



STATE OF DELAWARE
THE JUSTICE OF THE PEACE COURT


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POLICY DIRECTIVE 18-261

TO: ALL JUSTICES OF THE PEACE

FROM: ALAN G. DAVIS
CHIEF MAGISTRATE 

RE: NEW GUN RELINQUISHMENT LAWS

DATE: NOVEMBER 2, 2018

Scope:

This Policy Directive explains the law and related legal considerations for two (2) recently-passed statutory provisions permitting the Court to order the relinquishment of firearms and ammunition in limited circumstances. It sets forth the legal standards by which the applications are to be judged as well as a brief explanation of the process by which applications will be received and decided upon.

Justice of the Peace Court Policy:

It is the policy of the Justice of the Peace Court to ensure compliance with the law regarding relinquishment of weapons in limited circumstances.

Policy Directives/Legal Memoranda Affected:

A Procedural Memorandum regarding this process is forthcoming.

No other policy directive or legal memorandum are affected.

Effective Date:

This policy shall take effect immediately upon issuance and shall continue until further notice.

Discussion:

The recent legislative session, ending on June 30, 2018, saw several bills introduced and debated about various issues related to gun control. Of significance to the Justice of the Peace Court were House Substitute No. 1 to House Bill No. 222 (hereinafter referred to as the “Lethal Violence Protective Order” bill) and House Substitute No. 1 to House Bill No. 302 (hereinafter referred to as the “Beau Biden Gun Violence Protection Act”). Both of these bills were signed into law with the aim of providing a civil process by which firearms and ammunition may be seized from an individual due to concern about their dangerousness to self and others. Both laws provide that the Justice of the Peace Court is the initial court in which an application for gun relinquishment must be brought by a law enforcement officer.

While both recent gun relinquishment laws have similarities, there are also both procedural and legal distinctions in each. This policy directive will summarize each new law in turn and will then provide a general discussion regarding the standard of proof for each and a general overview of the intended process for both.

Summary of Laws**Lethal Violence Protective Order**

Signed into law on June 27, 2018, House Substitute 1 for House Bill 222, provides a path for gun relinquishment for both law enforcement and citizens who believe that a person poses a danger of causing physical injury to self or others by controlling, owning, purchasing, possessing, having access to or receiving a firearm. This Act permits a law enforcement officer to apply for and obtain an Emergency Lethal Violence Protective Order in the Justice of the Peace Court if the Court finds, by a preponderance of the evidence, that a respondent poses an immediate and present danger of causing physical injury to self or others by owning, possessing, controlling, purchasing, having access to or receiving a firearm. If an order is issued by the Justice of the Peace Court, it will require the relinquishment of firearms and/or to law enforcement, grant permission for law enforcement to search for and seize firearms and/or ammunition and may prohibit the individual from residing with others who possess firearms and/or ammunition. In doing so, the Court may not impair or limit the right to keep and bear arms of an individual who is not subject to the order.

Following an order issued by the Justice of the Peace Court, a full hearing must take place in Superior Court within 15 days. If needed, in order to effectuate service, the Justice of the Peace Court or the Superior Court may extend an emergency order as

needed to ensure the protection of the respondent or others, but the duration of the order may not exceed 45 days. At the hearing in Superior Court, if the Court finds by clear and convincing evidence that the respondent poses an immediate and present danger of causing physical injury to self or others by controlling, owning, purchasing, possessing, having access to or receiving a firearm, the Superior Court shall issue a Lethal Violence Protective Order (LVPO). If the Superior Court finds that there is not clear and convincing evidence to support the issuance of a Lethal Violence Protective Order, the Court shall vacate any Emergency Lethal Violence Protective Order that is in effect at that time.

Applications for a LVPO brought before the Justice of the Peace Court are brought on an emergency basis by a law enforcement officer. A private citizen may also file a verified pleading requesting a LVPO, however, that must be done on a non-emergency basis in Superior Court. If a citizen files such a pleading, the process begins with the full hearing held in Superior Court within 15 days and then follows the subsequent processes identified above.

A respondent subject to a Lethal Violence Protective Order issued by the Superior Court may submit one (1) written request at any time during the effective period of the order, requesting a hearing to terminate the order. At that hearing, the respondent must prove by clear and convincing evidence that s/he no longer poses a danger. The petitioner may request a renewal of the order at any time within three (3) months before expiration of the order. At a renewal hearing, the petitioner must prove by clear and convincing evidence that the respondent continues to pose a danger.

