that issued the ERPO must immediately notify the law enforcement agency designated under MCL 691.1809(1)(g) if any of the following occur:

- The county clerk receives proof that the restrained individual was served with the order. MCL 691.1811(2)(a).

- The ERPO is rescinded, modified, or extended. MCL 691.1811(2)(b); MCR 3.720(A)(4); MCR 3.720(B)(3).

- The ERPO expires without an extension. MCL 691.1811(2)(c).

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[8]An individual required to carry a pistol as part of the individual's employment that is issued a license to carry a concealed pistol, or a specified law enforcement officer.

[9]"It is the intent of the [L]egislature that the restrained individual's employer work with the restrained individual's union or bargaining representative under [MCL 691.1811(1)(c)] to avoid the restrained individual losing the individual's employment or compensation and benefits while the [ERPO] is in effect." MCL 691.1811(1)(c).

[10]The true copy may be provided to the FBI unless a local entering authority has been designated under MCL 691.1809(1)(h). MCL 691.1811(1)(e). If a local entering authority has been designated under MCL 691.1809(1)(h), it must enter the ERPO into the LEIN pursuant to the CJIS (Criminal Justice Information Systems) Policy Council Act, MCL 28.211 *et seq*. MCL 691.1811(3).

9.14 Law Enforcement Agency's Responsibilities

A. Duty to Enter ERPO into the LEIN and Report to FBI

The law enforcement agency designated in MCL 691.1809(1)(g) as the agency charged with forwarding an ERPO to the FBI when the ERPO is issued must immediately do both of the following without requiring proof of service:

- enter the ERPO into the LEIN according to the CJIS Policy Council Act, MCL 28.211 *et seq.*, unless a local entering authority is designated under MCL 691.1809(1)(h), and
- report entry of the ERPO to the Criminal Justice Information Services Division of the FBI for purposes of the National Crime Information Center. MCL 691.1815(1)(a)-(b).

A law enforcement agency receiving information under MCL 691.1811(2) restrained individual served with an ERPO; an ERPO is rescinded, modified, or extended; or an ERPO expires without extension) must enter the information into the LEIN[11] and report the information to the FBI pursuant to MCL 691.1815(1)(b). MCL 691.1815(2).

B. Alleged Violation of an ERPO By a Restrained Individual Who Had Not Been Served With the ERPO

A law enforcement officer responding to a call alleging that a restrained individual violated an ERPO that has not been served on the individual must serve the restrained individual with a true copy of the ERPO or must advise the individual of the existence of the order, the specific conduct enjoined, the penalties for violating the order, and where the restrained individual can obtain a copy of the ERPO. MCL 691.1815(3).

The law enforcement officer must enforce the ERPO and give the restrained individual an opportunity to comply with the ERPO before making a custodial arrest of the individual for violating the order. MCL 691.1815(3)-MCL 691.1815(4). A restrained individual who fails to comply with an ERPO is subject to an immediate custodial arrest. MCL 691.1815(4). An arrest for violating an ERPO does not preclude an arrest under MCL 764.15 and MCL 764.15a (circumstances allowing for a warrantless arrest). MCL 691.1815(4).

[11] As provided by the CJIS Policy Council Act, MCL 28.211 *et seq.*

After giving notice of the ERPO to the restrained individual, the law enforcement officer must enter or cause to be entered into the LEIN and reported to the FBI that the restrained individual was given actual notice of the ERPO. MCL 691.1815(3). The officer must also comply with MCL 691.1813(3) (file proof of service or proof of oral notice with the issuing court and the petitioner). MCL 691.1815(3); MCR 3.719(B)(3); MCR 3.719(C).

C. Extreme Risk Protection Order Requiring Seizure of a Firearm

A law enforcement agency ordered to seize a firearm pursuant to an ERPO must do all of the following:

> "(a) Seize a firearm identified in an [ERPO] from any place or from any individual who has possession or control of the firearm.
>
> (b) Seize any other firearms discovered that are owned by or in the possession or control of the restrained individual or if allowed under other applicable law." MCL 691.1815(5); see also MCR 3.718(C); MCR 3.721(C).

If a law enforcement officer seizes a firearm pursuant to an ERPO, the officer must give a tabulation of the firearms seized as required by MCL 780.655 to the individual whose firearms were taken. MCL 691.1815(6). If no individual is present at the time the firearms were seized, the officer must leave the tabulation in the place where the firearms were found. *Id.*

D. Retention and Storage of Seized Firearms

The law enforcement agency that seized a firearm under the ERPO Act must retain and store the firearm subject to order of the court that issued the ERPO authorizing seizure of the firearm. MCL 691.1815(7).

E. Reclaiming a Seized Firearm

In addition to any other appropriate order relating to a seized firearm, the court must order that the restrained individual may reclaim the firearm when the ERPO expires or is terminated, "unless the restrained individual is prohibited for another reason from owning or possessing a firearm, or [the court must] order that the firearm be transferred to a licensed firearm dealer if the restrained individual sells or transfers ownership of the firearm to the dealer." MCL 691.1815(7).

Before a restrained individual may reclaim a firearm and to determine whether another reason prohibits the restrained individual from owning or possessing a firearm, "the law enforcement agency shall conduct a verification under [the LEIN] and the national instant criminal background check system in the same manner as required under . . . MCL 28.425b(6)."[12] MCL 691.1815(7).

When a restrained individual reclaims a firearm from the law enforcement agency having the firearm, the law enforcement agency must enter into the LEIN and notify the FBI that a court has ordered that the individual's firearm be returned to the individual after expiration of the ERPO. MCL 691.1815(8).

A law enforcement agency that seized and stored a firearm under the ERPO Act "is not liable for damages to or a change in condition of the firearm unless the damage or change in condition resulted from a failure to exercise reasonable care in the seizure, transportation, or storage of the firearm." MCL 691.1815(9).

"If a restrained individual fails to reclaim a firearm under [MCL 691.1815(7)] within 90 days after the [ERPO] expires or is ordered terminated, the law enforcement agency storing the firearm shall do 1 of the following:

> (a) Proceed as for a firearm subject to disposal under [MCL 750.239 and MCL 750.239a].[13]
>
> (b) Follow the procedures for property under [MCL 434.21 to MCL 434.29]." MCL 691.1815(10).

"Subject to [MCL 691.1815(7)-MCL 691.1815(8)], if any individual other than the restrained individual claims title to a firearm seized under [the ERPO Act], the firearm must be returned to the claimant if the court determines that the claimant is the lawful owner." MCL 691.1815(11).

9.15 Extension of an Extreme Risk Protection Order

A court may issue one or more extensions of an ERPO on motion of the petitioner or on its own motion. MCL 691.1817; MCR 3.720(B)(1)(a). Each extension is effective for one year following expiration of a preceding order. MCL 691.1817; MCR 3.720(B)(1)(a).

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[12] MCL 28.425b governs the procedure and requirements for obtaining a license to carry a concealed pistol.

[13] MCL 750.239 and MCL 750.329a govern the forfeiture and disposition of firearms.

"The court shall only issue an extended order under [MCL 691.1817] if the preponderance of the evidence shows that the restrained individual can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MCL 691.1817; see also MCR 3.720(B)(1)(b).

"The petitioner or the court, as applicable, shall give the restrained individual written notice of a hearing on a motion to extend the order." MCL 691.1817; see also MCR 3.720(B)(1)(a).

9.16 List of Licensed Firearm Dealers

Every circuit court must prepare a list of trusted firearm dealers found in the court's jurisdiction. MCL 691.1818. In making the list, a circuit court can obtain from the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives a list of firearm dealers currently licensed in the court's jurisdiction. *Id*.

Appendix: Table Summarizing Federal and Michigan Statutory Firearms and Ammunition Restrictions

The following table provides general guidance in locating federal and state statutory firearms restrictions that apply to individuals who are subject to certain criminal proceedings and court orders involving domestic violence cases.

Event triggering restriction	Federal restrictions	Michigan restrictions
Felony Indictment (See Section 6.4)	Person subject to felony indictment is disqualified from receiving firearms or ammunition, and it is illegal to sell these items to the person indicted. 18 USC 922(d)(1); 18 USC 922(n). Law enforcement officers are exempt from federal firearm restrictions. 18 USC 925(a)(1).	Individual subject to felony indictment is disqualified from obtaining a firearm license. MCL 28.422(3)(d). Individual subject to felony indictment is disqualified from obtaining a concealed pistol license. MCL 28.425b(7)(f). Existing concealed pistol license is subject to suspension and/or revocation. MCL 28.428(2). Certain law enforcement, military, and governmental employees may be exempt from the firearm licensing statute under MCL 28.432, and from the concealed pistol licensing statute under MCL 28.432a.

Event triggering restriction	Federal restrictions	Michigan restrictions
Misdemeanor Indictment (Section 6.4)	No federal restrictions.	Individual subject to certain misdemeanor indictment is disqualified from obtaining a firearm license. MCL 28.422(3)(d). Individual charged with certain specified misdemeanors as listed in MCL 28.425b(7)(h) or MCL 28.425b(7)(i) is disqualified from obtaining a concealed pistol license. MCL 28.425b(7)(h); MCL 28.425b(7)(i). Existing concealed pistol license is subject to suspension. MCL 28.428(2). Certain law enforcement, military, and governmental employees may be exempt from the pistol licensing statute under MCL 28.432, and from the concealed pistol licensing statute under MCL 28.432a.

