

**Public Policy Position****ADM File No. 2023-24: Proposed Amendment of MCR 3.701 and Proposed Additions of MCR 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722**

The Family Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,643 members. The Family Law Section is not the State Bar of Michigan and the position expressed herein is that of the Family Law Section only and not the State Bar of Michigan. The State Bar's position is to support ADM File No. 2023-24 with the amendments recommended by the Family Law Section.

The Family Law Section has a public policy decision-making body with 19 members. On November 2, 2023, the Section adopted its position after an email discussion and e-vote. 19 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 0 members did not vote.

**Support with Amendments****Explanation**

The Court Rules Committee for the Family Law Council carefully compared the ERPO Act with the proposed ADM File to ensure that the court rules were consistent with the statute. The suggested amendments correct some grammatical errors, but mostly are designed to make the court rules a little clearer and in line with the content of the statute.

**Contact Person:** Jennifer Johnsen

**Email:** [jenjohnsen@westmichigandivorce.com](mailto:jenjohnsen@westmichigandivorce.com)

# Order

## Michigan Supreme Court Lansing, Michigan

September 20, 2023

Elizabeth T. Clement,  
Chief Justice

ADM File No. 2023-24

Brian K. Zahra  
David F. Viviano  
Richard H. Bernstein  
Megan K. Cavanagh  
Elizabeth M. Welch  
Kyra H. Bolden,  
Justices

Proposed Amendment of Rule 3.701  
and Proposed Additions of Rules 3.715,  
3.716, 3.717, 3.718, 3.719, 3.720, 3.721,  
and 3.722 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.701 and additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and  
deleted text is shown by strikeover.]

Subchapter 3.700 Personal Protection and Extreme Risk Protection Proceedings

Rule 3.701 Applicability of Rules: Forms

- (A) Scope. Except as provided by this subchapter and the provisions of MCL 600.2950., an4--MCL 600.2950a, and MCL 691.1801 to MCL 691.1821, actions for personal protection for relief against domestic violence or stalking and actions for extreme risk protection are governed by the Michigan Court Rules. Procedure related to personal protection orders against adults is governed by MCR 3.702 to MCR 3.709, and procedure related to extreme risk protection is governed by MCR 3.715 to MCR 3.722this subchapter. Procedure related to personal protection orders against minors is governed by subchapter 3.900, except as provided in MCR 3.981.
- (B) Forms. The state court administrator shall approve forms for use in personal protection act proceedings and for use in extreme risk protection act proceedings. The forms shall be made available for public distribution by the clerk of the circuit court.

[NEW] Rule 3.715 Definitions

When used in MCR 3.716-3.722, unless the context otherwise indicates:

- (1) "Existing action" means an action in any court in which both the petitioner and the respondent are parties; existing action includes, but is not limited to, pending and completed domestic relations actions, and other actions for personal protection or extreme risk protection orders.
- (2) "Extreme risk protection order" means that term as defined in MCL 691.1803.
- (3) "Family member," "guardian," "health care provider," and "law enforcement officer," mean those terms as defined in MCL 691.1803.
- (4) "Minor" means a person under the age of 18.
- (5) "Petition" means a pleading for commencing an independent action for extreme risk protection and is not considered a motion as defined in MCR 2.119.
- (6) "Petitioner" means the party seeking an extreme risk protection order.
- (7) "Respondent" means the party to be restrained by the extreme risk protection order.

[NEW] Rule 3.716 Commencing an Extreme Risk Protection Action

(A) Filing.

- (1) An extreme risk protection action is an independent action commenced by filing a petition with the family division of the circuit court. A petition may be filed regardless of whether the respondent owns or possesses a firearm. A proposed extreme risk protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the petition. When completing the proposed order, the petitioner must complete the case caption and the known fields with identifying information, including the race, sex, and date of birth or age of the respondent. The personal identifying information form approved by the State Court Administrative Office does not need to be completed or filed in extreme risk protection actions. There are no fees for filing an extreme risk protection action, ~~and no summons is issued.~~ An extreme risk protection action may

**Commented [TYJ1]:** The statute requires a summons.  
MCL 691.1805(3)

not be commenced by filing a motion in an existing case or by joining a claim to an action.

