STATE OF NEW YORK

3661

2017-2018 Regular Sessions

IN ASSEMBLY

January 30, 2017

Introduced by M. of A. LAVINE, SIMON, SEAWRIGHT, COLTON, FAHY -- Multi-Sponsored by -- M. of A. GALEF -- read once and referred to the Committee on Judiciary

AN ACT to amend the family court act, in relation to gun violence restraining orders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article 12 of the family court act is renumbered article 13, section 1211 is renumbered section 1311 and a new article 12 is added to read as follows:

ARTICLE 12
GUN VIOLENCE RESTRAINING ORDER

Section 1211. General.
1212. Temporary emergency gun violence restraining order.
1213. Ex parte gun violence restraining order.
1214. Gun violence restraining order issued after notice and hearing.
1215. Offenses.

§ 1211. General. 1. A gun violence restraining order is an order, in writing, signed by the court, prohibiting and enjoining a named person from having in his or her custody or control, owning, purchasing, possessing, or receiving any firearms or ammunition. This article establishes a civil restraining order process to accomplish that purpose.

2. The office of court administration shall prescribe the form of the petitions and orders and any other documents, and shall promulgate any rules of court, necessary to implement this article.

3. A petition for a gun violence restraining order shall describe the number, types, and locations of any firearms and ammunition presently believed by the petitioner to be possessed or controlled by the subject of the petition.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD05908-01-7

4. Nothing in this article shall be interpreted to require a law enforcement agency or a law enforcement officer to seek a gun violence restraining order in any case, including, but not limited to, in a case in which the agency or officer concludes, after investigation, that the criteria for issuance of a gun violence restraining order are not satisfied.

5. Prior to a hearing on the issuance, renewal, or termination of an order under section twelve hundred thirteen or twelve hundred fourteen of this article the court shall ensure that a search warrant is conducted and shall keep information obtained from a search conducted pursuant to this section confidential.

6. (a) The court shall notify the division of criminal justice services when a gun violence restraining order has been issued or renewed under this article no later than one court day after issuing or renewing the order.

(b) The court shall notify the division of criminal justice services when a gun violence restraining order has been dissolved or terminated under this article no later than five court days after dissolving or terminating the order. Upon receipt of either a notice of dissolution or a notice of termination of a gun violence restraining order, the division of criminal justice services shall, within fifteen days, document the updated status of any order issued under this article.

(c) The notices required to be submitted to the division of criminal justice services pursuant to this section shall be submitted in an electronic format, in a manner prescribed by the division.

(d) When notifying the division of criminal justice services pursuant to paragraph (a) or (b) of this subdivision, the court shall indicate in the notice whether the person subject to the gun violence restraining order was present in court to be informed of the contents of the order or if the person failed to appear. The person's presence in court shall constitute proof of service of notice of the terms of the order.

(e) (1) Within one business day of service, a law enforcement officer who served a gun violence restraining order shall submit the proof of service directly into the database established under section two hundred twenty-one-a of the executive law, including his or her name and law enforcement agency, and shall transmit the original proof of service form to the issuing court.

(2) Within one business day of receipt of proof of service by a person other than a law enforcement officer, the clerk of the court shall submit the proof of service of a gun violence restraining order directly into the database established under section two hundred twenty-one-a of the executive law, including the name of the person who served the order. If the court is unable to provide this notification to the division of criminal justice services by electronic transmission, the court shall, within one business day of receipt, transmit a copy of the proof of service to a local law enforcement agency. The local law enforcement agency shall submit the proof of service directly into the registry established under section two hundred twenty-one-a of the executive law within one business day of receipt from the court.

7. (a) A person subject to a gun violence restraining order issued pursuant to this article shall not have in his or her custody or control, own, purchase, possess, or receive any firearms or ammunition while that order is in effect.