Event triggering restriction	Federal restrictions	Michigan restrictions
Felony Conviction (Section 6.5)	Convicted felon cannot possess, receive, or transport firearms or ammunition. 18 USC 922(g)(1). Person is prohibited from selling or otherwise disposing of firearms or ammunition to a convicted felon. 18 USC 922(d)(1). Law enforcement officers are exempt from federal firearm restrictions. 18 USC 925(a)(1). **Note:** For purposes of federal statutes, if the felony conviction has been expunged, set aside, pardoned, or civil rights were restored, it is not considered a conviction unless firearm restrictions are expressly provided. 18 USC 921(a)(20).	Individual convicted of felony punishable by imprisonment of four or more years cannot "possess, use, transport, sell, purchase, carry, ship, receive, or distribute" firearms or "possess, use, transport, sell, carry, ship, or distribute ammunition" in Michigan until expiration of three years and after certain circumstances are met. MCL 750.224f(1); MCL 750.224f(3); MCL 750.224f(9). Person convicted of specified felony as defined in MCL 750.224f(10) cannot "possess, use, transport, sell, purchase, carry, ship, receive, or distribute" firearms or "possess, use, transport, sell, carry, ship, or distribute ammunition" in Michigan until expiration of 5 years and after certain circumstances are met, or until after the person's right to perform any of these actions has been restored. MCL 750.224f(2); MCL 750.224f(4). Law enforcement officers not exempt from restrictions imposed under MCL 750.224f. See MCL 750.231. Individual convicted of felony punishable by imprisonment of four or more years subject to restrictions set out in MCL 750.224f is disqualified from obtaining a firearm license under MCL 28.422(3)(e), or a concealed pistol license under MCL 28.425b(7)(e). Convicted felon (i.e. punishable by imprisonment for more than one year) is disqualified from obtaining a concealed pistol license. MCL 28.425b(7)(f). Existing concealed pistol license is subject to suspension and revocation. MCL 28.428(1); MCL 28.428(2)-(3). See Section 6.4(B)(2); Section 6.10. Certain law enforcement, military, and governmental employees may be exempt from the firearm licensing statute under MCL 28.432, and from the concealed pistol licensing statute under MCL 28.432a.

Event triggering restriction	Federal restrictions	Michigan restrictions
Misdemeanor Conviction (Section 6.6)	Person convicted of misdemeanor crime of domestic violence as defined in 18 USC 921(a)(33) cannot possess, receive, or transport firearms or ammunition. 18 USC 922(g)(9). Person is prohibited from selling or otherwise disposing of firearms or ammunition to person convicted of misdemeanor crime of domestic violence. 18 USC 922(d)(9). Law enforcement officers not exempt from restrictions imposed under 18 USC 922(d)(9) and 18 USC 922(g)(9). 18 USC 925(a)(1). **Note:** For purposes of federal statutes, if the conviction has been expunged, set aside, pardoned, or civil rights were restored, it is not considered a conviction unless firearm restrictions are expressly provided. 18 USC 921(a)(20).	Person convicted of misdemeanor involving domestic violence cannot "possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm or ammunition in [Michigan] until the expiration of 8 years after" all fines have been paid, all terms of imprisonment have been served, and all conditions of probation have been completed. MCL 750.224f(5)(a)-(c). Individual convicted of certain misdemeanor crimes as indicated under MCL 28.425b(7)(h) within eight years immediately preceding date of concealed pistol license application is disqualified from obtaining such license. MCL 28.425b(7)(h). Individual convicted of certain misdemeanor crimes as indicated under MCL 28.425b(7)(i) within three years immediately preceding date of concealed pistol license application is disqualified from obtaining such license. MCL 28.425b(7)(i). Existing concealed pistol license is subject to suspension and revocation. MCL 28.428(1); MCL 28.428(2)-(3). See Section 6.4(B)(2); Section 6.10. Certain law enforcement, military, and governmental employees may be exempt from the firearm licensing statute under MCL 28.432, and from the concealed pistol licensing statute under MCL 28.432a.

Event triggering restriction	Federal restrictions	Michigan restrictions
Entry of Court Order Restricting Firearms (Section 6.7)	Person subject to court order restraining him/her from "harassing, stalking, or threatening an intimate partner . . . or child of such intimate partner . . ., or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child" cannot possess or receive firearms or ammunition. 18 USC 922(g)(8). Person is prohibited from selling or otherwise disposing of firearms or ammunition to person subject to court order that restrains person from abusing intimate partner or intimate partner's child, and court order met procedural requirements as set out in 18 USC 922(d)(8)(A)-(B). 18 USC 922(d)(8). Law enforcement officers not exempt from court order with specific restrictions or conditions against him/her. See generally 18 USC 922(d)(8). But see, 18 USC 925(a)(1), which generally provides an exemption from federal firearm restrictions for use by federal or state departments or agencies, which presumably includes law enforcement agencies.	Domestic relationship PPO, nondomestic stalking PPO, or nondomestic sexual assault PPO may enjoin or restrain person from purchasing or possessing firearms. MCL 600.2950(1)(e); MCL 600.2950a(26). Conditional pretrial release order may include condition that person not purchase or possess firearms. MCL 765.6b(1), MCL 765.6b(3); MCR 6.106(D)(2)(k). Where person is ordered "to carry or wear an electronic monitoring device as a condition of [pretrial] release," court *must* also order person to not purchase or possess a firearm. MCL 765.6b(3). Probation order may include any condition of probation that is "reasonably necessary for the protection of 1 or more named persons." MCL 771.3(2)(o). Law enforcement officer not exempt from court order with specific restrictions or conditions against him/her. MCL 600.2950(1)(e), MCL 600.2950(2); MCL 600.2950a(5), MCL 600.2950a(26); MCL 765.6b(3); MCL 771.3(2)(o).

Event triggering restriction	Federal restrictions	Michigan restrictions
Entry of Court Order Restricting Firearms, continued (Section 6.7)		Individual subject to domestic relationship PPO, nondomestic stalking PPO, nondomestic sexual assault PPO, or extreme risk protection order (ERPO) is disqualified from obtaining a firearm license under MCL 28.422(3)(a)(*iii*)-(*iv*), (*viii*), and a concealed pistol license under MCL 28.425b(7)(d)(*iii*) and (*vi*). Individual subject to conditional pretrial release order that specifies individual may not purchase or possess a firearm is disqualified from obtaining a firearm license under MCL 28.422(3)(a)(*vi*), and a concealed pistol license under MCL 28.425b(7)(d)(*iv*). Existing concealed pistol license is subject to suspension and revocation. MCL 28.428(1); MCL 28.428(3). See Section 6.10. **Note:** Firearm license disqualification requires restrained individual to receive notice and opportunity for a hearing in court proceeding where PPO or conditional release was issued. MCL 28.422(3)(a). Concealed pistol license restrictions apply even if restrained party had no notice in the proceeding when the order was issued. See MCL 28.425b(7)(d).

Event triggering restriction	Federal restrictions	Michigan restrictions
Dangerous or Mentally Ill Individuals (Section 6.9)	No federal provision.	Individual may be disqualified if deemed dangerous to themselves or others from obtaining a firearm license under MCL 28.422(3). Individual may be disqualified from obtaining a concealed pistol license under MCL 28.425b(7)(j) if the individual has been "found guilty but mentally ill of any crime [or] has . . . offered a plea of not guilty of, or been acquitted of, any crime by reason of insanity." Individual may be disqualified from obtaining a concealed pistol license under MCL 28.425b(7)(k) if the individual is "currently [or] has . . . been subject to an order of involuntary commitment in an inpatient or outpatient setting due to mental illness." Individual may be disqualified from obtaining a concealed pistol license under MCL 28.425b(7)(*l*) if the individual has "a diagnosis of mental illness that includes an assessment that the individual presents a danger to himself or herself or to another at the time the application is made, regardless of whether he or she is receiving treatment for that illness." Individual may be disqualified from obtaining a concealed pistol license under MCL 28.425b(7)(m) if the individual is "under a court order of legal incapacity in this state or elsewhere." Existing concealed pistol license is subject to suspension and revocation. MCL 28.428(1); MCL 28.428(3). See Section 6.10.

Glossary

A

Abduction

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *abduction* is "the wrongful removal or wrongful retention of a child." MCL 722.1522(a).

Absconding

- For purposes of MCL 771.4b, *absconding* is "the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCL 771.4b(9)(a).

Access

- For purposes of MCR 3.218, *access* is "inspection of records, obtaining copies of records upon receipt of payment for costs of reproduction, and oral transmission by staff of information contained in friend of the court records[.]" MCR 3.218(A)(2).

Address confidentiality program

- The *address confidentiality program* is a program in the department of the attorney general that maintains the confidentiality of a victim's residential address when the victim is a certified participant in the program by designating for the victim's use another address that is not the victim's residential address. See generally MCL 780.855.

Aggravated stalking

- "An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

  (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.

  (b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

  (c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.

  (d) The individual has been previously convicted of a violation of [MCL 750.411i] or [MCL 750.411h]." MCL 750.411i(2).

Alternative dispute resolution (ADR)

- For purposes of MCR 2.410, *alternative dispute resolution* is "any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR 3.970; and other procedures by local court rule or ordered on stipulation of the parties." MCR 2.410(A)(2).

Ammunition

- For purposes of MCL 750.224f, *ammunition* is "any projectile that, in its current state, may be expelled from a firearm by an explosive." MCL 750.224f(10)(a).

Appearance ticket

- As used in MCL 764.9c to MCL 764.9g, *appearance ticket* is "a complaint or written notice issued and subscribed by a police officer or other public servant authorized by law or ordinance to issue it directing a designated person to appear in a designated local criminal court at a designated future time in connection with his or her alleged

commission of a designated violation or violations of state law or local ordinance." MCL 764.9f(1).

Assaultive crime

- For purposes of MCL 750.539*l*, *assaultive crime* is "that term as defined in . . . MCL 770.9a." MCL 750.539*l*(5)(a).

- For purposes of MCL 764.9c, *assaultive crime* is "that term as defined in [MCL 770.9a]." MCL 764.9c(9)(a).

- For purposes of MCL 765.6b(6), *assaultive crime* is "that term as defined in [MCL 770.9a]." MCL 765.6b(6)(a).

- For purposes of MCL 769.4a, *assaultive crime* is "1 or more of the following: (*i*) That term as defined in [MCL 770.9a][;] (*ii*) A violation of . . . MCL 750.81 to [MCL 750.90g;] (*iii*) A violation of a law of another state or of a local ordinance of a political subdivision of this state or of another state substantially corresponding to a violation described in subparagraph (*i*) or (*ii*)." MCL 769.4a(8)(a).