- (2) An extreme risk protection action may only be commenced by the following individuals:

- (a) the spouse of the respondent;
- (b) a former spouse of the respondent;
- (c) an individual who:
  - (i) has a child in common with the respondent,
  - (ii) has or has had a dating relationship with the respondent, or
  - (iii) resides or has resided in the same household with the respondent;
- (d) a family member;
- (e) a guardian of the respondent;
- (f) a law enforcement officer; or
- (g) a health care provider, if filing and maintaining the action does not violate requirements of the health insurance portability and accountability act of 1996, Public Law 104-191, or regulations promulgated under that act, 45 CFR parts 160 and 164, or physician-patient confidentiality.

- (B) Petition in General. The petition must

- (1) be in writing;
- (2) state the respondent's name and address;
- (3) state with particularity the facts that show the issuance of an extreme risk protection order is necessary because the respondent
  - (a) can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and

- (b) has engaged in an act or acts or made significant threats that substantially support the expectation in subrule (3)(a).
- (4) if known by the petitioner, state if any following circumstances are applicable:
- (a) the respondent is required to carry a pistol as a condition of the respondent's employment and is issued a license to carry a concealed pistol,
  - (b) the respondent is any of the following:
    - (i) police officer licensed or certified under the Michigan Commission on Law Enforcement Standards Act (MCOLES), MCL 28.601 to MCL 28.615,
    - (ii) sheriff or deputy sheriff,
    - (iii) member of the Department of State Police,
    - (iv) local corrections officer,
    - (v) employee of the Michigan Department of Corrections, or
    - (vi) federal law enforcement officer who carries a pistol during the normal course of the officer's employment or an officer of the Federal Bureau of Prisons,

(5) if the petitioner knows or believes that the respondent owns or possesses firearms, the petitioner must state that in the petition and, to the extent possible, identify the firearms, giving their location and any additional information that would help a law enforcement officer find the firearms;

**Commented [DW2]:** This numbering change is to reflect more accurately the language of the statute. See MCL 691.1805(6).

(6) state the relief sought;

(7) state whether an ex parte order is being sought;

(8) state whether an extreme risk protection ~~petition action~~ involving the respondent has been ~~filed~~~~commenced~~ in another jurisdiction; and provide the county, docket number, and current status of the extreme risk protection petition.

**Commented [TYJ3]:** This is to prevent forum shopping and provide the court with sufficient information of actions in other jurisdictions.

**Commented [JV4R3]:** Should it say "provide" rather than "provided?"

(9) be signed by the party or attorney as provided in MCR 1.109(E).

**Commented [TYJ5R3]:** Yes fixed

- (C) The petitioner's address must not be disclosed in any pleading, paper, or in any other manner. The petitioner must provide the court with ~~their~~<sup>an</sup> address and contact information in the form and manner established by the State Court Administrative Office for service of notices and other filings. The clerk of the court must maintain the petitioner's address as confidential in the court file.
- (D) Petition Against a Minor. In addition to the requirements outlined in subrule (B), a petition against a minor must also list, if known or can be easily ascertained, the names and addresses of the minor's parent(s), guardian, or custodian.
- (E) Other Pending Actions; Order, Judgments.
- (1) The petition must 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 the case number, if known.
    - (a) 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.
    - (b) If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court may contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information.
  - (2) 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.
- (F) Venue.
- (1) If the respondent is an adult, the petitioner may file an extreme risk protection action in any county in Michigan regardless of the parties' residency or location.
  - (2) If the respondent is a minor, the petitioner must file an extreme risk protection action in either the petitioner's or respondent's county of residence.

**Commented [DW6]:** First, we are anchoring an orphaned paragraph with a designated subsection.

Second, we struck "their" address because the address may not belong to the petitioner (e.g., a shelter, a relative's home, a PO Box, etc.).

