

Adjunct Statement to Testimony

Thank you for allowing me to provide a short additional statement to the Committee on H. 133.

Based on my previous statement and further testimony by Judge Brian Grearson, Asst. Attorney General Davis Scherr and also South Burlington Chief Shawn Burke, VT Traditions Coalition add the following observations.

First, that the Judiciary recognizes a basis for discretion under 15 VSA 1101 (5), 1102, 1103 (a)(b), 1104 (b), and 1106 (a) to name just a few that the confiscation of firearms and other weapons may be ordered under both Temporary and Final Orders under these Relief from Abuse statutes.

The Judiciary and Attorney General support the Bill at least in part to clear up and avoid any "inconsistency across counties" of use of that discretion, although they cite no hard evidence or data to support that concern. The validity of that anecdotal concern could be assuaged if the ERPO (Extreme Risk Protection Order) statute were utilized for ALL future confiscations resulting from the Petition for RFAs filed under the above cited statutes.

Any concern for the inconsistency is minimized if taken with data for the issuance of ERPOs as data could then be provided by county over time to see where any inconsistency appears. The Family Court already keeps similar data as Judge Grearson observed.

Defendant concerns with a lack of substantial evidentiary standard and the use of hearsay regarding the possession and location of firearms is not of concern to these witnesses as such, based on statements to date. Defendants ability to rebut assertions that the mere possession of firearms asserts a real threat is also not of concern based on Judge Grearson and others' statements about the necessity to lock this discretion into a statutory mandate.

By enshrining the confiscation of firearms into RFA statute they well ensure the use of the ERPO will not allow defendants access to a higher evidentiary standard. This is the bare assertion and intent of the Bill and the recent Proposal of Amendment. That will create an inconsistency of application of evidentiary standards for identical mechanisms seeking these confiscations.

This Committee along with many of the current participants in today's discussions were stakeholders and testified to create the ERPO statute in 2018. That process provided for a higher evidentiary standard for Final Orders requiring the confiscation of firearms known to be owned or possessed by the defendant. Although the Right to Counsel is not included in that process, it established a respect for the Article 16 right that demanded at least "Clear and Convincing" evidence of a threat to harm themselves or others.

See: <https://legislature.vermont.gov/bill/status/2018/S.221>

Denial of access to that statutory process by legislation in H. 133 represents a roll back of that legislation's intent and effect. All procedures requesting firearms confiscation under these Domestic Relations Statutes should mandate the highest level of protection for Defendant be accessed by the choice of venue, procedure and statute applied. The ERPO provides a higher standard of protections and therefore all future RFA requests where firearms are mentioned in the supporting Affidavits under 15 VSA 1101 (a) should be, by Judiciary direction, Rules and Procedures, automatically forwarded to the ERPO venue for any Final Order request determinations involving firearms. As that venue is identical, referrals should be simultaneous with the initial filing of the Affidavit and Request for Relief from Abuse under the statute.

in the past, with two years plus of having the ERPO statute in law, the Judiciary should have been endeavoring to reconcile the usage of these overlaps in jurisdiction. Instead today we are asked to partially void the ERPO statute's intent and effect by enshrining the RFA "supposed discretion" in a statute with lower evidentiary standards, no access to Right to Counsel appointed by the Court and denial of access to a choice of which procedure the defendant can prefer.

All this to my non-attorney eyes says that past use of the discretionary RFA firearms confiscation powers after effective dates in the ERPO statute created a right to appeal on many fronts. Defendants' access to the higher standard of evidence fully known to the Judiciary raises questions of the Common Benefits Clause under Vermont Constitution and precedent such as the aforementioned Brigham case, especially if Judge Grearson is correct that the RFA confiscation discretion has been used inconsistently across counties.

Since the effective dates of the ERPO process was available to Judges they should have been erring against the use of a "created" discretion in 15 VSA 1101(a) etc. and leaning towards the use of the higher standards in ERPO. Add to these the facts that were submitted in development of the ERPO law, and H.133 represents an attempt to

undermine the legislative intent of a past Legislative Biennium and Acts & Resolves of the State of Vermont.

A colourable assertion can be made that Substantive Due Process has been denied every time an RFA has failed to be referred to the ERPO process for firearms confiscation since its enactment, and that future similar Final Orders under 15 VSA 1101(a) be vulnerable to Appeal for various reasons.

Future orders that fail to make use of the ERPO statute as appropriate should be denied and referred for ERPO statute, and if not, a suit should commence under 42 U.S.C. § 1983 for violation of Defendants Rights to Due Process.

See also: <https://www.law.cornell.edu/uscode/text/42/1983>

Respectfully submitted,

William R. Moore, Firearms Policy Analyst

Vermont Traditions Coalition

vermonttraditions.org