- For purposes of MCR 6.103, *assaultive crime* is defined in MCL 764.3(5)(a) and includes the following:

  > "(*i*) A violation described in [MCL 770.9a].
  >
  > (*ii*) A violation of [MCL 750.81 to MCL 750.90g], not otherwise included in subparagraph (*i*).
  >
  > (*iii*) A violation of [MCL 750.110a, MCL 750.136b, MCL 750.234a, MCL 750.234b, MCL 750.234c, MCL 750.349b, and MCL 750.411h], or any other violent felony.
  >
  > (*iv*) A violation of a law of another state or of a political subdivision of this state or of another state that substantially corresponds to a violation described in subparagraph (*i*), (*ii*), or (*iii*)."

- For purposes of MCR 6.102(D), *assaultive crime* is defined in MCL 764.1a; MCL 764.1a defines *assaultive crime* as the term is defined in MCL 764.3(5)(a), above.

- For purposes of MCR 6.105(B), *assaultive crime* is defined in MCL 762.10d; MCL 762.10d(5)(a) defines *assaultive crime* as the term is defined in MCL 764.3(5)(a), above.

B

Biometric data

- For purposes of MCL 28.243, *biometric data* is "all of the following: (*i*) [f]ingerprint images recorded in a manner prescribed by the department [of state police][;] (*ii*) [p]alm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department [of state police][;] (*iii*) [d]igital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the department [of state police][; and] (*iv*) [a]ll descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b); MCL 28.241a(e).

C

Case or Court Proceeding

- For purposes of MCR 1.111, *case or court proceeding* is "any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

Child

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 et seq., child is "an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent." MCL 552.2102(a).

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *child* is "an unemancipated individual who is less than 18 years of age." MCL 722.1522(b).

- For purposes of MCL 750.136b, *child* is "a person who is less than 18 years of age and is not emancipated by operation of law as provided in . . . MCL 722.4." MCL 750.136b(1)(a).

Child-custody determination

- For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), *child-custody determination* is "a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial, and modification order. Child-custody determination does not include an order relating to child support or other monetary obligation of an individual." MCL 722.1102(c).

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *child-custody determination* is "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. Child custody determination includes a permanent, temporary, initial, or modification order." MCL 722.1522(c).

Child-custody proceeding

- For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), *child-custody proceeding* is "a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. Child-custody proceeding does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [A]rticle 3 [(the enforcement article) of the UCCJEA, MCL 722.1301–MCL 722.1316]." MCL 722.1102(d).

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *child-custody proceeding* is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is at issue. Child-custody proceeding includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship,

paternity, termination of parental rights, or protection from domestic violence." MCL 722.1522(d).

Circuit court

- For purposes of the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, *circuit court* "includes a unified trial court having jurisdiction over probationers." MCL 771A.2(a).

Civil immigration enforcement action

- For purposes of ICE Directive 11005.3, *civil immigration enforcement action* is "[a] civil immigration enforcement or removal determination, decision, or action that includes, but is not limited to, a decision whether or not to:

  a) Issue a detainer or assume custody of a noncitizen subject to a previous detainer;

  b) Issue, reissue, serve, file, or cancel a Notice to Appear;

  c) Focus resources on administrative violations or conduct;

  d) Stop, question, or arrest a noncitizen for an administrative violation of the civil

  immigration laws;

  e) Detain or release from custody subject to conditions;

  f) Grant deferred action or parole; and

  g) Execute a final order of removal (and under what circumstances)." ICE Directive 11005.3, ¶ 3.2.

Complaint

- For purposes of MCR 3.716 to MCR 3.722 only, *complaint* "means the act of petitioning the court to issue an extreme risk protection order. Petitioning the court in this manner commences an independent action for an extreme risk protection order and is not considered a motion as defined in MCR 2.119." MCR 3.715(1).[1]

[1] "An individual seeking an extreme risk protection order is petitioning a court for relief. However, the Legislature uses the terms 'complaint' and 'summons' throughout the Extreme Risk Protection Order Act, MCL 691.1801 *et seq.*, rather than the term 'petition.'" MCR 3.715(1).

Computer

- For purposes of MCL 750.411s, *computer* is "any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network." MCL 750.411s(8)(a).

Computer network

- For purposes of MCL 750.411s, *computer network* is "the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers." MCL 750.411s(8)(b).

Computer program

- For purposes of MCL 750.411s, *computer program* is "a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network." MCL 750.411s(8)(c).

Computer system

- For purposes of MCL 750.411s, *computer system* is "a set of related, connected or unconnected, computer equipment, devices, software, or hardware." MCL 750.411s(8)(d).

Confidential address

- For purposes of MCL 776.21b, *confidential address* "means that term as defined in [MCL 780.853]." MCL 776.21b(4)(a). MCL 780.853 defines *confidential address* as "the address of a program participant's residence, as specified on an application to be a program participant or on a notice of change of information as provided under [MCL 780.855] that is classified confidential by the department of the attorney general." MCL 780.853(b).

Confidential communication

- For purposes of MCL 600.2157a, *confidential communication* is "information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim." MCL 600.2157a(1)(a).

Confidential file

- For purposes of subchapter 3.900 of the Michigan Court Rules, *confidential file* "means[:]

(a) records of a case brought before the court under . . . MCL 712A.1 *et seq.*, including, but not limited to,

(*i*) the diversion record of a minor pursuant to . . . MCL 722.821 *et seq.*;

(*ii*) the separate statement about known victims of juvenile offenses, as required by . . . MCL 780.751 *et seq.*;

(*iii*) the testimony taken in a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);

(*iv*) the dispositional reports pursuant to MCR 3.943(C)(3) and [MCR] 3.973(E)(4);

(*v*) biometric data required to be maintained pursuant to MCL 28.243;

(*vi*) reports of sexually motivated crimes, MCL 28.247;

(*vii*) test results of those charged with certain sexual offenses or substance offense offenses, MCL 333.5129;

(b) the contents of a social file maintained by the court, including materials such as:

(*i*) youth and family record fact sheet;

(*ii*) social study;

(*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);

(*iv*) [DHHS] records;

(*v*) correspondence

(*vi*) victim statements;

(*vii*) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver." MCR 3.903(A)(3).

Confidential information

- For purposes of MCR 3.218, *confidential information* is: "(a) staff notes; (b) any confidential information from the [DHHS] child protective services unit or information included in any reports to protective services from a friend of the court office; (c) records from alternative dispute resolution processes, including the confidentiality of mediation records as defined in MCR 2.412; (d) communications from minors; (e) friend of the court grievances filed by the opposing party and the responses; (f) any information when a court order prohibits its release; (g) except as provided in MCR 3.219,[2] any information for which a privilege could be claimed, or that was provided by a governmental agency subject to the express written condition that it remain confidential; and (h) all information classified as confidential by the laws and regulations of title IV, part D of the Social Security Act, 42 USC 651 *et seq.*" MCR 3.218(A)(3).

Convention

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *Convention* is "the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007." MCL 552.2102(c).

Convicted

- For purposes of MCL 28.425b, *convicted* is "a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or

[2] MCR 3.219 provides that "[i]f there is a dispute involving custody, visitation, or change of domicile, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the friend of the court and to the attorneys of record for the parties, or the parties if they are not represented by counsel. The attorneys for the parties, or the parties if they are not represented by counsel, may file objections to the report before a decision is made."

family division of circuit court for a violation that if committed by an adult would be a crime." MCL 28.425b(22)(b).

- For purposes of MCL 600.2950a, *convicted* is "1 of the following:

  (*i*) The subject of a judgment of conviction or a probation order entered in a court that has jurisdiction over criminal offenses, including a tribal court or a military court.

  (*ii*) Assigned to youthful trainee status under . . . MCL 762.11 to [MCL] 762.15, if the individual's status of youthful trainee is revoked and an adjudication of guilt is entered.

  (*iii*) The subject of an order of disposition entered under . . . MCL 712A.18, that is open to the general public under . . . MCL 712A.28.

  (*iv*) The subject of an order of disposition or other adjudication in a juvenile matter in another state or country." MCL 600.2950a(31)(a).

Course of conduct

- For purposes of 18 USC 2261A, *course of conduct* is "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 USC 2266(2).

- For purposes of MCL 750.411h, *course of conduct* is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose."[3] MCL 750.411h(1)(a).

- For purposes of MCL 750.411i, *course of conduct* is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411i(1)(a).

[3] See *Pobursky v Gee*, 249 Mich App 44, 47 (2001), where the Court of Appeals addressed the phrase "2 or more separate noncontinuous acts" under MCL 750.411h to mean "acts [that] are distinct from one another [and] are not connected in time and space." In *Pobursky*, 249 Mich App at 48, the Court of Appeals found that "while [the] petitioner alleged a series of acts evidencing a continuity of purpose, the acts were not separate and noncontinuous" where the "petitioner alleged a single incident comprising a series of continuous acts, each immediately following the other, in which [the] respondent inflicted physical harm and threatened further harm." Specifically, the "[r]espondent allegedly attacked petitioner, hurled him over a bench into a wall or plate glass window, and then choked him while repeatedly threatening him[,]" all in one evening. *Id.* at 45.

Court

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *court* is "an entity authorized under the law of a state to establish, enforce, or modify a child-custody determination." MCL 722.1522(e).

Court records

- For purposes of MCR 8.119(I), *court records* are "all documents and records of any nature that are filed with or maintained by the clerk in connection with the action." MCR 8.119(I)(5).

Credible threat

- For purposes of MCL 750.411i, *credible threat* is "a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual." MCL 750.411i(1)(b).

- For purposes of MCL 750.411s, *credible threat* is "a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual." MCL 750.411s(8)(e).

Crime of violence

- For purposes of the Violence Against Women Act (VAWA), 18 USC 2261 *et seq.*, *crime of violence* is:

  "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

  (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 USC 16.

Crime punishable by imprisonment for a term exceeding one year

- For purposes of 18 USC 922, *crime punishable by imprisonment for a term exceeding one year* does not include

"(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 USC 921(a)(20).

"What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."*Id.*

Criminal history record information

- For purposes of MCL 28.241a *et seq.*, *criminal history record information* is "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number, and other identifying numbers; and information on misdemeanor arrests and convictions and felony arrests and convictions." MCL 28.241a(d).

Cruel

- For purposes of MCL 750.136b, *cruel* is "brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b).

Custody determination

- For purposes of the Parental Kidnapping Prevention Act (PKPA), *custody determination* is "a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications[.]" 28 USC 1738A(b)(3).