Third, we added the "for service of notice and other filings" to comport with the statutory language.

- (3) If the respondent does not live in Michigan, the petitioner must file an extreme risk protection order in the petitioner's county of residence.

(G) Minor or Legally Incapacitated Individual as Petitioner.

- (1) If a petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend. If the Petitioner is 14 years old or older, ~~the~~ the petitioner shall certify that the next friend is not disqualified by statute and that the next friend is an adult. If the Petitioner is not yet 14 years old, the next friend shall certify that the next friend is not disqualified by statute and that the next friend is an adult.
- (2) Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment. However, the court shall appoint a next friend if the minor is less than 14 years of age.

**Commented [DW7]:** This language is added to comport with MCR 2.201(E).

[NEW] Rule 3.717 Dismissal

Except as specified in MCR 3.718(A)(5), MCR 3.718(B)(2)(c), ~~MCR~~ 3.718(D), and MCR 3.720, an action for an extreme risk protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order. There is no fee for such a motion.

**Commented [TYJ8]:** This is another section that allows dismissal that should be added.

[NEW] Rule 3.718 Issuing Extreme Risk Protection Orders

(A) Ex Parte Orders. Except as otherwise provided in this rule:

- (1) The court must rule on a request for an ex parte order within one business day of the filing date of the petition.
- (2) An ex parte order must be granted if it clearly appears from the specific facts shown by a verified, written petition that
- (a) by a preponderance of the evidence after considering the factors identified in MCL 691.1807(1), the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that substantially support the expectation that the respondent will intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm; and
- (b) there is clear and convincing evidence 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 order can be issued.

- (3) An ex parte order expires one year after the date of issuance.
- (4) If an ex parte order is entered, the petition and order must be served as provided in MCR 3.719(B). However, failure to ~~make effect~~ service does not affect the order's validity or effectiveness.
- (5) If the court refuses to grant an ex parte order, it must state the reasons in writing and advise the petitioner of the right to request a hearing as provided in subrule (D). If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the petition is final. The court is not required to give such notice if the court determines after interviewing the petitioner that the petitioner's claims are sufficiently without merit that the action should be dismissed without a hearing.

Commented [DW9]: "Effect" is a better word.

(B) Immediate Emergency Ex Parte Orders.

- (1) A petitioner who is a law enforcement officer may verbally request by telephone that the court immediately issue an emergency ex parte order under subrule (A) 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.
- (2) The court must immediately rule on a verbal request made under this subrule and, if the court issues an immediate emergency ex parte order,
  - (a) the officer must notify the respondent of the court's order and advise where they can obtain a copy of the order;
  - (b) within one business day, the officer must file a sworn written petition detailing the facts and circumstances presented verbally to the court; and
  - (c) if the officer does not file the petition within one business day, the court must
    - (i) terminate the immediate emergency ex parte order,
    - (ii) order that the respondent, subject to the restrictions in MCL 691.1815, may reclaim any seized firearm(s), and
    - (iii) dismiss the case.



(C) Anticipatory Search Warrant. If the court orders the firearms immediately surrendered, ~~the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) shall~~ may file an affidavit requesting that the court shall also issue an anticipatory search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. ~~The law enforcement officer's affidavit may include affirmative allegations contained in the petition.~~ An anticipatory search warrant issued under this subrule must be subject to and contingent on the failure or refusal of the respondent, following 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. If the respondent does not 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, the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) shall file an affidavit stating the reasons the law enforcement officer executed the anticipatory search warrant.

**Commented [DW10]:** There is no requirement of a law enforcement officer affidavit contained in the statute. The statute mandates issuance of an anticipatory search warrant. MCL 691.1807(8). And if the person doesn't comply, the officer has to back up their actions with the affidavit.

