

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Education

BILL: SPB 7106
INTRODUCER: Education Committee
SUBJECT: Risk Protection Orders
DATE: April 11, 2019 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Olenick	Sikes		ED Submitted as Comm. Bill/Fav

I. Summary:

SPB 7106 expands the definition of a petitioner for purposes of seeking a risk protection order from a court. In addition to law enforcement officers and agencies, the bill specifies that a petitioner may include certain family members of the respondent or a person who is the respondent's legal guardian. The bill provides these persons the ability to file a petition seeking a risk protection order without the assistance of law enforcement.

The bill is effective July 1, 2019.

II. Present Situation:

Background

In 2018, the Florida Legislature passed the Marjory Stoneman Douglas High School Public Safety Act (Act) in response to a tragic school shooting.¹ In addition to other provisions in the Act, the law addresses public safety by restricting firearm and ammunition possession by a person who poses a danger to himself or herself or others.²

Risk Protection Orders in Florida

Section 790.401, F.S., contains a process for a law enforcement officer or a law enforcement agency to petition a circuit court for a temporary ex parte risk protection order and a final risk protection order.³ The intent of the process and court intervention is to temporarily prevent

¹ Chapter 2018-3, s. 16, L.O.F.

² See s. 790.401, F.S. From March 2018 through January 2019, 1,316 petitions for ex parte risk protection orders were granted and 1,176 petitions for risk protection order petitions were granted. Information provided by individual clerks of court to the Office of the State Courts Administrator. (On file with the Florida Senate Committee on Education).

³ The law enforcement officer or law enforcement agency petitioning the court for a risk protection order (petitioner) must make a good faith effort to provide notice to a family or household member of the respondent and to any known third party who may be at risk of violence. The notice must state that the petitioner intends to petition the court for a risk protection order or has already done so and must include referrals to appropriate resources, including mental health, domestic violence,

persons from accessing firearms when there is demonstrated evidence that a person poses a significant danger to himself or herself or others, including significant danger as a result of a mental health crisis or violent behavior. The process strikes a balance between the rights of the person (respondent) including due process of law, and reducing death or injury as a result of his or her use of firearms during a mental health crisis.⁴

To issue a risk protection order the court must find by clear and convincing evidence that the respondent poses a significant danger of causing personal injury to himself or herself or others by having in his or her custody or control, or by purchasing, possessing, or receiving, a firearm.⁵

A court, in determining whether grounds for a risk protection order exist may consider any relevant evidence including, but not limited to:

- A recent act or threat of violence by the respondent against himself or herself or others, whether or not such violence or threat of violence involves a firearm;
- An act or threat of violence by the respondent within the past 12 months, including, but not limited to, acts or threats of violence by the respondent against himself or herself or others;
- Evidence of the respondent being seriously mentally ill or having recurring mental health issues;
- A violation by the respondent of a protection order or a no contact order issued under ss. 741.30, 784.046, or 784.0485, F.S.;
- A previous or existing risk protection order issued against the respondent;
- A violation of a previous or existing risk protection order issued against the respondent;
- Whether the respondent, in this state or any other state, has been convicted of, had adjudication withheld on, or pled nolo contendere to a crime that constitutes domestic violence as defined in s. 741.28, F.S.;
- Whether the respondent has used, or has threatened to use, against himself or herself or others any weapons;
- The unlawful or reckless use, display, or brandishing of a firearm by the respondent;
- The recurring use of, or threat to use, physical force by the respondent against another person, or the respondent stalking another person;
- Whether the respondent, in this state or any other state, has been arrested, convicted of, had adjudication withheld on, or pled nolo contendere to a crime involving violence or a threat of violence;
- Corroborated evidence of the abuse of controlled substances or alcohol by the respondent;
- Evidence of recent acquisition of firearms by the respondent;
- Any relevant information from family and household members concerning the respondent; and
- Witness testimony, taken while the witness is under oath, relating to the matter before the court.⁶

and counseling resources. The petitioner must attest in the petition to having provided such notice or must attest to the steps that will be taken to provide such notice. Section 790.401(2)(f), F.S.