Cyberbully

- For purposes of MCL 750.411x, *cyberbully* is "posting a message or statement in a public media forum about any other person if both of the following apply:

(*i*) The message or statement is intended to place a person in fear of bodily harm or death and expresses an intent to commit violence against the person.

(*ii*) The message or statement is posted with the intent to communicate a threat or with knowledge that it will be viewed as a threat." MCL 750.411x(6)(a).

D

Dating partner

- For purposes of 18 USC 2261, *dating partner* is "a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of[:] (A) the length of the relationship; and (B) the type of relationship; and (C) the frequency of interaction between the persons involved in the relationship." 18 USC 2266(10).

Dating relationship

- For purposes of MCL 750.411h, *dating relationship* "means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 750.411h(1)(b).

- For purposes of the Domestic Violence Prevention and Treatment Act, *dating relationship* means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 400.1501(b).

- For purposes of MCL 600.2950, *dating relationship* is "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 600.2950(30)(a).

- For purposes of MCL 750.81, *dating relationship* is "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not

include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL MCL 750.81(7).

- For purposes of MCL 750.81a, *dating relationship* is "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 750.81a(4).

- For purposes of MCL 769.4a, *dating relationship* is "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 769.4a(8)(b).

- For purposes of MCL 764.15a, *dating relationship* is "frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 764.15a(b).

- For purposes of MCL 691.1801 *et seq.*, *dating relationship* "means a relationship that consists of frequent, intimate associations primarily characterized by the expectation of affectional involvement. *Dating relationship* does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 691.1803(b) (emphasis added). See also MCR 3.715(2).

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *dating relationship* "means frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."MCL 711.1(3)(4)(a).

Declarant

- For purposes of MCL 768.27c, *declarant* is "an individual who makes a statement." MCL 768.27c(5)(a).

Deployment

- For purposes of the Child Custody Act, MCL 722.21 *et seq.*, *deployment* is "the movement or mobilization of a servicemember to a location for a period of longer than 60 days and not longer than 540 days under temporary or permanent official orders as follows:

  (*i*) That are designated as unaccompanied.

  (*ii*) For which dependent travel is not authorized.

  (*iii*) That otherwise do not permit the movement of family members to that location.

  (*iv*) The servicemember is restricted from travel." MCL 722.22(e).

Device

- For purposes of MCL 750.411s, the term *device* "includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses." MCL 750.411s(8)(f).

DNA

- For purposes of MCL 767.24(3) and MCL 767.24(4), *DNA* is "human deoxyribonucleic acid." MCL 767.24(5)(a).

Domestic or sexual violence service provider agency

- For purposes of MCL 776.21b, *domestic or sexual violence service provider agency* "means an agency that receives funding from the [Department of Health and Human Services] division of victim services to provide confidential supportive services to victims of domestic or sexual violence, receives a federal grant through the United States Department of Justice to provide confidential supportive services to victims of domestic or sexual violence, or is associated with an Indian tribe and is providing confidential supportive services to victims of domestic or sexual violence." MCL 776.21b(4)(b).

Domestic relations action

- For purposes of MCL 600.1035, *domestic relations action* is "any of the following:

> (a) An action for divorce, separate maintenance, annulment of marriage, affirmation of marriage, paternity, family support under the family support act [(FSA)], . . . MCL 552.451 to [MCL] 552.459, the custody of minors under the child custody act of 1970 [(CCA)], . . . MCL 722.21 to [MCL] 722.31, or grandparenting time under [MCL 722.27b] of the [CCA] . . . .
>
> (b) A proceeding that is ancillary or subsequent to an action listed in subdivision (A) and that relates to any of the following:
>
> > (*i*) The custody of a minor.
> >
> > (*ii*) Parenting time with a minor.
> >
> > (*iii*) The support of a minor, spouse, or former spouse." MCL 600.1035(4).

Domestic relations matter

- As used in the Friend of the Court Act, MCL 552.501 *et seq.*, *domestic relations matter* is "a circuit court proceeding as to child custody, parenting time, child support, or spousal support, that arises out of litigation under a statute of this state, including, but not limited to, the following: (*i*) 1846 RS 84, MCL 552.1 to [MCL] 552.45[;] (*ii*) [t]he family support act, . . . MCL 552.451 to [MCL] 552.459[;] (*iii*) [t]he child custody act of 1970, . . . MCL 722.21 to [MCL] 722.31[;] (*iv*) [the emancipation of minors act], MCL 722.1 to [MCL] 722.6[;] (*v*) [t]he paternity act, . . ., MCL 722.711 to [MCL] 722.730[;] (*vi*) [t]he revised uniform reciprocal enforcement of support act, . . . MCL 780.151 to [MCL] 780.183[; and] (*vii*) [t]he uniform interstate family support act, . . . MCL 552.2101 to [MCL] 552.2905." MCL 552.502(m).

Domestic violence

- For purposes of the Batterer Intervention Standards for the State of Michigan,[4] *domestic violence* is defined as follows:

> "Domestic Violence is a pattern of controlling behaviors, some of which are criminal, that includes but is not limited to physical assaults, sexual assaults, emotional abuse, isolation, economic coercion, threats, stalking and intimidation. These behaviors are used by the batterer in an effort to control the

[4] The Batterer Intervention Standards for the State of Michigan are standards many states and several Michigan localities promulgated to assist courts in identifying Batterer Intervention Services (BIS) providers. For additional information on the BIS, see Section 1.5(B).

intimate partner. The behavior may be directed at others with the effect of controlling the intimate partner." Batterer Intervention Standards for the State of Michigan, Section 4.1.

- For purposes of the Domestic Violence Prevention and Treatment Act, *domestic violence* is defined as follows:

"'Domestic violence' means the occurrence of any of the following acts by an individual that is not an act of self-defense:

(*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 400.1501(d).[5]

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *domestic violence* "is that term as defined in . . . MCL 400.1501." MCL 722.1522(f).

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, *domestic violence* is "that term as defined in . . . MCL 400.1501." MCL 780.621(4)(b).

- For purposes of MCL 765.6b(6), *domestic violence* is "that term as defined in . . . MCL 400.1501." MCL 765.6b(6)(b).

- For purposes of MCR 6.102(D), *domestic violence* means the term as it is defined in MCL 764.1a; MCL 764.1a(9)(c) defines *domestic violence* as it is defined in MCL 400.1501. MCR 6.102(D)(1).

[5] Several other statutes refer to this definition of *domestic violence* by reference. See, e.g., MCL 600.2157a (admissibility of statements between domestic violence counselor and victim), MCL 600.2972 (motion to seal court records in domestic violence case), MCL 712.1 (safe delivery of newborns), MCL 750.136b (child abuse), MCL 765.6b (release of defendant subject to protective conditions), and MCL 780.951 (presumption regarding self defense).

- For purposes of MCR 6.103, *domestic violence* is defined as it is defined in MCL 764.3; MCL 764.3(5)(b) defines *domestic violence* as it is defined in MCL 400.1501. MCR 6.103(A)(1).

- For purposes of MCR 6.105, *domestic violence* is defined as it is defined in MCL 762.10d; MCL 762.10d(5)(b) defines *domestic violence* as it is defined in MCL 400.1501. MCR 6.105(B).

- For purposes of the Code of Criminal Procedure, MCL 768.27b (admitting other acts of *domestic violence* into evidence in a criminal proceeding involving domestic violence), that term "means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested."MCL 768.27b(6)(a).

- For purposes of the Code of Criminal Procedure, MCL 768.27c (determining admissibility of evidence of infliction or threat of physical injury in domestic violence cases), the term *domestic violence* means "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to

feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27c(5)(b).

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *domestic violence* "means the occurrence of any of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 711.3(4)(b).

Domestic violence incident

- For purposes of the Code of Criminal Procedure, MCL 764.15c, *domestic violence incident* "means an incident reported to a law enforcement agency involving allegations of 1 or both of the following:

  (*i*) A violation of a personal protection order issued under . . . MCL 600.2950, or a violation of a valid foreign protection order.

  (*ii*) A crime committed by an individual against his or her spouse or former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship,[6] or an individual who resides or has resided in the same household." MCL 764.15c(7)(c).

Domestic violence offense

- For purposes of the Veterans Treatment Court Program, *domestic violence offense* is "any crime alleged to have been committed by an individual against his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has

[6] MCL 764.15c(7)(b) defines dating relationship as "that term [is] defined in . . . MCL 600.2950."

had a dating relationship, or an individual who resides or has resided in the same household." MCL 600.1200(b).

- For purposes of the Mental Health Court Program, *domestic violence offense* is "any crime alleged to have been committed by an individual against his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or an individual who resides or has resided in the same household." MCL 600.1090(d).

E

Emergency license

- For purposes of the Firearms Act and except as otherwise provided in this act, *emergency license* is "a license to carry a concealed pistol." See MCL 28.425a(4).

Electronic monitoring device

- For purposes of MCL 765.6b(6), *electronic monitoring device* is "any electronic device or instrument that is used to track the location of an individual or to monitor an individual's blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual." MCL 765.6b(6)(c).

Emotional distress

- For purposes of MCL 750.411h, *emotional distress* is "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(c).

- For purposes of MCL 750.411i, *emotional distress* is "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411i(1)(c).

- For purposes of MCL 750.411s, *emotional distress* is "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411s(8)(g).

Enhanced driver license

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *enhanced driver license* is "th[at] term[] as defined in . . . MCL 28.302." MCL 722.1522(g).

Enhanced official state personal identification card

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *enhanced official state personal identification card* is "th[at] term[] as defined in . . . MCL 28.302." MCL 722.1522(g).

Enter or leave Indian country

- For purposes of the Violence Against Women Act, 18 USC 2261 *et seq.*, *enter or leave* Indian country "includes leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government." 18 USC 2266(3).

Existing action

- For purposes of subchapter 3.700, *existing action* is "an action in this court or any other court in which both the petitioner and the respondent are parties; existing actions include, but are not limited to, pending and completed domestic relations actions, criminal actions, other actions for [PPOs]." MCR 3.702(5). See also MCR 3.715(3).