**Commented [TYJ11]:** This is not discretionary

(D) Probable Cause. At any time while an extreme risk protection order is in effect, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file an affidavit with the court that issued the order alleging that the restrained individual has a firearm or a concealed pistol license in the individual's possession or control. If an affidavit is filed under this subsection, the court shall determine whether probable cause exists to believe that the restrained individual has a firearm or concealed pistol license in the individual's possession or control. If the court finds that probable cause exists, the court may issue an arrest warrant or order a hearing. The court shall also issue a search warrant describing the firearm or firearms or the concealed pistol license believed to be in the restrained individual's possession or control and authorizing a designated 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 by the search.

**Commented [DW12]:** This is 691.1810(5). It was not included anywhere in the proposed Court Rule.

#### ~~(D)~~(E) Hearing.

- (1) The court must expedite and give priority to hearings required by the extreme risk protection act.
- (2) The court must schedule a hearing for the issuance of an extreme risk protection order in the following instances:
  - (a) the petition does not request an ex parte order;
  - (b) the court refuses to enter an ex parte order and the petitioner timely requests a hearing; or
  - (c) the court entered an ex parte order and the respondent requests a

hearing.

- (3) If the court enters an ex parte order or an immediate emergency ex parte order and the respondent requests a hearing, the hearing must occur
  - (a) unless subrule (3)(b) applies, within 14 days of the request for a hearing; or
  - (b) within 5 days of the request for a hearing if the respondent is an individual described in MCL 691.1805(5).
- (4) The ~~petitioner must serve on the~~ respondent must be served with the petition and notice of the hearing as provided in MCR 2.105(A), for a hearing scheduled under subrules (D)(2)(a)-(b). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian are known, ~~the petitioner shall also in the same manner serve~~ the petition and notice of the hearing must be served on the respondent's parent(s), guardian, or custodian. The clerk of the court serve the respondent's request for a hearing under subrule (D)(2)(c) on the petitioner, as provided in MCR 2.107(C), due to the confidential nature of the petitioner's address. If the respondent is a person described in MCL 691.1805(5), providing notice one day before the hearing is deemed as sufficient notice to the petitioner.
- (5) The hearing must be held on the record. In accordance with MCR 2.407 and MCR 2.408, the court may allow the use of videoconferencing technology.
- (6) The petitioner must attend the hearing and carries the burden of proving, by a preponderance of the evidence, that the respondent can reasonably be expected within the near future to, intentionally or unintentionally, seriously physically injure themselves 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. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the petition.
- (7) If the respondent fails to appear at a hearing on the petition under subrules (D)(2)(a)-(b) and the court determines 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 an extreme risk protection order is necessary. If the respondent fails to appear at a hearing on the petition requested under subrule (D)(2)(c), the court may adjourn and reschedule the hearing or continue the order without further hearing.
- (8) At the hearing, the court must consider the factors identified in MCL 691.1807(1) and state on the record the reasons for granting, denying, or continuing an extreme risk protection order and enter an appropriate order. Additionally, the court must immediately state the reasons for granting,

**Commented [DW13]:** This is intended to remove a perceived burden on those unfamiliar with the legal system and Court Rules, and to make it clearer and more consistent with the way our Court Rules read.

denying, or continuing an extreme risk protection order in writing.

[NEW] Rule 3.719 Orders

- (A) Form and Scope of Order. An order granting an extreme risk protection order must include the following provisions:

- (1) Respondent Responsibilities. The respondent must complete the filing requirements contained in subrule (D)(1) within one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order. A failure to comply with the filing requirements may subject the respondent to contempt of court proceedings and immediate arrest.
- (2) Purchase/Possession of Firearms. The respondent must not purchase or possess a firearm. If the respondent has been issued a license under MCL 28.422 that the respondent has not used and that is not yet void, the respondent must not use it and must surrender it to the law enforcement agency designated under MCL 691.1809(1)(g).
- (3) Concealed Carry Licenses. The respondent must not apply for a concealed pistol license. If the respondent has been issued a license to carry a concealed pistol, the license will be suspended or revoked under MCL 28.428, once the extreme risk protection order is entered into the law enforcement information network (LEIN). The respondent must surrender the license to carry a concealed pistol as required by MCL 28.428.
- (4) Firearm Surrender. The respondent must, within 24 hours or, at the court's discretion, immediately after being served with the order, surrender any firearms in the respondent'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.