Finally, this legislation creates sanctions for any person who provides false information in the affidavit or verified pleading in order to obtain a Lethal Violence Protective Order. Sanctions are also created for a person who violates a Lethal Violence Protective Order by adding it to Section 1271A of Title 11, making a violation of the order criminal contempt.

Beau Biden Gun Violence Prevention Act

Signed into law on April 30, 2018, the “Beau Biden Gun Violence Prevention Act” provides a path for gun relinquishment when a mental health provider makes a report to law enforcement due to a concern that a client is dangerous to self or others and is in possession of firearms or ammunition. Specifically, this Act allows a law enforcement officer to apply for an Order of Relinquishment from the Justice of the Peace Court if the officer has probable cause to believe that an individual who is the subject of a report from a mental health provider is dangerous to others or self and is in possession of firearms or ammunition. The Justice of the Peace Court must hold a hearing on this application immediately. If the Justice of the Peace Court finds that probable cause exists, it must order the relinquishment of the Respondent’s firearms and/or ammunition to law enforcement, grant permission for law enforcement to search for and seize firearms and/or ammunition and may prohibit the Respondent from residing with others who possess firearms and/or ammunition. In doing so, the Court may not

impair or limit the right to keep and bear arms of an individual who is not subject to an order. An Order of Relinquishment from the Justice of the Peace Court expires after 30 days.

Simultaneous to the law enforcement officer seeking an Order of Relinquishment at the Justice of the Peace Court, the law enforcement officer must also refer the matter to the Department of Justice. If the Justice of the Peace Court issues an Order of Relinquishment, the Department of Justice must file a petition at the Superior Court for a relinquishment order that would continue after the expiration of the order issued by the Justice of the Peace Court. If the Department of Justice chooses not to file a petition with the Superior Court, the order issued by the Justice of the Peace Court simply expires at the conclusion of 30 days.

The hearing in the Justice of the Peace Court is conducted on an expedited schedule and is intended to be ex parte; the respondent does not have the right to be at the hearing. However, at the Superior Court hearing, the respondent has the right to notice, to be heard, to present evidence and cross examine witnesses. At the Superior Court hearing, the Department of Justice has the burden of proving by clear and convincing evidence that the individual is dangerous to self or others. A respondent subject to a Superior Court order of relinquishment may petition the Relief from Disabilities Board for an order to return firearms or ammunition.

Of note, this Act also creates a new section (§5403) of Title 16 which permits a mental health service provider, institution, agency or hospital to disclose confidential communications to law enforcement if the service provider, institution, agency or hospital concludes that the patient is dangerous to self or others. This is a discretionary disclosure; however, the statute protects the service provider from a criminal or civil cause of action as a result of making the communication. Additionally, the Act expands the definition of “dangerous to others” for purposes of this law to take into account a more temporal imminence to the person’s actions.¹

Standard of Proof

The Lethal Violence Protective Order

The LVPO law provides that the petitioner (law enforcement agency) has the burden of demonstrating that reason exists to believe that a respondent poses an immediate and present danger of causing physical injury to self or others by owning, possessing, controlling, purchasing, having access to, or receiving a firearm. The LVPO law defines relevant terms as follows:

¹ The definition of “dangerous to others”, pursuant to 16 *Del. C.* § 5001(3), employs the phrase “within the immediate future.” The definition of “dangerous to others,” pursuant to 11 *Del. C.* § 1448(C), employs the phrase “within the reasonably foreseeable future.”

10 Del.C. § 7701

- (1) "Firearm" means as defined in § 222 of Title 11.
- (2) "Law-enforcement officer" means as defined in § 222 of Title 11.
- (3) "Lethal violence protective order" means an order issued by the Justice of the Peace Court or Superior Court prohibiting and enjoining a person from controlling, owning, purchasing, possessing, having access to, or receiving a firearm.
- (4) "Petitioner" means either of the following:
 - a. A family member of the respondent as defined in § 901 of this title or a member of the class defined in § 1041(2)b. of this title.
 - b. A law-enforcement officer who files a petition alleging that the respondent poses a danger of causing physical injury to self or others by controlling, owning, purchasing, possessing, having access to or receiving a firearm.
- (5) "Physical injury" means as defined in § 222 of Title 11.
- (6) "Respondent" means the individual who is alleged to pose a danger of causing physical injury to self or others by controlling, owning, purchasing, possessing, having access to or receiving a firearm.