(b) (1) Upon issuance of a gun violence restraining order issued pursuant to this article, the court shall order the restrained person to surrender to the local law enforcement agency all firearms and ammuni-

tion in the restrained person's custody or control, or which the restrained person possesses or owns.

(2) The surrender ordered pursuant to subparagraph one of this paragraph shall occur by immediately surrendering all firearms and ammunition in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the restraining order. A law enforcement officer serving a gun violence restraining order that indicates that the restrained person possesses any firearms or ammunition shall request that all firearms and ammunition be immediately surrendered. Alternatively, if no request is made by a law enforcement officer, the surrender shall occur within twenty-four hours of being served with the order, by either surrendering all firearms and ammunition in a safe manner to the control of the local law enforcement agency, or by selling all firearms and ammunition to a licensed gun dealer. The law enforcement officer or licensed gun dealer taking possession of any firearms or ammunition pursuant to this subdivision shall issue a receipt to the person surrendering the firearm or firearms or ammunition or both at the time of surrender. A person ordered to surrender all firearms and ammunition pursuant to this subdivision shall, within forty-eight hours after being served with the order, do both of the following:

(A) File with the court that issued the gun violence restraining order the original receipt showing all firearms and ammunition have been surrendered to a local law enforcement agency or sold to a licensed gun dealer. Failure to timely file a receipt shall constitute a violation of the restraining order.

(B) File a copy of the receipt described in clause (A) of this subparagraph with the law enforcement agency that served the gun violence restraining order. Failure to timely file a copy of the receipt shall constitute a violation of the restraining order.

(c) (1) Any firearms or ammunition surrendered to a law enforcement officer or law enforcement agency pursuant to this section shall be retained by the law enforcement agency until the expiration of any gun violence restraining order that has been issued against the restrained person. Upon expiration of any order, any firearms or ammunition shall be returned to the restrained person.

(2) A restrained person who owns any firearms or ammunition that are in the custody of a law enforcement agency pursuant to this section and who does not wish to have the firearm or firearms or ammunition returned is entitled to sell or transfer title of any firearms or ammunition to a licensed dealer provided that the firearm or firearms or ammunition are otherwise legal to own or possess and the restrained person otherwise has right to title of the firearm or firearms or ammunition.

(d) If a person other than the restrained person claims title to any firearms or ammunition surrendered pursuant to this section, and he or she is determined by the law enforcement agency to be the lawful owner of the firearm or firearms or ammunition, the firearm or firearms or ammunition shall be returned to him or her.

§ 1212. Temporary emergency gun violence restraining order. 1. A temporary emergency gun violence restraining order may be issued on an ex parte basis only if a law enforcement officer asserts, and a judicial officer finds, that there is reasonable cause to believe both of the following:

(a) The subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another by having in

his or her custody or control, owning, purchasing, possessing, or receiving a firearm; and

(b) A temporary emergency gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or have been determined to be inadequate or inappropriate for the circumstances of the subject of the petition.

2. A temporary emergency gun violence restraining order issued pursuant to this section shall prohibit the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition, and shall expire twenty-one days from the date the order is issued.

3. A temporary emergency gun violence restraining order is valid only if it is issued by a judicial officer after making the findings required by subdivision one of this section and pursuant to a specific request by a law enforcement officer.

4. A temporary emergency gun violence restraining order issued under this section shall include all of the following:

(a) A statement of the grounds supporting the issuance of the order.

(b) The date and time the order expires.

(c) The address of the superior court for the county in which the restrained party resides; and

(d) The following statement: "To the restrained person: This order will last until the date and time noted above. You are required to surrender all firearms and ammunition that you own or possess in accordance with Article 12 of the Family Court Act and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive a firearm or ammunition, while this order is in effect. However, a more permanent gun violence restraining order may be obtained from the court. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order."