If the court orders the respondent to immediately surrender the individual's firearms, the order must include a statement that the law enforcement agency designated under MCL 691.1809(1)(g) must proceed to seize the respondent's firearms after the respondent is served with or receives actual notice of the extreme risk protection order, after giving the respondent an opportunity to surrender the respondent's firearms. Unless the petitioner is a law enforcement officer or health care provider, there is a presumption that the respondent will have 24 hours to surrender the firearms.

- (5) Firearm Description. If the petitioner has identified any firearms in the petition, a specific description of the firearms to be surrendered or seized.

- (6) **Hearing Request.** If the extreme risk protection order was issued without written or oral notice to the respondent, the order must include a statement that the respondent may request and attend a hearing to modify or rescind the order. The hearing will be held within 14 days of the request for a hearing or, if the respondent is an individual described in MCL 691.1805(5), the hearing will be held within 5 days of the request for a hearing.
- (7) **Motions.** A statement that the respondent may file a motion to modify or rescind the order as allowed under MCL 691.1801 *et seq.*, and that motion forms and filing instructions are available from the clerk of the court.
- (8) **Law Enforcement Agency Designation.** 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 designated law enforcement agency must be an agency within whose jurisdiction the respondent resides.
- (9) **LEIN Entry.** Directions to a local entering authority or the law enforcement agency designated under MCL 691.1809(1)(g) to enter the order into LEIN.
- (10) **Order Violations.** A statement that violating the order will subject the respondent to the following:
  - (a) immediate arrest;
  - (b) contempt of court;
  - (c) an automatic extension of the order; and
  - (d) criminal penalties, including imprisonment for up to one year for an initial violation and up to five years for a subsequent violation.
- (11) **Right to Attorney.** A statement that the respondent has the right to seek the advice of an attorney.
- (12) **Expiration Date.** An expiration date that is one year after the date of issuance.

(B) **Service.**

- (1) Except as provided in subrule (B)(2), the petitioner must serve the order on the respondent as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian is known, the petitioner must also in the same manner serve the order on the respondent's parent(s), guardian, or custodian. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J). Failure to serve the order does not affect its validity or effectiveness.
- (2) If the court ordered the immediate surrender of the respondent's firearms, the order must be served personally by a law enforcement officer.

- (3) Proof of service must be filed with the court within one business day after service.
- (C) Oral Notice. If oral notice of the order is made by a law enforcement officer as described in MCL 691.1813(3), proof of the notification must be filed with the court by the law enforcement officer within one business day after the notification.
- (D) Respondent Responsibilities.
  - (1) Not later than one business day after the respondent receives a copy of the extreme risk protection order or has actual notice of the order, the respondent must do one of the following:
    - (a) File with the court that issued the order one or more documents or other evidence verifying that all of the following are true:
      - (i) All firearms previously in the respondent's possession or control were surrendered to or seized by the local 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.
      - (ii) Any concealed pistol license was surrendered to the county clerk as required by the order and MCL 28.428.
      - (iii) At the time of the verification, the respondent does not have any firearms or a concealed pistol license in the respondent's possession or control.
    - (b) File with the court that issued the order one or more documents or other evidence verifying that both of the following are true:
      - (i) At the time the order was issued, the respondent did not have a firearm or concealed pistol license in the respondent's possession or control.
      - (ii) At the time of the verification, the respondent does not have a firearm or concealed pistol license in the respondent's possession or control.
  - (2) Failure to File. The clerk of the court must review the proof of service filed with the court and determine whether the respondent has complied with the filing requirements of subrule (D)(1). If the respondent has not complied

with the filing requirements of subrule (D)(l), the clerk and the court must take the following actions:

- (a) Clerk of the Court. The clerk of the court must notify the local law enforcement agency identified in MCL 691.1809(1)(g) and the assigned judge of the failure to comply with the filing requirements. If this notice is provided, the clerk of the court must again notify the local law enforcement agency and the assigned judge when the respondent has complied with the filing requirements.

