

SACRIFICING THE CONSTITUTION

ON THE

ALTAR OF VICTIM ADVOCACY:

DUE PROCESS, THE WARRANT CLAUSE AND THE

IMMEDIATE ENFORCEABILITY OF EX PARTE

PROTECTION ORDERS

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INTRODUCTION.....	3
I. HISTORICAL AND LEGAL BACKGROUND.....	7
II. ANALYSIS.....	10
A. Due Process Clause Concerns with Ex Parte Protection Orders.....	11
1. Interests Subject to Deprivation by Ex Parte Orders.....	11
2. The Time and Nature of Due Process Hearings.....	14
3. Lower Court Decisions Regarding Deprivations Through Ex Parte Orders.....	18
B. Constitutional Dimensions of Warrantless Arrest Pursuant to Unnoticed Ex Parte PPOs.....	20
1. Overview of the Warrant Clause.....	20
2. Possible Justifications for Warrantless Arrest of Violators of Unnoticed Ex Parte Orders.....	23
a. Exigent Circumstances.....	23
b. Anticipatory Warrants.....	25
III. PROPOSALS.....	27
IV. CONCLUSION.....	29
APPENDIX.....	31

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“And why am I under arrest?” he then asked. “That’s something we’re not allowed to tell you. Go into your room and wait there. Proceedings are underway and you’ll learn about everything all in good time . . . If you carry on having as much good luck as you have been with your arresting officers then you can reckon on things going well with you.”²

INTRODUCTION

In 1994, Michigan’s legislature approved sweeping changes to the state’s domestic violence laws. Among other things, the new “domestic relations personal protection order” statute³ permits individuals to petition the court for an ex parte injunction against a named respondent which becomes immediately enforceable when signed by the judge. These orders may enjoin a wide range of behaviors, including otherwise licit conduct,⁴ thereby subjecting the individual against whom the PPO has been issued to warrantless arrest and criminal contempt proceedings⁵ for engaging in otherwise legal or even constitutionally protected conduct.⁶ Moreover, since the order may be enforced without notice,⁷ an individual may be arrested without any knowledge (either actual or constructive) prior to the incident leading to the arrest that his or her actions violated a court order.⁸ In short, “[t]his means that police officers can arrest people for violation of orders even if the individuals had no notice of them.”⁹

² FRANZ KAFKA, *THE TRIAL* 1 (David Wyllie, trans. 2003).

³ MCLA 600.2950 (West 2004).

⁴ *See infra*, note 33 and accompanying text.

⁵ MCLA 600.2950(23).

⁶ *See infra*, note 33 and accompanying text.

⁷ MCLA 600.2950(12).

⁸ *See, eg.*, MARY M. LOVIK, *DOMESTIC VIOLENCE: A GUIDE TO CIVIL AND CRIMINAL PROCEEDING*, 2d. ed. (2001). Technically, Michigan’s statute does require the arresting officer to inform the respondent that his or her actions are violating a PPO and give him or her an opportunity to comply with the order, but whether such on-the-spot information can possibly qualify as “notice” for constitutional purposes is debatable, especially given the range of conduct which the order may enjoin. *See infra*, notes 37-39 and accompanying text.

⁹ Note, *Michigan’s Domestic Violence Laws: A Critique and Proposal for Reform*, 42 WAYNE L. REV. 227, 238-39 (1995).

To many individuals involved in the fight against domestic violence, one of the most attractive aspects of these orders is that they operate prospectively,¹⁰ “explicitly seek[ing] to alter the future behavior of the batterer.”¹¹ The problem with this approach to dealing with the vexatious and pervasive issue of domestic violence is that by prospectively enjoining otherwise legal behavior on the part of respondents (who may never have been convicted of any past

¹⁰ David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L. J. 1190 (1995) (providing an overview of civil protection orders).