⁴ Chapter 2018, s. 14, L.O.F.

⁵ Section 790.401(3)(b), F.S.

⁶ Section 790.401(3)(c)1.-15., F.S.

If the court issues a risk protection order it may do so for a period that it deems appropriate, up to and including but not exceeding 12 months.⁷

Florida law allows the petitioner to request that a court issue a temporary ex parte risk protection order, without notice to the respondent, before the hearing for a final risk protection order has occurred. To issue the ex parte order, the court must find that the respondent poses a significant danger of causing personal injury to himself or herself or to others in the near future by having in his or her custody or control or by purchasing, possessing, or receiving a firearm or ammunition.⁸ The court must consider all relevant evidence, including the evidence described above, in determining whether to issue an ex parte risk protection order.⁹

Upon issuance of a risk protection order, including a temporary ex parte risk protection order, the court must order the respondent to surrender to the local law enforcement agency all firearms and ammunition in the respondent's custody, control, or possession, and any license to carry a concealed weapon or firearm issued under s. 790.06, F.S.¹⁰

The law enforcement officer serving a risk protection order, including a temporary ex parte risk protection order, must request that the respondent immediately surrender all firearms and ammunition in his or her custody, control, or possession and any license to carry a concealed weapon or firearm issued under s. 790.06, F.S. The law enforcement officer must take possession of all firearms and ammunition belonging to the respondent that are surrendered.¹¹

Alternatively, if personal service by a law enforcement officer is not possible or is not required because the respondent was present at the risk protection order hearing, the respondent must surrender the firearms and ammunition owned by the respondent and any license to carry a concealed weapon or firearm issued under s. 790.06, F.S., in a safe manner to the control of the local law enforcement agency immediately after being served with the order by service or immediately after the hearing at which the respondent was present.¹²

Notwithstanding ss. 933.02 and 933.018, F.S., a law enforcement officer may seek a search warrant from a court to conduct a search for firearms or ammunition if the officer has probable cause to believe that there are firearms or ammunition in the respondent's custody, control, or possession that have not been surrendered.¹³

At the time of surrender, a law enforcement officer taking possession of a firearm, any ammunition, or a license to carry a concealed weapon or firearm issued under s. 790.06, F.S., must issue a receipt identifying all firearms and the quantity and type of ammunition that have been surrendered and must provide a copy of the receipt to the respondent. Within 72 hours after service of the order, the law enforcement officer serving the order shall file the original receipt with the court and ensure that his or her law enforcement agency retains a copy of the receipt.

⁷ Section 790.401(3)(b), F.S.

⁸ Section 790.401(4)(a), F.S.

⁹ Section 790.401(4)(b), F.S.

¹⁰ Sections 790.401(3)(g), (4)(e), and (7)(a), F.S.

¹¹ Section 790.401(7)(b), F.S.

¹² *Id.*

¹³ *Id.*

All law enforcement agencies must develop policies and procedures by January 1, 2019, regarding the acceptance, storage, and return of firearms or ammunition required to be surrendered.¹⁴

Upon the sworn statement or testimony of any person alleging that the respondent has failed to comply with the surrender of firearms or ammunition as required by a risk protection order or temporary ex parte risk protection order, the court must determine whether probable cause exists to believe that the respondent has failed to surrender all firearms or ammunition in his or her custody, control, or possession. If the court finds that probable cause exists, the court must issue a warrant authorizing a search of the locations where the firearms or ammunition are reasonably believed to be found and the seizure of any firearms or ammunition discovered pursuant to such search.¹⁵

A law enforcement agency must provide notice to any family or household members of the respondent before the return of any surrendered firearm and ammunition.¹⁶ A respondent may elect to transfer all firearms and ammunition that have been surrendered to or seized by a local law enforcement agency to another person who is willing to receive the respondent's firearms and ammunition. The law enforcement agency may allow such a transfer only if it is determined that the chosen recipient:

- Currently is eligible to own or possess a firearm and ammunition under federal and state law after confirmation through a background check;
- Attests to storing the firearms and ammunition in a manner such that the respondent does not have access to or control of the firearms and ammunition until the risk protection order against the respondent is vacated or ends without extension; and
- Attests not to transfer the firearms or ammunition back to the respondent until the risk protection order against the respondent is vacated or ends without extension.¹⁷