**Commented [TYJ14]:** The judge will not know to take action under subsection (b) below unless notified.

- (b) Court. ~~The court must hold a compliance hearing not later than five (5) days after the restrained individual has been served with the order or receives actual notice of the order. If at the compliance hearing the restrained individual fails to appear or has failed to comply with the filing requirements of subrule (D)(1), the court must issue a bench warrant and issue a search warrant to seize any firearms and may hold the individual in direct contempt of court. The court must issue either a bench warrant or an order to show cause to initiate contempt proceedings as identified in MCR 3.721. If issuing an order to show cause, the hearing must be held scheduled within 5 days of the date the proof of service is filed with the court. The court may recall the bench warrant or cancel the order to show cause cancel the hearing if the respondent makes the required filings identified in subrule (D)(l). If the respondent fails to appear for the show cause hearing, the court must issue a bench warrant.~~

**Commented [DW15]:** Nowhere in MCL 691.1810(1) is a "show cause" proceeding mentioned; this language follows the statute more directly.

~~If the court issues a bench warrant under this subrule, a law enforcement officer may file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.~~

**Commented [TYJ16]:** Scheduled means it can be put on the docket months down the road. The intent is "held" within 5 days.

**Commented [DW17]:** This appears to be partial language from 691.1810(5), and we created a subrule for that part of the statute [3.718(D)].

- (E) Clerk of the Court Responsibilities. The clerk of the court that issues an extreme risk protection order must complete the actions identified in MCL 691.1811.

#### [NEW] Rule 3.720 Modification, Termination, or Extension of Order

- (A) Modification or Termination.

- (1) Time for Filing and Number of Motions.

- (a) The petitioner may file a motion to modify or terminate the extreme risk protection order and request a hearing at any time after the extreme risk protection order is issued.

~~(b)~~ If the order is issued *ex parte*, the respondent may file a request for hearing on the order by not later than 14 days after the order is served on the restrained individual or after the restrained individual receives actual notice of the order.

**Commented [DW18]:** There was no provision for the hearing within 14 days. MCL 691.1807(3).

~~(b)(c)~~ If the order is issued after a hearing, or if the order is affirmed at a hearing scheduled under MCR 3.720(A)(1)(b), ~~the~~ the respondent may file one motion to modify or terminate an extreme risk protection order during the first six months that the order is in effect and one motion during the second six months that the order is in effect. If the order is extended under subrule (B), the respondent may file one motion to modify or terminate the order during the first six months that the extended order is in effect, and one motion during the second six months that the extended order is in effect. If the respondent files more than one motion during these times, the court shall review the motion before a hearing is held and may summarily dismiss the motion without a response from the petitioner and without a hearing.

**Commented [DW19]:** This allows for all individuals (even ones who got into court within fourteen days to have a hearing) to have the chance to change the Court's mind in the first six months after the order is issued, as provided in MCL 691.1807..

~~(c)(d)~~ The moving party carries the burden and must prove by a preponderance of the evidence that the respondent no longer poses a risk to seriously physically injure another individual or the respondent by possessing a firearm.

- (2) Service. The nonmoving party must be served, as provided in MCR 2.107 at the mailing address or addresses provided to the court, the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve the respondent's motion on the petitioner due to the confidential nature of the petitioner's address.
- (3) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate an extreme risk protection order within 14 days ~~of~~ after the filing of the motion.
- (4) Notice of Modification or Termination. If an extreme risk protection order is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the extreme risk protection order of the change. A modified or terminated order must be served on the respondent as provided in MCR 2.107.
- (5) If the extreme risk protection order expires or is terminated, the court must order, subject to the restrictions in MCL 691.1815, that the respondent may reclaim any seized firearm(s). Upon the motion of the respondent, the court may also order, at any time, the transfer of the respondent's firearm(s) seized by law enforcement under the extreme risk protection order to a licensed firearm dealer if the respondent sells or transfers ownership of the firearm to the dealer.