¹¹ *Id.* Whether protection orders live up to their promise is another issue entirely. Although there is considerable evidence that protection orders do have some deterrent effect on batterers, they certainly have not proven to be any sort of “magic pill.” A study conducted in Baltimore, Maryland, indicates that while 99% of women who filed for a protective order appeared in court and received an initial ex parte protective order, 30% of these women did not proceed to the second stage of the process which would have finalized these orders. See Jane C. Murphy, *Engaging the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL’Y & L. 499, 508-509 (2003) (examining the findings of the study by Mary Ann Dutton, et al., *Ecological Model of Battered Women’s Experience Over Time* (2002)).

The reasons for such high “victim drop-out” are manifold, but several characteristics of protection orders in most states may help to elucidate some of these reasons. For one thing, each stage in the protection order process is typically initiated by the victim. By placing the burden squarely on the victim to proceed with each stage of the protection order process, it is hardly surprising that there is a substantial rate of “victim drop-out.” Susan E. Bernstein discusses the reasons for “victim drop-out” at length in her Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?* 15 CARDOZO L. REV. 525, 539 (1993) (citations omitted):

First, protection orders place a heavy burden on victims to both obtain and enforce the order. Victim initiation is flawed for a number of reasons. To begin with, the burden of initiation may deter victims who are uncomfortable initiating charges against their current or past partner from seeking help at all . . . Further, a complaint brought by a victim may lack credibility because prosecutors and judges may more seriously evaluate claims brought by the police than by private complainants. Finally, if the order is violated and the abuser returns to the victim’s home or other forbidden territories, then the burden shifts back to the victim to call the police to enforce the order . . . However, court orders are also poorly enforced, and thus often fail to provide protection. Generally, the police arrest offenders for violation of a civil protection order only when there are other charges in connection with it, such as destruction of property, disruption of the peace, public intoxication, or violent behavior witnessed by a responding officer.

Victim dropout may be curtailed by mandatory prosecution, but mandatory prosecution is by no means universal. Without successful prosecutions to enforce protection orders, the deterrent effect of such orders must be de minimis at best.

Another serious problem for victims is fear of retribution. Such fear is by no means unreasonable; at least one study found that 10% of women who obtain a protection order are subsequently beaten by their partner in retaliation. Kathleen J. Ferraro, *Cops, Courts, and Woman Battering*, in *VIOLENCE AGAINST WOMEN: THE BLOODY FOOTPRINTS* 173 (Pauline B. Bart & Eileen G. Moran eds., 1993). Another recent study indicates that after sixth months, 65% of petitioners noted that their partner had not violated the terms of their protection order. See Joan Zorza and Nancy K.D. Lemon, *Two-Thirds of Civil Protection Orders are Successful; Better Court and Community Services Increase their Success Rates*, 2(4) DOMESTIC VIOLENCE REPORT 51-52 (April/May 1997). The study “included 285 battered women in Denver, Colorado; Wilmington, Delaware; and Washington, DC.” The authors of this study point to the recidivism rate as a success, but the bottom line is that protection orders aren’t that effective if over one-third of the individuals enjoined by such orders disregard them.

criminal infractions), and by backing the injunction up with the threat of warrantless arrest from the moment such an order is issued (regardless of whether the respondent has yet even received notice of the injunction), the ex parte protection order effectuates a politically correct but socially disastrous assault on the constitutional rights of the individual enjoined by the order.

Unfortunately, this concern does not seem to faze the many proponents of personal protection orders. Indeed, one recent commentary boldly demands that the “[p]roperty, custody, and due process rights of persons who have jeopardized the physical safety of others should yield until an expedited hearing....”¹² Taken to its logical end, such an extremist position could dispense with the fields of due process and criminal procedure altogether! Another commentator has argued that the immediate, unnoticed enforcement of ex parte protection orders is necessary insofar as “[t]he delay between filing requests for protective orders and service of orders left victims without the protection of injunctions and vulnerable to further abuse. In fact, victims were most often in danger during this delay period if their batterers were evading service because they knew that the victims had filed for injunctive relief.”¹³ Admittedly, the dangers faced by victims of domestic violence between the time that a PPO is issued and the time that notice is effectuated are by no means negligible, and any legislative attempt to provide protection to victims of domestic violence must take these issues seriously.¹⁴ However, concern for victims’

¹² Mary S. Hood & Julie Kuncze Field, *Domestic Abuse Injunction Law and Practice: Will Michigan Ever Catch Up to the Rest of the Country?* 73 MICH. B.J. 902, 903-04 (1994) (citing Herrell, S. B. & Hofford, M., *Family Violence: Improving Court Practice*, Reno, NV: National Council of Juvenile and Family Court Judges at 22 (1990)).