5. A law enforcement officer who requests a temporary emergency gun violence restraining order shall do all of the following:

(a) If the order is obtained orally, memorialize the order of the court on the form approved by the office of court administration;

(b) Serve the order on the restrained person, if the restrained person can reasonably be located;

(c) File a copy of the order with the court as soon as practicable after issuance;

(d) Have the order entered into the computer database system for protective orders maintained by the division of criminal justice services.

6. (a) (1) Except as provided in subparagraph two of this paragraph, the petition for a temporary emergency gun violence restraining order shall be obtained by submitting a written petition to the court.

(2) If time and circumstances do not permit the submission of a written petition, a temporary emergency gun violence restraining order may be issued in accordance with the procedures for obtaining an oral search warrant.

(b) The presiding judge of the supreme court of each county shall designate at least one judge, commissioner, or referee who shall be reasonably available to issue temporary emergency gun violence restraining orders when the family court is not in session.

§ 1213. Ex parte gun violence restraining order. 1. (a) A family member of a person or a law enforcement officer may file a petition requesting that the court issue an ex parte gun violence restraining order enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

(b) For the purposes of this section, "family member" shall mean a member of the same family or household as defined in section eight hundred twelve of this chapter.

(c) A court may issue an ex parte gun violence restraining order if the petition, supported by an affidavit made in writing and signed by the petitioner under oath, or an oral statement taken pursuant to subdivision two of this section and any additional information provided to the court shows that there is a substantial likelihood that both of the following are true:

(1) The subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm as determined by considering the factors listed in subdivision two of this section.

(2) An ex parte gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition.

(d) An affidavit supporting a petition for the issuance of an ex parte gun violence restraining order shall set forth the facts tending to establish the grounds of the petition, or the reason for believing that they exist.

(e) An ex parte order under this section shall be issued or denied on the same day that the petition is submitted to the court, unless the petition is filed too late in the day to permit effective review, in which case the order shall be issued or denied on the next day of judicial business in sufficient time for the order to be filed that day with the clerk of the court.

2. (a) (1) The court, before issuing an ex parte gun violence restraining order, shall examine on oath, the petitioner and any witness the petitioner may produce.

(2) In lieu of examining the petitioner and any witness the petitioner may produce, the court may require the petitioner and any witness to submit a written affidavit signed under oath.

(b) (1) In determining whether grounds for a gun violence restraining order exist, the court shall consider all evidence of the following:

(A) A recent threat of violence or act of violence by the subject of the petition directed toward another.

(B) A recent threat of violence or act of violence by the subject of the petition directed toward himself or herself.

(C) A violation of an emergency order of protection that is in effect at the time the court is considering the petition.

(D) A recent violation of an unexpired order of protection.

(E) A pattern of violent acts or violent threats within the past twelve months, including, but not limited to, threats of violence or acts of violence by the subject of the petition directed toward himself, herself, or another.

(2) In determining whether grounds for a gun violence restraining order exist, the court may consider any other evidence of an increased

risk for violence, including, but not limited to, evidence of any of the following:

(A) The unlawful and reckless use, display, or brandishing of a firearm by the subject of the petition.

(B) The history of use, attempted use, or threatened use of physical force by the subject of the petition against another person.

(C) Any prior arrest of the subject of the petition for a felony offense.

(D) Any history of a violation by the subject of the petition of an emergency order of protection.

(E) Any history of a violation by the subject of the petition of an order of protection.

(F) Documentary evidence, including, but not limited to, police reports and records of convictions, of either recent criminal offenses by the subject of the petition that involve controlled substances or alcohol or ongoing abuse of controlled substances or alcohol by the subject of the petition.

(G) Evidence of recent acquisition of firearms, ammunition, or other deadly weapons.

(3) For the purposes of this subdivision, "recent" shall mean within the six months prior to the date the petition was filed.

(c) If the court determines that grounds to issue an ex parte gun violence restraining order exist, it shall issue an ex parte gun violence restraining order that prohibits the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition, and expires no later than twenty-one days from the date of the order.

