



THIRD JUDICIAL CIRCUIT OF MICHIGAN

2 Woodward Avenue, Courtroom 701
Detroit, MI 48226

December 1, 2023

Larry Royster
Supreme Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Comments to ADM File No. 2023-24 – Extreme Risk Protection Act

Dear Clerk Royster:

In ADM File No. 2023-24, this Court is considering the amendment of Rule 3.701 and the addition of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722 to the Michigan Court Rules. The amendments and additions are intended to provide procedural guidance to trial courts for implementing the Extreme Risk Protection Order Act [hereinafter ERPOA], MCL 691.1801 et seq. The Domestic Relations Section of the Family Division of the Third Circuit Court of Michigan- [hereinafter Third Circuit Court] has reviewed ADM File No. 2023-24. Our review determined that, while the court rules provide a workable procedure for handling incoming ERPOA, as currently written, some of the rules do not comply with ERPOA itself.

The Third Circuit Court appreciates the opportunity to contribute feedback on this important question. From its unique vantage point as the largest trial court in Michigan, it asks this Court to review our position, amend the court rules to comply with ERPOA, and provide clarity on portions of ERPOA and the proposed court rules that are ambiguous.

I. Commencing an Extreme Risk Protection Action

How an action brought under ERPOA is commenced under the proposed Court Rules is unclear for several reasons. First, ERPOA itself contains internal ambiguity with regard to how an ERPOA action is commenced. For instance, MCL 691.1805(3) provides that an ERPOA action must be commenced by filing a summons and complaint. This implies that a Petitioner must serve a copy of the ERPOA action summons and complaint on Respondent before an ERPOA action hearing could be held before the court. See MCR 2.105. However, MCL 691.1807(2) contradictorily provides, “[T]he court may issue an extreme risk protection order **without written or oral notice to the 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 extreme risk protection order can be issued (emphasis added).” In contradiction to MCL 691.1805(3), MCL 691.1807(2) implies that a petitioner may request an ex parte ERPOA and that a court may grant an ex parte ERPOA upon specific findings. It is not clear how this statutory ambiguity can be resolved, other than through a legislative correction.

Second, regardless of the statutory issue, the proposed ERPOA Court Rules also contain language that does not

conform to the ERPOA statute. As the Court Rules are currently written, MCR 3.716(A)(1) states that an Extreme Risk Protection Action should be commenced by filing a *petition* and that no summons is required. However, as discussed above, MCL 691.1805(3) requires that “an individual who files an action under this section shall do so by filing a summons and complaint on forms approved by the state court administrative office as directed by the supreme court.” Between the statute and the proposed Court Rules, it is unclear how an ERPOA action is initiated.

II. Dismissal of an Extreme Risk Protection Order Action

For dismissal of an ERPOA action, MCR 3.717 states that “except as specified in MCR 3.718(A)(5), 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 (emphasis added).” When reading MCR 3.718 in its entirety, it appears that another section, MCR 3.718(B)(2)(c), also allows for dismissal, but apparently was overlooked. It should be added into the current rule, or it will be a nullity. Additionally, if dismissal was limited to those provisions described under MCR 3.717, the trial courts would lack the authority to dismiss for other procedural reasons that have long been permitted in other civil cases such lack of standing, improper venue, lack of jurisdiction, and failure to meet the requirements of the statute or court rules. Dismissal on these grounds should never be disallowed, as they involve foundational legal principles intended to keep courts from having to consider improvidently brought actions. Thus, the Court Rules should be revised to provide that a court has discretion to dismiss a case for these procedural reasons. This will assure that ERPOA actions move forward efficiently and without wasting court resources.

III. MCR 3.718(C) Anticipatory Search Warrant

MCL 691.1807(8) dictates when an anticipatory search warrant should be issued. The statute states specifically (with emphasis added.): “if the court orders the firearms immediately surrendered, it **shall** also 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, authorizing 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 1966 PA 189, MCL 780.651 to 780.659.”

Nonetheless, MCR 3.718(C) states: “[I]f the court orders the firearms immediately surrendered, the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) **may** file an affidavit requesting that the court 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 statute makes clear that for the immediate surrender of a firearm, an anticipatory search warrant is mandatory. In contrast, the proposed court rule implies that the court has discretion as to when an anticipatory search warrant should be issued. Thus, there is conflicting language between the statute, which uses the word “shall” and the court rules, which uses the word “may” with regard to when an anticipatory search warrant is issued.