Extreme risk protection order (ERPO)

- For purposes of MCL 691.1801 *et seq.*, *extreme risk protection order* "means an order issued by a court under [MCL 691.1807]." MCL 691.1803(c). See also MCR 3.715(4).

F

Family or household member

- For purposes of the Domestic Violence Prevention and Treatment Act, *family or household member* includes any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a dating relationship.

(*iv*) An individual with whom the person is or has engaged in a sexual relationship.

(*v*) An individual to whom the person is related or was formerly related by marriage.

(*vi*) An individual with whom the person has a child in common.

(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)." MCL 400.1501(e).

- For purposes of the Code of Criminal Procedure, MCL 768.27b (admitting other acts of domestic violence into evidence in a criminal proceeding involving domestic violence), defines a *family or household member* to include any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27b(6)(b).

- For purposes of MCL 768.27c (determining admissibility of evidence of infliction or threat of physical injury in domestic violence cases), *family or household member* means any of the following:

  "(*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate

associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27c(5)(c).

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *family or household member* "includes any of the following:

  (*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a dating relationship.

  (*iv*) An individual with whom the person is or has engaged in a sexual relationship.

  (*v*) An individual to whom the person is related or was formerly related by marriage.

  (*vi*) An individual with whom the person has a child in common.

  (*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)." MCL 711.3(4)(c).

Family member

- For purposes of MCL 691.1801 *et seq.*, *family member* "means an individual who is related to the respondent as any of the following:

  (i) A parent.

  (ii) A son or daughter.

  (iii) A sibling.

  (iv) A grandparent.

  (v) A grandchild.

  (vi) An uncle or aunt.

  (vii) A first cousin." MCL 691.1803(d). See also MCR 3.715(5).

Federal law enforcement officer

- For purposes of MCL 600.2950, *federal law enforcement officer* is "an officer or agent employed by a law enforcement agency of the United States government whose primary responsibility is the enforcement of laws of the United States." MCL 600.2950(30)(b).

- For purposes of MCL 600.2950a, *federal law enforcement officer* is "an officer or agent employed by a law enforcement agency of the United States government whose primary responsibility is the enforcement of laws of the United States." MCL 600.2950a(31)(b).

Felony

- For purposes of Michigan statutory firearm licensing restrictions, MCL 28.421 *et seq.*, a *felony* is "except as otherwise provided in this subdivision, that term as defined in . . . MCL 761.1,[7] or a violation of a law of the United States or another state that is designated as a felony or that is punishable by death or by imprisonment for more than 1 year. Felony does not include a violation of a penal law of this state that is expressly designated as a misdemeanor." MCL 28.421(1)(b).

- For purposes of MCL 28.425b, *felony* is "except as otherwise provided in this subdivision, that term as defined in . . . MCL 761.1,[8] or a violation of a law of the United States or another state that is designated as a felony or that is punishable by death or by imprisonment for more than 1 year. Felony does not include a violation of a penal law of this state that is expressly designated as a misdemeanor." MCL 28.425b(22)(c).

- For purposes of MCL 750.223(3)(a), *felony* is "a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more." MCL 750.223(3)(a).

- For purposes of MCL 750.224f, a *felony* is "a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for a term exceeding 1

[7] MCL 761.1(f) defines a *felony* as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."

[8] MCL 761.1(f) defines a *felony* as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."

year, or an attempt to violate such a law." MCL 750.224f(10)(b).

Firearm

- For purposes of 18 USC 922, *firearm* is "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.[9] Such term does not include an antique firearm." 18 USC 921(a)(3).

- For purposes of Michigan statutory firearm licensing restrictions, MCL 28.421 *et seq.*, *firearm* is "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive." MCL 28.421(1)(c).

- For purposes of the Michigan Penal Code, *firearm* is "any weapon which will, is designed to, or may readily be converted to expel a projectile by action of an explosive."[10]MCL 750.222(e).

Foreign protection order

- For purposes of MCL 600.2950i–MCL 600.2950m, *foreign protection order* is "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other

[9] The term *destructive device* includes such things as bombs, grenades, or mines. See 18 USC 921(a)(4).

[10] A weapon need not be operable or reasonably or readily operable in order to constitute a firearm under MCL 750.222(e) (formerly MCL 750.222(d)). *People v Peals*, 476 Mich 636, 650-651 (2006). Rather, the statutory definition "requires only that the weapon be of a type that is designed or intended to propel a dangerous projectile." *Id.* at 642. It is the "design and construction of the weapon, rather than its state of operability[that] are relevant in determining whether it is a 'firearm.'" *Id.* at 638. See also *People v Humphrey*, 312 Mich App 309, 318, 319 n 4 (2015) (holding that "the [Michigan] Supreme Court's construction of the term 'firearm' [under MCL 750.222(e) (formerly MCL 750.222(d)) in *Peals*, 476 Mich at 638, 642,] is the only viable interpretation of the term as it concerns all the crimes defined in MCL 750.222 through MCL 750.239a[,]" and further noting that "the reasoning employed in *Peals* is . . . viable" under the definition of *firearm* in both former MCL 750.222(d) and MCL 750.222(e) as amended by 2015 PA 28, effective August 10, 2015).

federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." MCL 600.2950h(a).

Firearms records

- For purposes of Michigan statutory firearm licensing restrictions, MCL 28.421 *et seq.*, *firearms records* means "any form, information, or record required for submission to a government agency under [MCL 28.422, MCL 28.422a, MCL 28.422b, and MCL 28.425b], or any form, permit, or license issued by a government agency under this act." MCL 28.421(1)(d).

Foreign country

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *foreign country* is "a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and 1 or more of the following:

  (*i*) That has been declared under the law of the United States to be a foreign reciprocating country.

  (*ii*) That has established a reciprocal arrangement for child support with this state as provided in [MCL 552.2308].

  (*iii*) That has enacted a law or established procedures for the issuance and enforcement of support orders that are substantially similar to the procedures under this act.

  (*iv*) In which the Convention is in force with respect to the United States." MCL 552.2102(e).

Foreign support order

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *foreign support order* is "a support order of a foreign tribunal." MCL 552.2102(f).

Foreign tribunal

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *foreign tribunal* is "a court, administrative agency, or quasi-judicial entity of a foreign county that is authorized to establish, enforce, or modify

support orders or to determine parentage of a child. Foreign tribunal includes a competent authority under the Convention." MCL 552.2102(g).

Fugitive from justice

- For purposes of 18 USC 922(g)(8), *fugitive from justice* is "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." 18 USC 921(a)(15).

G

Gender identity

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *gender identity* is "an individual's gender-related self-identity, regardless of whether the self-identity is associated with the individual's assigned sex at birth." MCL 711.3(4)(d).

Good cause

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *good cause* "includes, but is not limited to, evidence that the publication or availability of the record of a proceeding under [MCL 711.1] could place the petitioner or another individual in physical danger, at an increased likelihood of physical danger, or at risk of unlawful discrimination or retaliation." MCL 711.3(4)(e).

Governmental agency

- For purposes of MCR 3.218, *governmental agency* is "any entity exercising constitutional, legislative, executive, or judicial authority, when providing benefits or services." MCR 3.218(A)(5).

Guardian

- For purposes of MCL 691.1801 *et seq.*, *guardian* "means that term as defined in [MCL 700.1104]." MCL 691.1803(e). See also MCR 3.715(5).

H

Harassment

- For purposes of MCL 750.411h, *harassment* is "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(d).

- For purposes of MCL 750.411i, *harassment* is "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411i(1)(d).

Health care provider

- For purposes of MCL 691.1801 *et seq.*, *health care provider* "means any of the following:

  (i) A physician, physician's assistant, nurse practitioner, or certified nurse specialist licensed under [MCL 333.16101 to MCL 333.18838], or a physician, physician's assistant, nurse practitioner, or certified nurse specialist licensed in another state.

  (ii) A mental health professional as that term is defined in [MCL 330.1100b], or a mental health professional licensed in another state." MCL 691.1803(f). See also MCR 3.715(5).

Home state

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *home state* is "that term as defined in the [UCCJEA], MCL 722.1102." MCL 722.1522(h).

Human Trafficking

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *human trafficking* is "a violation of . . . MCL 750.462a to [MCL] 750.462h." MCL 711.3(4)(f).

I

Identified

- For purposes of MCL 767.24(3) and MCL 767.24(4), *identified* is "the individual's legal name is known and the individual has been determined to be the source of the DNA." MCL 767.24(5)(b).

Indian country

- For purposes of the Violence Against Women Act, 18 USC 2261 *et seq.*, *Indian country* "has the meaning stated in [18 USC 1151]." 18 USC 2266(4).

Infliction or threat of physical injury

- For purposes of the Code of Criminal Procedure, MCL 768.27c (determining admissibility of evidence of infliction or threat of physical injury in domestic violence cases), *infliction or threat of physical injury* "includes all of the following:

  (*i*) Physically harming or restraining any individual.

  (*ii*) Threatening to harm or physically restrain any individual or the creation of any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in physical, psychological, reputational, or financial harm to, or physical restraint of, any individual.

  (*iii*) Facilitating or controlling an individual's access to a controlled substance, as that term is defined in . . . MCL 333.7104, other than for a legitimate medical purpose." MCL 768.27c(5)(d).

Informed consent

- For purposes of MCL 765.6b, *informed consent* is when "the victim was given information concerning all of the following before consenting to participate in electronic

device: (*i*) [t]he victim's right to refuse to participate in that monitoring and the process for requesting the court to terminate the victim's participation after it has been ordered[,] (*ii*) [t]he manner in which the monitoring technology functions and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements[,] (*iii*) [t]he boundaries imposed on the defendant during the monitoring program[,] (*iv*) [s]anctions that the court may impose on the defendant for violating an order issued under this subsection[,] (*v*) [t]he procedure that the victim is to follow if the defendant violates an order issued under this subsection or if monitoring equipment fails to operate properly[,] (*vi*) [i]dentification of support services available to assist the victim to develop a safety plan to use if the court's order issued under this subsection is violated or if the monitoring equipment fails to operate properly[,] (*vii*) [i]dentification of community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other help in addressing the consequences and effects of domestic violence[,] (*viii*) [t]he nonconfidential nature of the victim's communications with the court concerning electronic monitoring and the restrictions to be imposed upon the defendant's movements." MCL 765.6b(6)(d).