## (B) Extension of Order.

## (1) Motions.

- (a) Time for Filing and Service. Upon motion by the petitioner or the court's own motion, the court may issue an extended extreme risk protection order that is effective for one year after the expiration of the preceding order. The respondent must be served the motion to extend the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.107 at the mailing address or addresses provided to the court. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve both the petitioner and respondent if upon the court's own motion. Failure to timely file a motion to extend the effectiveness of the order does not preclude the petitioner from commencing a new extreme risk protection action regarding the same respondent, as provided in MCR 3.716.
- (b) Legal Standard. The court shall only issue the extended order under this subrule if the preponderance of the evidence shows the restrained individual can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves 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.

- (2) Automatic Extensions. If ~~the court or a jury finds that~~ the respondent has refused or failed to comply with an extreme risk protection order, the court that issued the order must issue an extended extreme risk protection order effective for 1 year after the expiration of the preceding order.
- (3) Notice of Extension. If the court issues an extended extreme risk protection order, it must enter an amended order. The clerk must immediately notify the law enforcement agency specified in the extreme risk protection order if the court enters an amended order. The petitioner must serve an amended order on the respondent as provided in MCR 2.107.

(C) Minors and Legally Incapacitated Individuals. Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.716(F). ~~The Court may appoint a GAL or LGAL under MCR 2.201(E).~~

## (D) Fees. There are no motion fees for modifying, terminating, or extending an extreme risk protection order.

## [NEW] Rule 3.721 Contempt Proceedings for Violation of Extreme Risk Protection Orders

**Commented [TYJ20]:** This is redundant and confusing, it implies that there may be a right to a jury trial in all violations, which is inaccurate.

**Commented [DW21]:** The Court will be able to issue an ex parte order without delay and then later determine if the Court should appoint a GAL or provide the minor with a LGAL.

**Commented [TYJ22]:** If a petition is entered against the child of a petitioner, that child should be appointed a GAL.

**Commented [JV23R22]:** The references here should be to MCR 2.201(E) (1)(c) and MCR 3.707(C), which require appointment of a GAL for a minor respondent.

**Commented [TYJ24R22]:** corrected

**Commented [DW25R22]:** Neither MCR 3.307(C) nor MCR 3.707(C) applies.



- (A) In General. An extreme risk protection order is enforceable under MCL 691.1810(4)-(5), MCL 691.1815(4), and MCL 691.1819.
- (B) Motion to Show Cause.
  - (1) Filing. If the respondent violates the extreme risk protection order, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. There is no fee for such a motion. If the motion and affidavit establish probable cause for a finding of contempt, the court must 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.
  - (2) Service. If issuing an order to show cause, the hearing must be held within 5 days. The prosecuting attorney or law enforcement officer must serve the motion to show cause and the order on the respondent and petitioner as provided in MCR 2.107.
- (C) Search Warrant. If the violation alleges that the respondent has a firearm or concealed pistol license in the respondent's possession or control, a law enforcement officer or prosecuting attorney may also file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the petition.
- (D) Arraignment; Advice to Respondent.

At the respondent's first appearance before the court for arraignment on contempt of court, the court must:

- (1) advise the respondent
  - (a) of the alleged violation,
  - (b) of the right to contest the charge at a contempt hearing, and
  - (c) that they are 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 an extreme risk protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one;

- (2) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority;
  - (3) set a reasonable bond pending a hearing of the alleged violation; and
  - (4) take a guilty plea as provided in subrule (E) or schedule a hearing as provided in subrule (F).
- (E) Pleas of Guilty. The respondent may plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must:
- (1) advise the respondent
    - (a) 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 subrule **(D)(1)(c)**;
    - (b) of the maximum possible jail sentence for the violation; and
    - (c) that if they plead guilty to violating the extreme risk protection order, the court will automatically extend the duration of the extreme risk protection order for 1 year after the expiration of the preceding order;
  - (2) ascertain that the plea is understandingly, voluntarily, and knowingly made;
  - (3) establish factual support for a finding that the respondent is guilty of the alleged violation.
- (F) Scheduling or Postponing Hearing. Following the respondent's appearance or arraignment, the court shall do the following:
- (1) Set a date for the hearing at the earliest practicable time.