Within 24 hours after issuance, the clerk of the court shall enter any risk protection order or temporary ex parte risk protection order issued under this section into the uniform case reporting system.¹⁸

Also within 24 hours after issuance, the clerk of the court shall forward a copy of an order issued under this section to the appropriate law enforcement agency specified in the order. Upon receipt of the copy of the order, the law enforcement agency shall enter the order into the Florida Crime Information Center and National Instant Criminal Background Check System. The order must remain in each system for the period stated in the order, and the law enforcement agency shall only remove orders from the systems that have ended or been vacated. Entry into the Florida Crime Information Center and National Crime Information Center constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any county in this state.¹⁹

¹⁴ Section 790.401(7)(c), F.S.

¹⁵ Section 790.401(7)(d), F.S.

¹⁶ Section 790.401(8)(c), F.S.

¹⁷ Sections 790.401(9), F.S.

¹⁸ Section 790.401(10)(a), F.S.

¹⁹ Section 790.401(10)(b), F.S.

The issuing court shall forward, within three business days after issuance of a risk protection order or temporary ex parte risk protection order, all available identifying information concerning the respondent, along with the date of order issuance, to the Department of Agriculture and Consumer Services. Upon receipt of the information, the department shall determine if the respondent has a license to carry a concealed weapon or firearm. If the respondent does have a license to carry a concealed weapon or firearm, the department must immediately suspend the license.²⁰

If a risk protection order is vacated before its end date, the clerk of the court shall, on the day of the order to vacate, forward a copy of the order to the Department of Agriculture and Consumer Services and the appropriate law enforcement agency specified in the order to vacate. Upon receipt of the order, the law enforcement agency shall promptly remove the order from any computer-based system in which it was entered.²¹

A person who makes a false statement, which he or she does not believe to be true, under oath in a hearing under s. 790.401, F.S., in regard to any material matter commits a felony of the third degree.²²

A person who has in his or her custody or control a firearm or any ammunition or who purchases, possesses, or receives a firearm or any ammunition with knowledge that he or she is prohibited from doing so by a risk protection order commits a felony of the third degree.²³

Risk Protective Orders in Other States, Federal Legislation

Risk protection order laws, also known as gun violence restraining orders, red flag orders, and extreme risk protection orders have been and are being enacted in other states. Specifically, these risk protection order laws enable law enforcement, and in some states, family and household members, to petition a court to remove a person's access to guns if he or she poses an imminent danger to self or others.²⁴

In 1999, Connecticut became the first state to pass a law similar to a risk protection order, providing for a state attorney or two law enforcement officers to file a sworn affidavit seeking court authority to temporarily remove a person's firearms to prevent imminent harm.²⁵ Currently,

²⁰ Section 790.401(10)(c), F.S.

²¹ Section 790.401(10)(d), F.S.

²² Section 790.401(11)(a), F.S. A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082, 775.083, and 775.084, F.S.

²³ Section 790.401(11)(b), F.S.

²⁴ Giffords Law Center to Prevent Gun Violence, *Gun Violence Protective Orders*, available at <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/gun-violence-protective-orders/> (last visited April 10, 2019).

²⁵ Section 29-38C, Conn. Gen. Stat.

fourteen states and the District of Columbia have passed risk protection order laws.²⁶ In March of 2019, Colorado passed HB 1177, and the bill is awaiting the Governor’s signature.²⁷

Congress is currently considering several bills related to risk protection orders. On January 3, 2019, Senator Rubio introduced a bill entitled the “Extreme Risk Protection Order and Violence Prevention Act of 2019.”²⁸ The requirements are virtually identical to s. 790.401, F.S., the major difference being that the federal bill includes the ability of family or household members to act as a petitioner, in addition to a law enforcement officer.²⁹ The bill authorizes appropriations in the amount of \$20 million for each fiscal year from 2019 through 2023 to be awarded by the Department of Justice to states and Indian tribes that have enacted qualifying risk protection order laws. The purpose of the grant funds is to provide assistance to law enforcement agencies or the courts in carrying out the provisions of the state or tribal risk protection order law.³⁰

III. Effect of Proposed Changes:

The bill expands the definition of “petitioner” to include the following individuals as a petitioner for the purpose of seeking a risk protection order under s. 790.401, F.S.:

- An individual with a biological or legal parent-child relationship with the respondent;
- An individual with a stepparent-stepchild relationship with the respondent;
- An individual with a grandparent-grandchild relationship with the respondent;
- An individual who is the legal guardian of a respondent; or
- A sibling of a respondent.