Internet

- For purposes of MCL 750.411s, *internet* is "that term as defined in . . . 47 USC 230." MCL 750.411s(8)(h).

Interstate or foreign commerce

- For purposes of 18 USC 922(g)(8), *interstate or foreign commerce* is "commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone." 18 USC 921(a)(2).

Intimate partner

- For purposes of 18 USC 922(g)(8), *intimate partner* is, "with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a

child of the person, an individual who cohabitates or has cohabited with the person." 18 USC 921(a)(32).

L

Law enforcement agency

- For purposes of MCL 691.1801 *et seq.*, *law enforcement agency* "means any of the following:

  (i) A sheriff's department.

  (ii) The department of state police.

  (iii) A police department of a township, village, or incorporated city.

  (iv) The public safety department of an institution of higher education created under or described in article VIII of the state constitution of 1963.

  (v) The public safety department of a community or junior college.

  (vi) The public safety department or office of a private college." MCL 691.1803(g). See also MCR 3.715(5).

Law enforcement officer

- For purposes of MCL 691.1801 *et seq.*, *law enforcement officer* "means a law enforcement officer as that term is defined in [MCL 28.602]." MCL 691.1803(h). See also MCR 3.715(5).

LEIN

- For purposes of MCL 600.2950h–MCL 600.2950m, *LEIN* is "the law enforcement information network regulated under the LEIN policy council act of 1974, . . . MCL 28.211 to [MCL] 28.216." MCL 600.2950h(b).

- For purposes of MCL 765.6b, *LEIN* is "the law enforcement information network regulated under the C.J.I.S. policy council act, . . . MCL 28.211 to [MCL] 28.215, or by the department of state police." MCL 765.6b(11).

Listed offense

- For purposes of MCL 771.2a, *listed offense* "means that term as defined in . . . MCL 28.722." MCL 771.2a(13)(a). MCL

28.722(i) defines *listed offense* as "a tier I, tier II, or tier III offense."[11]

M

Major controlled substance offense

- For purposes of the Code of Criminal Procedure, *major controlled substance offense* means "either or both of the following:" a violation of MCL 333.7401(2)(a), a violation of MCL 333.7403(2)(a)(*i*)-(*iv*), or conspiracy to commit a violation of either MCL 333.7401(2)(a) or MCL 333.7403(2)(a)(*i*)-(*iv*). MCL 761.2.

Mediation communications

- For purposes of MCR 2.411, MCR 2.412 and MCR 3.216, *mediation communications* are "statements whether oral or in a record, verbal or nonverbal, that occur during the mediation process or are made for purposes of retaining a mediator or for considering, initiating, preparing for, conducting, participating in, continuing, adjourning, concluding, or reconvening a mediation." MCR 2.412(A); MCR 2.412(B)(2).

Mediation participant

- For purposes of MCR 2.411, MCR 2.412, and MCR 3.216, *mediation participant* is "a mediation party, a nonparty, an attorney for a party, or a mediator who participates in or is present at a mediation." MCR 2.412(B)(4).

Member of the clergy

- For purposes of the Child Protection Law, MCL 722.621 *et seq.*, *member of the clergy* means "a priest, minister, rabbi, Christian science practitioner, spiritual leader, or other religious practitioner, or similar functionary of a church, temple, spiritual community, or recognized religious body, denomination, or organization." MCL 722.622(z).

Mental illness

[11]Tier I, tier II, and tier III listed offenses are defined in the Sex Offenders Registration Act at MCL 28.722(r), MCL 28.722(t), and MCL 28.722(v).

- For purposes of MCL 28.425b, *mental illness* is "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and includes, but is not limited to, clinical depression." MCL 28.425b(22)(d).

Minor

- For purposes of subchapter 3.700, *minor* is "a person under the age of 18." MCR 3.702(6). See also MCR 3.715(6).

Minor personal protection order (PPO)

- For purposes of subchapter 3.700, *minor personal protection order* is "a personal protection order issued by a court against a minor and under jurisdiction granted by MCL 712A.2(h)." MCR 3.702(7).

Misdemeanor

- For purposes of Michigan statutory firearm licensing restrictions, MCL 28.421 *et seq.*, *misdemeanor* is "a violation of a penal law of this state or violation of a local ordinance substantially corresponding to a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine, or both." MCL 28.421(1)(f).

- For purposes of MCL 28.425b, *misdemeanor* is "a violation of a penal law of this state or violation of a local ordinance substantially corresponding to a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine, or both." MCL 28.425b(22)(e).

Misdemeanor crime of domestic violence

- For purposes of 18 USC 922(g)(9), *misdemeanor crime of domestic violence* is "an offense that—

  (*i*) is a misdemeanor under Federal, State, or Tribal law; and

  (*ii*) has, as an element, the use or attempted use of physical force,[12] or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person

who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 USC 921(a)(33)(A).

Misdemeanor involving domestic violence

- For purposes of MCL 750.224f, *misdemeanor involving domestic violence* is "a violation of any of the following:

  (*i*) [MCL 750.81(2)].

  (*ii*) [MCL 750.81(4)] if both the violation of [MCL 750.81(4)] and the previous conviction were for assaulting or assaulting and battering an individual described in [MCL 750.81(2)].

  (*iii*) [MCL 750.81a(2)].

  (*iv*) [MCL 750.115(2)].

  (*v*) [MCL 750.145n(5)].

  (*vi*) [MCL 750.377a(1)(d) or MCL 750.377a(1)(f)].

  (*vii*) [MCL 750.380(5) or MCL 750.380(7)].

  (*viii*) [MCL 750.411h(2)(c)].

  (*ix*) [MCL 750.540e(1)(h)].

  (*x*) An ordinance, a law of another state, or a law of the United States that substantially corresponds to a violation listed in [MCL 750.224f(10)(c)(*i*)-(*ix*)].

[12] The term *use of physical force* contained within 18 USC 921(a)(33)(A)'s definition of *misdemeanor crime of domestic violence* includes the "common-law meaning of 'force'–namely, offensive touching[.]" *United States v Castleman*, 572 US 157, 158, 162 (2014) (respondent's conviction of "'intentionally or knowingly caus[ing] bodily injury to' the mother of his child" qualified as a misdemeanor crime of domestic violence). 18 USC 921(a)(33)(A)'s definition of *misdemeanor crime of domestic violence* "contains no exclusion for convictions based on reckless behavior[; a] person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally." *Voisine v United States*, 579 US ___, ___ (2016) (finding a conviction for "reckless domestic assault qualifies as a 'misdemeanor crime of domestic violence' under [18 USC]922(g)(9)[]").

(*xi*) An ordinance, a law of another state, or a law of the United States that is specifically designated as domestic violence." MCL 750.224f(10)(c).

N

NCIC protection order file

- For purposes of MCL 600.2950*l*, *NCIC protection order file* is "the national crime information center protection order file maintained by the United States department of justice, federal bureau of investigation." MCL 600.2950h(c).

Near a courthouse

- For purposes of the interim guidance governing civil immigration enforcement actions in or near a courthouse, *near a courthouse* "means in the close vicinity of [a] courthouse, including the entrance and exit of a courthouse, and in adjoining or related areas such as an adjacent parking lot or transportation point (such as a bus stop right outside a courthouse). It does not include adjacent buildings or houses that are not part of [a] courthouse or otherwise are not used for court-related business." *Memorandum for U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP)*, April 27, 2021, p 2.

Neglect

- For purposes of MCL 600.2950, *neglect* is that term as defined in . . . MCL 750.50." MCL 600.2950(30)(c). Under MCL 750.50(1)(h), *neglect* means "to fail to sufficiently and properly care for an animal to the extent that the animal's health is jeopardized."

Nonpublic

- For purposes of MCR 8.119(H)(10), *nonpublic* "means that term as defined in MCR 1.109(H)(2)." MCR 8.119(H)(10). According to MCR 1.109(H)(2) *nonpublic* "means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or

court rule. A court may not make a record nonpublic by court order." MCR 1.109(H)(2).

O

Obligee

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *obligee* is "1 or more of the following:

  (*i*) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order or a judgment determining parentage of a child has been issued.

  (*ii*) A foreign county, state, or political subdivision of a state to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee in place of child support.

  (*iii*) An individual seeking a judgment determining parentage of the individual's child.

  (*iv*) A person that is a creditor in a proceeding under article 7." MCL 552.2102(p).

Official proceeding

- For purposes of MCL 750.122, *official proceeding* is "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a).

Offending parent

- For purposes of MCL 722.25, *offending parent* is "a parent who has been convicted of criminal sexual conduct as described in [MCL 722.25(2)] or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration as described in [MCL 722.25(2)]." MCL 722.25(7).

- For purposes of MCL 722.27a, *offending parent* is "a parent who has been convicted of criminal sexual conduct as described in [MCL 722.27a(4)] or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration as described in [MCL 722.27a(4)]." MCL 722.27a(19).

Omission

- For purposes of MCL 750.136b, *omission* is "willful failure to provide food clothing, or shelter necessary for a child's welfare or willful abandonment of a child." MCL 750.136b(1)(c).

P

Parent

- For purposes of the Child Custody Act, MCL 722.21 *et seq.*, *parent* is "the natural or adoptive parent of a child." MCL 722.22(i). As used in this definition, *natural parent* includes the woman who gave birth to a child; the term *natural parent* is not limited to whether a person has a genetic connection to a child. *LeFever v Matthews*, 336 Mich App 651, 666 (2021).

Parental kidnapping

- MCL 750.350a(1) defines *parental kidnapping* as "an adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights under a lawful court order at the time of the taking or retention, or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention."

Participant

- For purposes of MCR 2.407, *participant* "include[s], but [is] not limited to, parties, counsel, and subpoenaed witnesses, but do[es] not include the general public." MCR 2.407(A)(1).

Party

- For purposes of MCR 1.111, *party* is "a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

Peace officer

- For purposes of MCL 28.425f, *peace officer* is "a motor carrier officer appointed under . . . MCL 28.6d, and security personnel employed by the state under . . . MCL 28.6c." MCL 28.425f(8).

Person

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *person* is "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity." MCL 552.2102(s).