¹³ *Supra*, note 9, at 244 (citing Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 222 (1993)).

¹⁴ See *infra*, Section III, dealing with PROPOSALS, outlining possible alternatives to the current statutory system.

safety must ultimately yield to the constitutional mandates of Due Process and the Warrant Clause.¹⁵

This comment explores two distinct constitutional objections to unnoticed ex parte protection orders. The first objection is that due process is offended insofar as the ex parte order deprives the respondent of his or her liberty or property interests. In many cases, this objection may be unavailing in light of the U.S. Supreme Court's due process jurisprudence.¹⁶ The weight of the government's interest in protecting victims of domestic violence from their abusers and the relative ease with which any procedurally deficient deprivation may be remedied tend to vitiate this due process objection in all but the most extreme cases, such as where an ex parte PPO ejects an individual from his or her home or place of employment.¹⁷ However, in these extreme cases, immediate enforcement of the PPO will almost certainly offend the Due Process Clause.¹⁸ The second objection is that the Warrant Clause of the Fourth Amendment is offended by subjecting an individual to warrantless arrest for conduct which would be completely licit but for the existence of the unnoticed¹⁹ protection order. Although many lower courts have upheld the constitutionality similar schemes, the best reading of the U.S. Supreme Court's criminal procedural jurisprudence precludes such an expansion of the police powers of the state. In short, immediate enforcement of ex parte protection orders may, depending upon the conduct enjoined, violate the Due Process and Warrant Clauses of the United States Constitution.

¹⁵ See *infra*, APPENDIX, detailing proposed legislation.

¹⁶ See, e.g., *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting forth the test for determining whether a pre-hearing deprivation violates due process).

¹⁷ See *infra*, notes 75-78 and accompanying text.

¹⁸ See *infra*, Section II(A)(2).

¹⁹ By 'unnoticed,' I mean that the individual enjoined by the protection order does not have notice, either actual or constructive, of the order.

I. HISTORICAL AND LEGAL BACKGROUND

The immediate enforceability of ex parte protection orders is a relatively new development in Michigan's domestic violence law. For many years, Michigan law provided that violators of "certain injunctions against domestic abuse . . . would be subject to warrantless arrest and criminal contempt sanctions."²⁰ However, these injunctions could only be issued against an individual's "spouse, a former spouse, an individual with whom [the petitioner had] a child in common, or an individual residing or having resided in the same household."²¹ Furthermore, the orders could only enjoin a respondent from entry onto the premises of the petitioner, assaultive behavior, and unauthorized removal of the minor children from the legal custodian.²² Most importantly, these injunctions were ineffective until they were served on the respondent.

Prior to the enactment of Michigan's domestic relations personal protection order statute, "incidents of domestic abuse reported by law enforcement agencies increased 54% between 1989 and 1992."²³ There was a growing consensus that Michigan was falling behind other states in terms of the legal protections offered to victims of domestic violence.²⁴ In 1994, recognizing the need for action, the Michigan legislature created "domestic relationship personal protection orders"²⁵ and "non-domestic stalking personal protection orders"²⁶ in order to provide individuals with a civil injunctive remedy for domestic violence and stalking.²⁷

²⁰ Michigan Judicial Institute, MICHIGAN DOMESTIC VIOLENCE BENCHBOOK 247 (2004).

²¹ MCLA 600.2950(1) (West 1984).

²² MCLA 600.2950 (West 1984).

²³ See Hood, *supra*, note 12, at 902 (citing Michigan State Police, *Uniform Crime Reporting Division: 1992 Figures*).