²⁶ These states are: California (Cal. Penal Code s. 18125; Cal. Penal Code s. 18150; Cal. Penal Code s. 18175); Connecticut Conn. Gen. Stat. § 29-38c; Delaware (10 Del. C. 7701, et seq.); District of Columbia 17.2017 DC B 1068, Act 629 (effective until April 30, 2019); 2017 DC B22-0588, Act A22-0620 (projected law date June 6, 2019); Florida (Section 790.401, F.S.); Illinois (430 ILCS 67/1, et seq.); Indiana (Section 35-47-14, Ind. Code Ann); Maryland (Md Public Safety Code 5-601, et seq.); Massachusetts (Mass. Gen. Laws ch. 140, s. 121; Mass. Gen. Laws ch. 140, s. 129B(C); Mass. Gen. Laws ch. 140, s. 131(C); Mass. Gen. Laws ch. 140, s. 131R-Z); New Jersey (2018 NJ A 1217); New York (2019 NY SB 2451); Oregon (ORS 166.525, et seq.); Rhode Island (RI Gen Laws 8-8.3-1, et seq.); Vermont (13 VSA 4051, et seq.); Washington (Wash. Rev. Code s. 7.94.030; Wash. Rev. Code s. 7.94.040; Wash. Rev. Code s. 7.94.050; Wash. Rev. Code s. 7.94.080); See Giffords Law Center to Prevent Gun Violence, *Gun Law TrendWatch*, April 2, 2019, available at <https://lawcenter.giffords.org/wp-content/uploads/2019/04/Giffords-Law-Center-Gun-Law-Trendwatch-4.2.19.pdf> (last visited April 10, 2019); Everytown for Gun Safety, *Red Flag Laws, Fact Sheets, Protecting Kids and Communities*, March 25, 2019, available at https://everytownresearch.org/red-flag-laws/#foot_note_2 (last visited April 10, 2019).

²⁷ Colorado (HB 1177, 2019). See Everytown for Gun Safety, *Red Flag Laws, Fact Sheets, Protecting Kids and Communities*, March 25, 2019, available at https://everytownresearch.org/red-flag-laws/#foot_note_2 (last visited April 10, 2019).

²⁸ Congress.gov, *S. 7 – Extreme Risk Protection Order and Violence Prevention Act of 2019*, 116th Congress (2019-2020), available at <https://www.congress.gov/bill/116th-congress/senate-bill/7/text?q=%7B%22search%22%3A%5B%22%5C%22risk+protection+order%5C%22%22%5D%7D> (last visited April 10, 2019).

²⁹ *Id.* The federal bill defines “family or household member” as any: individual related by blood, marriage, or adoption to the respondent; dating partner of the respondent; individual who has a child in common with the respondent, regardless of whether the individual has been married to the respondent; or lived together with the respondent at any time; individual who resides or has resided with the respondent during the past year; spouse or intimate partner of the respondent; individual who has a biological or legal parent-child relationship with the respondent, including a stepparent-stepchild and grandparent-grandchild relationship; and individual who is acting or has acted as the legal guardian of the respondent

³⁰ *Id.*

The bill allows for a petition for a risk protection order to be filed by any of these listed persons, and specifies that the petition must be filed in the petitioner's county of residence or the respondent's county of residence. If the petition is filed by a law enforcement officer or his or her agency, it must be filed in the county where the office is located.

The bill also clarifies that the address of record, if the petitioner is not a law enforcement officer, is the residence of the petitioner.

The bill is effective July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 790.401 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