3. (a) An ex parte gun violence restraining order issued under this section shall include all of the following:

(1) A statement of the grounds supporting the issuance of the order.

(2) The date and time the order expires.

(3) The address of the superior court in which any responsive pleading should be filed.

(4) The date and time of the scheduled hearing.

(5) The following statement: "To the restrained person: This order is valid until the expiration date and time noted above. You are required to surrender all firearms and ammunition that you own or possess in accordance with Article 12 of the Family Court Act and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive a firearm or ammunition, while this order is in effect. A hearing will be held on the date and at the time noted above to determine if a more permanent gun violence restraining order should be issued. Failure to appear at that hearing may result in a court making an order against you that is valid for a year. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order."

(b) (1) An ex parte gun violence restraining order shall be personally served on the restrained person by a law enforcement officer, or any person who is at least eighteen years of age and not a party to the action, if the restrained person can reasonably be located.

(2) When serving a gun violence restraining order, a law enforcement officer shall inform the restrained person of the hearing scheduled pursuant to subdivision four of this section.

4. Within twenty-one days after the date on the order, before the court that issued the order or another court in the same jurisdiction, the court shall hold a hearing pursuant to section twelve hundred fourteen of this article to determine if a gun violence restraining order should be issued.

§ 1214. Gun violence restraining order issued after notice and hearing. 1. (a) A family member of a person or a law enforcement officer may request that a court, after notice and a hearing, issue a gun violence restraining order enjoining the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition for a period of one year.

(b) For the purposes of this section, "family member" shall mean a member of the same family or household as defined in section eight hundred twelve of this chapter.

2. In determining whether to issue a gun violence restraining order under this section, the court shall consider evidence of the facts identified in subparagraph one of paragraph (b) of subdivision two of section twelve hundred thirteen of this article and may consider any other evidence of an increased risk for violence, including, but not limited to, evidence of the facts identified in subparagraph two of paragraph (b) of subdivision two of section twelve hundred thirteen of this article.

3. (a) At the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that both of the following are true:

(1) The subject of the petition, or a person subject to an ex parte gun violence restraining order, as applicable, poses a significant danger of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition.

(2) A gun violence restraining order is necessary to prevent personal injury to the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable, or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition, or the person subject to an ex parte gun violence restraining order, as applicable.

(b) (1) If the court finds that there is clear and convincing evidence to issue a gun violence restraining order, the court shall issue a gun violence restraining order that prohibits the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition.

(2) If the court finds that there is not clear and convincing evidence to support the issuance of a gun violence restraining order, the court shall dissolve any temporary emergency or ex parte gun violence restraining order then in effect.

(c) The gun violence restraining order issued under this section shall have a duration of one year, subject to termination by further order of the court at a hearing held pursuant to subdivision four of this section and renewal by further order of the court pursuant to subdivision five of this section.

4. (a) A gun violence restraining order issued pursuant to this chapter shall include all of the following:

(1) A statement of the grounds supporting the issuance of the order.

(2) The date and time the order expires.

(3) The address of the superior court for the county in which the restrained party resides.

(4) The following statement: "To the restrained person: This order will last until the date and time noted above. If you have not done so already, you must surrender all firearms and ammunition that you own or possess in accordance with Article 12 of the Family Court Act. You may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive a firearm or ammunition, while this order is in effect. Pursuant to section 1214 of the Family Court Act, you have the right to request one hearing to terminate this order at any time during its effective period. You may seek the advice of an attorney as to any matter connected with the order."

(b) When the court issues a gun violence restraining order under this article, the court shall inform the restrained person that he or she is entitled to one hearing to request a termination of the order, pursuant to subdivision five of this section, and shall provide the restrained person with a form to request a hearing.

5. (a) A person subject to a gun violence restraining order issued under this section may submit one written request at any time during the effective period of the order for a hearing to terminate the order.