The standard of proof to be applied in these proceedings is a preponderance of the evidence. The Delaware Supreme Court has defined preponderance of the evidence to mean the side on which the "greater weight of evidence" is found.² The Family Court similarly defined preponderance of the evidence in *Shipman v. Division of Social Services*, as such relevant evidence as will enable the court to determine the identity of the litigant who should prevail, with the weight of evidence tipping in favor of that litigant. The Court went on to assert that if the evidence is even in balance, the litigant having the burden of persuasion by a preponderance of the evidence has failed to sustain that burden.³ The tipping of the scales is a common metaphor for the preponderance of the evidence standard, one that aptly describes that the evidence must show that the alleged finding is "more likely than not".⁴

The Beau Biden Gun Prevention Act

The Beau Biden Gun Prevention Act provides that the law enforcement agency has the burden of demonstrating that probable cause exists to believe that the individual subject to the report is dangerous to others or self and in possession of firearms or ammunition. The Act defines the relevant terms as follows:

² *Taylor v. State*, 748 A.2d 914 (Del. 2000).

³ 454 A.2d 767 (Del. Fam. Ct. 1982)

⁴ DEL. P.J.I. CIV. §4.1 (2000)

(2) "Dangerous to others" means that by reason of mental condition there is a substantial likelihood that the person will inflict serious bodily harm upon another person within the reasonably foreseeable future. This determination must take into account a person's history, recent behavior, and any recent act or threat.

(3) "Dangerous to others or self" means as "dangerous to others" and "dangerous to self" are defined in this subsection.

(4) "Dangerous to self" means that by reason of mental condition there is a substantial likelihood that the person will sustain serious bodily harm to oneself within the reasonably foreseeable future. This determination must take into account a person's history, recent behavior, and any recent act or threat.

The standard of proof to be used in these applications is that of probable cause. Probable cause is a common sense determination made by the issuing judicial officer based upon the facts contained within the affidavit. The Superior Court of Delaware has asserted that probable cause is based on the totality of the circumstances and a case-by-case review of, "...the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."⁵ Additionally, the Superior Court of Delaware has noted that probable cause cannot be simplified with any mathematical precision and lies somewhere between suspicion and sufficient evidence to convict.⁶

The most commonly used and understood application of probable cause is that utilized in the warrant process. The differentiation between probable cause to search and probable cause to arrest are likely useful here. As the Delaware Supreme Court has stated, these are not fungible legal concepts and each involves a different inquiry. The focus of probable cause to search is on a place. The focus of probable cause to arrest and, in this case, issue a Lethal Violence Protective Order, is on the person. Here, the question is whether the individual is dangerous to others or self and is in possession of firearms or ammunition. In applying the probable cause standard, a determination may be made using the totality of the circumstances test to determine if a "fair probability" exists that the individual meets the definition.⁷

Process

The process for receiving both types of applications will occur in a manner similar to that of a warrant application. Receipt will occur electronically with the officer appearing for the hearing shortly thereafter. If an order is issued, the officer will receive

⁵ *State v. Maxwell*, 624 A.2d 926, 928 (Del.1993) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, 544 (1983)).

⁶ *Quartarone v. Kohl's Dep't Stores, Inc.*, 983 A.2d 949 (Del. Super. Ct. 2009).

⁷ *Sisson v. State*, 903 A.2d 288 (Del. 2006)

a copy directly after the hearing. A more detailed explanation of the procedural aspects of these matters may be found in a forthcoming procedural memorandum.

Conclusion:

It is the policy of the Justice of the Peace Court to ensure compliance with the law regarding relinquishment of weapons in limited circumstances. This policy directive sets forth the legal standards by which the applications are to be judged as well as a brief explanation of the process by which applications will be received and decided upon.

cc: All Justice of the Peace Court Employees
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Honorable Andre Bouchard
Honorable Jan Jurden
Honorable Alex J. Smalls
Honorable Michael K. Newell
Amy Quinlan, State Court Administrator
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