IV. MCR 3.718(D) ERPOA Hearings

The statute provides a general rule that the court must expedite and give priority to hearings under ERPOA. MCL 691.1806(1). Further, it specifically provides under MCL 691.1807(3) that hearings regarding ex parte orders or immediate emergency ex parte orders must be held within 14 days, or within 5 days if the respondent is an individual described in MCL 691.1805(5). While these timeframes have been incorporated into the court rules, there is no guidance with regard to the timing of hearings on non-ex parte ERPOA orders. Consequently, it is unclear when a non-ex parte ERPOA hearing should be held with the court.

In addition, there is no direction in the proposed court rules regarding whether a hearing on an ERPOA action should be public or non-public. In the absence of such direction, the ERPOA hearings would be public.

Finally, it should be considered whether certain ERPOA orders fall under the federal Violence Against Women Act, as, in that case, 18 USC 2265(d)(3) would prevent the public dissemination of information regarding the person protected by the order.

V. MCR 3.719(D)(2)(a) Duty of the Court Clerk


Under the statute and court rules, the clerk of the court is responsible for notifying the local law enforcement agency of respondent’s failure to comply with the filing requirements under MCL 691.1810, MCL 691.1810(2) and MCR 3.719(D)(2)(a). However, the court rule lacks a requirement that notification of respondent’s failure to comply be given to the judge who issued the ERPOA order. If the judge who issued the ERPOA order is not notified by the clerk of the court regarding respondent’s failure to comply with filing requirements, the judge will not know to take appropriate action, such as issuing a bench warrant or an order to show cause to initiate contempt proceedings under MCR 3.719(D)(2)(b). Accordingly, this rule should be amended to add language regarding notification to the assigned judge in order for the ERPOA matter to proceed timely pursuant to statute.

VI. Summary

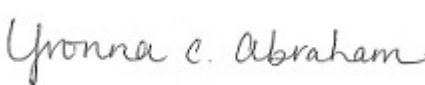
In sum, while the proposed amendments to Michigan Court Rule 3.701 and additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722 are necessary, additional amendments are needed to clarify the procedures that a trial court should follow for ERPOA matters. The Third Circuit Court welcomes continued dialogue on the important issues involved.



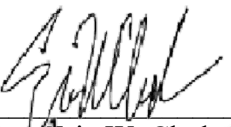
Hon. Patricia F. Fressard
Chief Judge
Third Circuit Court

Sincerely,


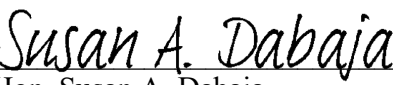
Hon. Melissa A. Cox
Presiding Judge, Family Division—Domestic Relations
Third Circuit Court



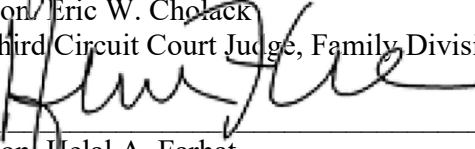
Hon. Yvonna C. Abraham
Third Circuit Court Judge, Family Division



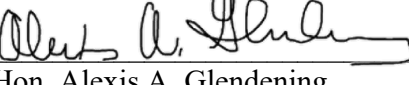
Hon. Eric W. Cholack
Third Circuit Court Judge, Family Division



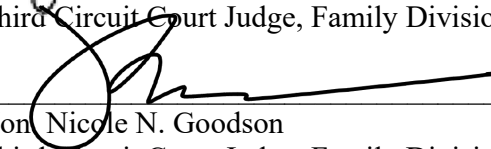
Hon. Susan A. Dabaja
Third Circuit Court Judge, Family Division



Hon. Helal A. Farhat
Third Circuit Court Judge, Family Division




Hon. Alexis A. Glendening
Third Circuit Court Judge, Family Division




Hon. Nicole N. Goodson
Third Circuit Court Judge, Family Division



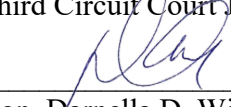
Hon. Mary Beth Kelly
Third Circuit Court Judge, Family Division



Hon. Carla G. Testani
Third Circuit Court Judge, Family Division



Hon. Regina Triplett
Third Circuit Court Judge, Family Division



Hon. Darnella D. Williams-Claybourne
Third Circuit Court Judge, Family Division