(b) If the court finds after the hearing that there is no longer clear and convincing evidence to believe: (1) that the person poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm as determined under section twelve hundred thirteen of this article; or

(2) that a gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another, the court shall terminate the order.

6. (a) (1) A family member of a restrained person or a law enforcement officer may request a renewal of a gun violence restraining order at any time within the three months before the expiration of a gun violence restraining order.

(2) For the purposes of this subdivision, "family member" shall mean a member of the same family or household as defined in section eight hundred twelve of this chapter.

(b) A court may, after notice and a hearing, renew a gun violence restraining order issued under this section if the petitioner proves, by clear and convincing evidence, that the subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm as determined by considering the factors listed in subdivision two of this section; or that a gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition.

(c) In determining whether to renew a gun violence restraining order issued under this section, the court shall consider evidence of the facts identified in subparagraph one of paragraph (b) of subdivision two of section twelve hundred thirteen of this article and may consider any other evidence of an increased risk for violence, including, but not limited to, evidence of the facts identified in subparagraph two of paragraph (b) of subdivision two of section twelve hundred thirteen of this article.

(d) At the hearing, the petitioner shall have the burden of proving, by clear and convincing evidence, that the subject of the petition poses a significant danger, in the near future, of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm as determined by considering the factors listed in subdivision two of this section; or that a gun violence restraining order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances of the subject of the petition.

(e) If the renewal petition is supported by clear and convincing evidence, the court shall renew the gun violence restraining order issued under this section.

(f) The renewal of a gun violence restraining order issued pursuant to this section shall have a duration of one year, subject to termination by further order of the court at a hearing held pursuant to subdivision five of this section and further renewal by further order of the court pursuant to this subdivision.

(g) A gun violence restraining order renewed pursuant to this section shall include the following information:

(1) A statement of the grounds supporting the issuance of the order.

(2) The date and time the order expires.

(3) The address of the superior court in which any responsive pleading should be filed.

(4) The date and time of the scheduled hearing.

(5) The following statement: "To the restrained person: This order is valid until the expiration date and time noted above. You are required to surrender all firearms and ammunition that you own or possess in accordance with Article 12 of the Family Court Act and you may not have in your custody or control, own, purchase, possess, or receive, or attempt to purchase or receive a firearm or ammunition, while this order is in effect. A hearing will be held on the date and at the time noted above to determine if a more permanent gun violence restraining order should be issued. Failure to appear at that hearing may result in a court making an order against you that is valid for a year. You may seek the advice of an attorney as to any matter connected with the order. The attorney should be consulted promptly so that the attorney may assist you in any matter connected with the order."

7. Any hearing held pursuant to this section may be continued upon a showing of good cause. Any existing order issued pursuant to this subdivision shall remain in full force and effect during the period of continuance.

8. If a person subject to a gun violence restraining order issued or renewed pursuant to this section was not present in court at the time the order was issued or renewed, the gun violence restraining order shall be personally served on the restrained person by a law enforcement officer or any person who is at least eighteen years of age and not a party to the action, if the restrained person can reasonably be located.

§ 1215. Offenses. 1. Every person who files a petition for an ex parte gun violence restraining order pursuant to section twelve hundred thirteen of this article, or a gun violence restraining order issued after notice and a hearing pursuant to section twelve hundred fourteen of this article, knowing the information in the petition to be false or with the intent to harass, is guilty of a misdemeanor.

2. Every person who owns or possesses a firearm or ammunition with knowledge that he or she is prohibited from doing so by a temporary emergency gun violence restraining order issued pursuant to section twelve hundred twelve of this article, an ex parte gun violence restraining order issued pursuant to section twelve hundred thirteen of this article, or a gun violence restraining order issued after notice and a hearing issued pursuant to section twelve hundred fourteen of this article, is guilty of a misdemeanor and shall be prohibited from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition for a five-year period, to commence upon the expiration of the existing gun violence restraining order.

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law.