- For purposes of MCL 750.136b, *person* is "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person."[13] MCL 750.136b(1)(d).

- For purposes of 18 USC 922, *person* is "any individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 USC 921(a)(1).

Person acting as a parent

- For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), *person acting as a parent* is "a person, other than a parent, who meets both of the following criteria: (*i*) [h]as physical custody of the child or has had physical custody for a period of 6 consecutive months, including a temporary absence, within 1 year immediately before the commencement of a child-custody proceeding[, and] (*ii*) [h]as been awarded legal custody by a court or claims a right to legal custody under [Michigan] law[.]" MCL 722.1102(m).

[13] "[A] fetus is not a 'child' for purposes of MCL 750.136b." *People v Jones (Melissa)*, 317 Mich App 416, 428-429, 432 (2016) (finding that "[n]either the definition of 'child' in the child abuse statute, [MCL 750.136b(1)(a),] nor the general definition of 'person' in the Michigan Penal Code[, MCL 750.10,] refer to fetuses[,] . . . [a]nd the Legislature has consistently refrained from expanding the definition of person to include fetuses[]").

Personal protection order (PPO)[14]

- For purposes of MCL 600.2950, *personal protection order* is "an injunctive order issued by the family division of circuit court restraining or enjoining activity and individuals listed in [MCL 600.2950(1)]." MCL 600.2950(30(d).

- For purposes of MCL 600.2950a, *personal protection order* is "an injunctive order issued by the family division of circuit court restraining or enjoining conduct prohibited under [MCL 600.2950a(1)] or [MCL 600.2950a(3)]." MCL 600.2950a(31)(d).

- For purposes of MCL 764.15b, *personal protection order* is "a personal protection order issued under . . . MCL 600.2950 and [MCL] 600.2950a, and, unless the context indicates otherwise, includes a valid foreign protection order." MCL 764.15b(9)(b).

Petition

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *petition* "includes a motion or its equivalent." MCL 722.1522(i).

Petitioner

- For purposes of MCL 691.1801 *et seq.*, *petitioner* "means the individual who requests an extreme risk protection order in an action under [MCL 691.1805]." MCL 691.1803(i). See also MCR 3.715(7).

Physical custody

- For purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), *physical custody* is "the physical care and supervision of a child." MCL 722.1102(n).

Physical harm

- For purposes of MCL 750.136b, *physical harm* is "any injury to a child's physical condition." MCL 750.136b(1)(e).

Pistol

[14] See also protection order for a definition of that term as it pertains to the Violence Against Women Act (VAWA).

- For purposes of Michigan statutory firearm licensing restrictions, MCL 28.421 *et seq.*, *pistol* is "a loaded or unloaded firearm that is 26 inches or less in length, or a loaded or unloaded firearm that by its construction and appearance conceals it as a firearm." MCL 28.421(1)(i).

Possession or control

- For purposes of MCL 691.1801 *et seq,*. *possession or control* "includes, but is not limited to, actual possession or constructive possession by which the individual has the right to control the firearm, even though the firearm is in a different location than the individual. *Possession or control* does not require the individual to own the firearm." MCL 691.1803(j) (emphasis added). See also MCR 3.715(8).

Post a message

- For purposes of MCL 750.411s, *post a message* is "transferring, sending, posting, publishing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, whether truthful or untruthful, about the victim." MCL 750.411s(8)(i).[15] See Section 2.3(C) for more information about cyberstalking under MCL 750.411s.

Prior conviction

- For purposes of MCL 750.136b, *prior conviction* is "a violation of [MCL 750.136b] or a violation of a law of another state substantially corresponding to [MCL 750.136b]." MCL 750.136b(12).

Prisoner

- For purposes of MCL 600.2950a, *prisoner* is "a person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of federal, state, or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program." MCL 600.2950a(31)(e).

Probationer

[15] "According to the language of MCL 750.411s(8)(i), posted messages can be prohibited even if they are truthful, but by the same token MCL 750.411s cannot be read to prohibit constitutionally protected speech, MCL 750.411s(6)." *TT v KL*, 334 Mich App 413, 442-443 (2020).

- For purposes of the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, *probationer* "means an individual placed on probation for committing a felony." MCL 771A.2(b).

Protection order

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *protection order* is "either of the following: (*i*) An order entered under . . . MCL 600.2950 [or MCL] 600.2950a, under . . . MCL 765.6b [or MCL 771.3(2)(o)], under . . . MCL 712A.13a, or under . . . MCL 791.236[(16); or] (*ii*) A foreign protection order as defined in . . . MCL 600.2950h." MCL 722.1522(j).

- For purposes of the Violence Against Women Act (VAWA), *protection order* is "(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking." 18 USC 2266(5).

Protective order

- For purposes of MCL 750.539*l*, *protective order* is "both of the following: (*i*) An order entered under . . . MCL 600.2950, [MCL] 600.2950a, [or MCL] 600.2950h, or under . . . MCL 765.6b [or MCL] 771.3(2)(o), or under . . . MCL 712A.13a, or under . . . [MCL 791.236(16); and] (*ii*) A foreign protection order as defined in . . . MCL 600.2950h." MCL 750.539*l*(5)(e).

Public media forum

- For purposes of MCL 750.411x, *public media forum* is "the internet or any other medium designed or intended to be used to convey information to other individuals, regardless

of whether a membership or password is required to view the information." MCL 750.411x(6)(c).

R

Records

- For purposes of MCR 3.218 and "unless the context otherwise indicates," *records* is "any case-specific information the friend of the court office maintains in any media[.]" MCR 3.218(A)(1).

- For purposes of Subchapter 3.900 of the Michigan Court Rules, "unless the context otherwise indicates[,]" *records* is "defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders." MCR 3.903(A)(25).

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *record* is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." MCL 722.1522(k).

Respondent

- For purposes of MCL 691.1801 *et seq.*, *respondent* "means the individual against whom an extreme risk protection order is requested in an action under [MCL 691.1805]." MCL 691.1803(k). See also MCR 3.715(9).

Restrained individual

- For purposes of MCL 691.1801 *et seq.*, *restrained individual* "means the individual against whom an extreme risk protection order has been issued and is in effect." MCL 691.1803(*l*).

Rights of access

- For purposes of the Hague Convention on the Civil Aspects of International Abduction (Hague Convention), Article 5(b) of the Hague Convention defines *rights of access* to

include "the right to take a child for a limited period of time to a place other than the child's habitual residence."

- For purposes of the International Child Abduction Remedies (ICAR), 42 USC 11602(7) defines *rights of access* as "visitation rights[.]"

Rights of custody

- For purposes of the Hague Convention on the Civil Aspects of International Abduction (Hague Convention), Article 5(a) of the Hague Convention defines *rights of custody* to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence[.]"

S

Serious bodily injury

- For purposes of the Violence Against Women Act, 18 USC 2261 *et seq.*, *serious bodily injury* "has the meaning stated in [18 USC 2119(2)]." 18 USC 2266(6).

Serious mental harm

- For purposes of MCL 750.136b, *serious mental harm* is "an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(1)(g).

Serious physical harm

- For purposes of MCL 750.136b, *serious physical harm* is "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f).

Sexual assault

- For purposes of MCL 600.2157a, *sexual assault* is "assault with intent to commit criminal sexual conduct." MCL 600.2157a(1)(c).

- For purposes of MCL 600.2950a, *sexual assault* is "an act, attempted act, or conspiracy to engage in an act of criminal conduct as defined in . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or] [MCL] 750.520g, or an offense under a law of the United States, another state, or a foreign country or tribal or military law that is substantially similar to an offense listed in this subdivision." MCL 600.2950a(31)(f).

- For purposes of the Code of Criminal Procedure, MCL 768.27b (admitting other acts of domestic violence into evidence in a criminal proceeding involving domestic violence), *sexual assault* means a listed offense as that term is defined in . . . MCL 28.722." MCL 768.27b(6)(c).

Sexual assault or domestic crisis center

- For purposes of MCL 600.2157a, *sexual assault or domestic violence crisis center* is "an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence[16] and their families through crisis intervention and counseling." MCL 600.2157a(1)(e).

Sexual assault or domestic violence counselor

- For purposes of MCL 600.2157a, *sexual assault or domestic violence counselor* is "a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence[17] and their families." MCL 600.2157a(1)(d).

Sexual cConduct

- For purposes of MCL 750.520j (the rape-shield statute),

  > "the plain meaning of 'sexual conduct' in MCL 750.520j(1) [encompasses] individual behaviors-— including acts and responses-—that involve or are

[16] For purposes of MCL 600.2157a, MCL 600.2157a(1)(b) defines domestic violence as "that term as defined in . . . [MCL] 400.1501[.]"

[17] For purposes of MCL 600.2157a, MCL 600.2157a(1)(b) defines domestic violence as "that term as defined in . . . [MCL] 400.1501[.]"

> associated with sexual activities. This interpretation does not require an act of volition . . . . '[S]exual conduct' includes both voluntary and involuntary behavior . . . ." *People v Masi*, ___ Mich ___, ___ (2025).

Sexual contact

- For purposes of Michigan criminal sexual conduct, *sexual contact* is "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (*i*) [r]evenge[,] (*ii*) [t]o inflict humiliation[, or] (*iii*) [o]ut of anger." MCL 750.520a(q). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

Sexual penetration

- For purposes of Michigan criminal sexual conduct, *sexual penetration* is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

Specified felony

- For purposes of MCL 750.224f, *specified felony* is "a felony in which 1 or more of the following circumstances exist:

  (*i*) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

  (*ii*) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.

  (*iii*) An element of that felony is the unlawful possession or distribution of a firearm.

  (*iv*) An element of that felony is the unlawful use of an explosive.

(*v*) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson."[18] MCL 750.224f(10)(d).

Spouse or intimate partner

- For purposes of 18 USC 2261, *spouse or intimate partner* includes

"a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or [] a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship[.]" 18 USC 2266(7)(A)(i).

"any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides." 18 USC 2266(7)(B).

- For purposes of 18 USC 2261A, *spouse or intimate partner* includes "(I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or (II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship." 18 USC 2266(7)(A)(ii).