- (a) The hearing of a respondent being held in custody for an alleged violation of an extreme risk protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. The court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the respondent or any other individual(s).
  - (b) If a respondent is released on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the respondent and other individuals, including continued compliance with the extreme risk protection order. The release order shall comply with MCL 765.6b.
  - (c) If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, upon motion of the prosecutor, the court may postpone the hearing for the outcome of that prosecution.
- (2) Notify the prosecuting attorney of a contempt proceeding.
- (3) Notify the petitioner and the petitioner's attorney, if any, and the law enforcement officer that filed the motion, if applicable, of the contempt proceeding and direct the party to appear at the hearing and give evidence on the charge of contempt.
- (G) Prosecution After Arrest. If the court holds a contempt proceeding, the prosecuting attorney ~~must~~shall prosecute the proceeding.
- (H) The Violation Hearing.
- (1) Jury. There is no right to a jury trial.
  - (2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses.
  - (3) Evidence; Burden of Proof. The rules of evidence apply to both criminal and civil contempt proceedings. 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.
  - (4) Judicial Findings. At the conclusion of the hearing, the court must find the facts specifically, state separately its conclusion of law, and direct entry of

**Commented [TYJ26]:** Pursuant to *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) *Shall* is ambiguous. It can mean either the mandatory or will:

shall, vb. (bef. 12c) 1. Has a duty to; more broadly, is required to "the requester shall send notice" "notice shall be sent". This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) "all claimants shall request mediation". 3. May "no person shall enter the building without first signing the roster". When a negative word such as not or no precedes shall (as in the example in angled bracket), the word shall often means may. What is being negated is permission, not a requirement. 4. Will (as a future tense verb) "the corporation shall then have a period of 30 days to object". 5. Is entitled to "the secretary shall be reimbursed for all expenses". Only sense 1 is acceptable under strict standards of drafting.

the appropriate judgment. The court must state its findings and conclusion on the record or in a written opinion made a part of the record.

- (5) Sentencing. If the respondent is found in contempt, the court may impose sanctions as provided by MCL 600.1701 *et seq.*

[NEW] Rule 3.722 Appeals

- (A) Rules Applicable. Except as provided by this rule, appeals involving an extreme risk protection order must comply with subchapter 7.200.
- (B) From Entry of Extreme Risk Protection Order.
  - (1) Either party has an appeal of right from:
    - (a) an order granting, denying, or continuing an extreme risk protection order after a hearing under MCR 3.718(D).
    - (b) an order granting or denying an extended extreme risk protection order after a hearing under MCR 3.720(B).
  - (2) Appeals of all other orders are by leave to appeal.
- (C) From Finding After Violation Hearing. The respondent has an appeal of right from a judgment of sentence for criminal contempt entered after a contested hearing.

*Staff Comment (ADM File No. 2023-24):* The proposed amendments would offer procedural guidance to trial courts for implementing the Extreme Risk Protection Order (ERPO) Act, MCL 691.1801 *et seq.*

**Note that the comment period for this proposal is slightly shorter than the typical three-month period so that this issue can be considered by the Court for adoption before the ERPO Act takes effect.**

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be submitted by December 1, 2023 by clicking on the

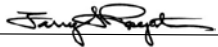
"Comment on this Proposal" link under this proposal on the Court's Proposed & Adopted Orders on Administrative Matters page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at [ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov). When submitting a comment, please refer to ADM File No. 2023-24. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J., would have declined to publish the proposal for comment.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 20, 2023

  
Clerk