- For purposes of MCL 600.2950k, *spouse or intimate partner* is "all of the following: (a) [s]pouse[;] (b) [f]ormer spouse[;] (c) [a]n individual with whom [the] petitioner has had a child

[18] MCL 750.224f(10)(d) is not unconstitutionally vague because "the ordinary and plain language of [MCL 750.224f(10)(d)] provides, in clear and understandable terms, that a person who is convicted of a felony involving 'the use, attempted use, or threatened use of force against the person or property of another, or that by its nature[] involves a substantial risk that physical force against the person or property of another may be used,' is subject to the more stringent requirements for restoration of firearms rights set forth in MCL 750.224f(2)." *People v Pierce*, 272 Mich App 394, 399 (2006) (Court of Appeals rejected the defendant's claim that MCL 750.224f was unconstitutionally vague because the crime of breaking and entering into a store, which the defendant was previously convicted of, "[was] a crime that clearly fit[] within the language [of MCL 750.224f(10)(d)(*i*)][, and] [t]herefore, [MCL 750.224f(10)(d) provide[d] adequate notice to persons of ordinary intelligence concerning the conduct proscribed"). Effective February 13, 2024, MCL 750.224f(10)(d) defines the term *specified felony* for purposes of MCL 750.224f. However, the *Pierce* case cites to MCL 750.224f(6), which formerly defined the term.

in common[;] (d) [a]n individual residing or having resided in the same household as [the] petitioner[; and] (e) [a]n individual with whom [the] petitioner has or has had a dating relationship as that term is defined in [MCL 600.2950]." MCL 600.2950k(3).

Stalking

- For purposes of a proceeding under MCL 711.1 (change of name of adult or minor), *stalking* is "that term as defined in sections . . . MCL 750.411h to [MCL] 750.411i." MCL 711.3(4)(g).

- For purposes of MCL 750.411h, *stalking* is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(e).

- For purposes of MCL 750.411i, *stalking* is "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411i(1)(e).

State

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *state* is "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. State includes an Indian nation or tribe." MCL 552.2102(z).

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *state* "is a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. State includes a federally recognized Indian tribe or nation." MCL 722.1522(*l*).

- For purposes of Violence Against Women Act (VAWA), 18 USC 2261 *et seq.*, *state* "includes a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States." 18 USC 2266(8).

Strangulation or suffocation

- For purposes of MCL 750.84, *strangulation or suffocation* is "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." MCL 750.84(2).

Support order

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *support order* is "a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign county for the benefit of a child, a spouse, or a former spouse, that provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. Support order may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney's fees, and other relief." MCL 552.2102(bb).

T

Technical probation violation

- For purposes of MCL 771.4b, *technical probation violation* is "a violation of the terms of a probationer's probation order that is not listed below, including missing or failing a drug test, subparagraph (*ii*) notwithstanding." MCL 771.4b(9)(b). "Technical probation violations do not include the following:

  (*i*) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (*ii*) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (*iii*) The consumption of alcohol by a probationer who is on probation for a felony violation of . . . MCL 257.625.

  (*iv*) Absconding." MCL 771.4b(9)(b).

- For purposes of subchapters 6.000–6.800 of the Michigan Court Rules, *technical probation violation* is "any violation of the terms of a probation order, including missing or failing a drug test[.]" MCR 6.003(7). *Technical probation violations* do not include the following:

  > "(a) A violation of an order of the court requiring that the probationer have no contact with a named individual.
  >
  > (b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.
  >
  > (c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.
  >
  > (d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCR 6.003(7).

Tracking device

- For purposes of MCL 750.539*l*, *tracking device* is "any electronic device that is designed or intended to be used to track the location of a motor vehicle regardless of whether that information is recorded." MCL 750.539*l*(5)(f).

Travel document

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *travel document* is "records relating to a travel itinerary, including travel tickets, passes, reservations for transportation, or accommodations. Travel document does not include a passport or visa." MCL 722.1522(m).

Travel in interstate or foreign commerce

- For purposes of the Violence Against Women Act (VAWA), 18 USC 2261 *et seq.*, *travel in interstate or foreign commerce* "does not include travel from 1 State to another by an individual who is a member of an Indian tribe and who remains at all times in the territory of the Indian tribe of which the individual is a member." 18 USC 2266(9).

Treatment

- For purposes of MCL 28.425b, *treatment* is "care or any therapeutic service, including, but not limited to, the administration of a drug, and any other service for the treatment of a mental illness." MCL 28.425b(22)(f).

Tribunal

- For purposes of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, *tribunal* is "a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child." MCL 552.2102(cc).

U

Unconsented contact

- For purposes of MCL 750.411h, *unconsented contact* is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following: (*i*) Following or appearing within the sight of that individual[,] (*ii*) Approaching or confronting that individual in a public place or on private property[,] (*iii*) Appearing at that individual's workplace or resident[,] (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual[,] (*v*) Contacting that individual by telephone[,] (*vi*) Sending mail or electronic communications to that individual[, and] (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual." MCL 750.411h(1)(f).

- For purposes of MCL 750.411i, *unconsented contact* is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following: (*i*) Following or appearing within the sight of that individual[,] (*ii*) Approaching or confronting that individual in a public place or on private property[,] (*iii*) Appearing at that individual's workplace or resident[,] (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual[,] (*v*) Contacting that individual by telephone[,]

(*vi*) Sending mail or electronic communications to that individual[, and] (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual." MCL 750.411i(1)(f).

- For purposes of MCL 750.411s, *unconsented contact* is "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes any of the following: (*i*) Following or appearing within sight of the victim[,] (*ii*) Approaching or confronting the victim in a public place or on private property[,] (*iii*) Appearing at the victim's workplace or residence[,] (*iv*) Entering onto or remaining on property owned, leased, or occupied by the victim[,] (*v*) Contacting the victim by telephone[,] (*vi*) Sending mail or electronic communications to the victim through the use of any medium, including the internet or a computer, computer program, computer system, or computer network[, and] (*vii*) Placing an object on, or delivering or having delivered an object to, property owned, leased, or occupied by the victim." MCL 750.411s(8)(j).

V

Valid foreign protection order

- For purposes of MCL 764.15b, *valid foreign protection order* is "a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i." MCL 764.15b(9)(c).

- For purposes of MCL 764.15c, *valid foreign protection order* is "a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i." MCL 764.15c(7)(f).

Veteran

- For purposes of the Veterans Treatment Court Program, *veteran* means "an individual who meets both of the following: (*i*) [i]s a veteran as defined in . . . MCL 35.61[;[19]]

[19] MCL 35.61 defines *veteran* "[f]or purposes of all acts of the state relative to veterans[]" as "an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable. Veteran includes an individual who died while on active duty in the United States Armed Forces."

(*ii*) [s]erved at least 180 days of active duty in the armed forces of the United States."[20] MCL 600.1200(h).

Veterans treatment court

- For purposes of Chapter 12 (Veterans Treatment Courts) of the Revised Judicature Act, MCL 600.1205 *et seq.*, *veterans treatment court* is "a court adopted or instituted under [MCL 600.1201] that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness." MCL 600.1200(j).

Victim

- For purposes of MCL 600.2157a, *victim* is "a person who was or who alleges to have been the subject of a sexual assault or of domestic violence." MCL 600.2157a(1)(f).

- For purposes of MCL 750.411h, *victim* is "an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411h(1)(g).

- For purposes of MCL 750.411i, *victim* is "an individual who is the target of a willful course of conduct involving repeated or continuing harassment." MCL 750.411i(1)(g).

- For purposes of MCL 750.411s, *victim* is "the individual who is the target of the conduct elicited by the posted message or a member of that individual's immediate family." MCL 750.411s(8)(k).

- For purposes of MCL 750.520a, *victim* is "the person alleging to have been subjected to criminal sexual conduct."MCL 750.520a(s).

Victim-based immigration benefits

- For purposes of ICE Directive 11005.3, *victim-based immigration benefits* are "[i]mmigration benefits adjudicated by USCIS for noncitizen crime victims and their qualifying family members, including T nonimmigrant status (T visa) for qualifying human trafficking victims, U nonimmigrant status (U Visa) for qualifying victims of crime, VAWA relief for qualifying domestic violence victims, Special Immigrant Juvenile classification (SIJ) for qualifying children who

[20] "Veterans who served in more than 1 period of war service may combine their active duty days of service to satisfy the length of active duty service required by veteran benefit statutes or acts." MCL 35.62.

have been abused, neglected, or abandoned by one or both parents." ICE Directive 11005.3, ¶ 3.8.

Victim-centered approach

- For purposes of ICE Directive 11005.3, *victim-centered approach* is "[an] approach broadly adopted by federal law enforcement agencies whereby equal value is placed on the identification and stabilization of victims and on the deterrence, investigation, and prosecution of perpetrators. It should be applied to policymaking and civil immigration enforcement actions to the greatest extent possible, to the extent consistent with law. The goal of a victim-centered investigation and prosecution is to focus the investigation and prosecution around the victim while minimizing any undue stress, harm, and trauma to the victim." ICE Directive 11005.3, ¶ 3.9.

Videoconferencing

- For purposes of MCR 2.407, *videoconferencing* is "the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, camera, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only option." MCR 2.407(A)(2).

Violent felony

- For purposes of MCR 6.106(B)(1), *violent felony* "is a felony, an element of which involves a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

- For purposes of MCL 771.2a, *violent felony* is "that term as defined in . . . MCL 791.236." MCL 771.2a(14)(g). MCL 791.236(20) defines *violent felony* as "an offense against a person in violation of . . . MCL 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [or MCL] 750.530."

Visitation

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *visitation* "includes parenting time as that term is used in the support and parenting time enforcement act, . . . MCL 552.601 to [MCL] 552.650." MCL 722.1522(n).

W

Wrongful removal

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *wrongful removal* is "the taking of a child that breaches rights of custody or visitation given or recognized under the law of this state. Wrongful removal does not include actions taken to provide for the safety of a party of the child." MCL 722.1522(o).

Wrongful retention

- For purposes of the Uniform Child Abduction Prevention Act (UCAPA), *wrongful retention* is "the keeping or concealing of a child that reaches rights of custody or visitation given or recognized under law of this state. Wrongful retention does not include actions taken to provide for the safety of a party or the child." MCL 722.1522(p).

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