²⁴ See generally *id.*

²⁵ MCLA 600.2950(1).

²⁶ MCLA 600.2950a(1).

²⁷ BENCHBOOK, *supra*, note 20, at 245 (2004).

The 1994 PPO statutes simplified the process by which injunctive relief is sought. Under the new system, judges must rule on requests for ex parte PPOs within 24 hours of their filing.²⁸ Moreover, a judge’s denial of a PPO request must be in writing and include specific reasons for the denial.²⁹ State law also requires the courts to provide free forms and filing for PPO petitions.³⁰

The 1994 statute also expanded the scope of individuals who may petition for civil injunctive relief. The new statute included individuals engaged in “frequent, intimate associations primarily characterized by the expectation of affectional involvement” within its purview.³¹ In other words, along with individuals who are married, cohabiting, or have a child in common, domestic violence personal protection orders could now be sought by individuals in a “dating relationship.” Furthermore, the legislature’s concurrent creation of non-domestic stalking personal protection orders expanded civil injunctive relief, albeit of a more limited type, to cover any individual who has been the victim of stalking.³²

The new statute also expands the types of conduct which may be enjoined by court order. Domestic relations personal protection orders are now capable of enjoining a wide range of behaviors, both legal and illegal, such as:

- (a) Entering onto premises.

²⁸ MCR 3.705(A)(1).

²⁹ MCLA 600.2950(7); MCLA 600.2950a(4).

³⁰ MCLA 600.2529(1)(a).

³¹ MCLA 600.2950(30)(a). Individuals engaged in divorce proceedings must seek protective orders under MCLA 552.14, which is beyond the scope of this paper. There are also several important categories of people who are specifically excluded from the scope of domestic violence personal protection orders: parents are precluded from taking out a protection order against their unemancipated minor children, 600.2950(27)(a); unemancipated minor children are precluded from taking out a protection order against their parents, 600.2950(27)(b); and protection orders cannot be issued against anyone under ten years old, 600.2950(27)(c). The same exclusions apply in the case of stalking personal protection orders, MCLA 600.2950a(25)(a)-(c), with the additional category of “prisoners” excluded from the coverage of the stalking PPO statute, MCLA 600.2950a(28).

³² See generally MCLA 600.2950a. Non-domestic anti-stalking PPOs are not the subject of this Comment, and references to PPOs and ex parte orders should be understood to refer to domestic relations PPOs unless otherwise noted.

- (b) Assaulting, attacking, beating, molesting, or wounding a named individual.
- (c) Threatening to kill or physically injure a named individual.
- (d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.
- (e) Purchasing or possessing a firearm.
- (f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.
- (g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs a petitioner's employment or educational relationship or environment.
- (h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's minor child or about petitioner's employment address.
- (i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.
- (j) Any other specific act or conduct that imposes on or interferes with personal liberty or that causes a reasonable apprehension of violence.³³

Non-domestic stalking personal protection orders are more limited in scope, and may only enjoin stalking and aggravated stalking, as defined in MCLA 750.411h.

While the aforementioned aspects of Michigan's personal protection order statutes serve as powerful weapons in the fight against domestic violence, the statute also provides that "[a] personal protection order is effective and immediately enforceable anywhere in this state when signed by a judge."³⁴ Michigan's domestic relationship personal protection order statute requires the court to issue the immediately effective ex parte order as long as certain minimal statutory requirements are met. Specifically, MCLA 600.2950(12) provides that:

An ex parte personal protection order shall be issued and effective without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate

³³ MCLA 600.2950(1)(a)-(j).

³⁴ MCLA 600.2950(9).

notice or that notice will itself precipitate adverse action before a personal protection order can be issued.³⁵

The only “notice” that is required in order to arrest an individual for a PPO violation is provided by the arresting officer.³⁶ Prior to taking an individual into custody, the officer must inform the individual that his or her conduct has been enjoined by an ex parte protection order and that the individual can only avoid arrest by *immediate* compliance with the protection order.³⁷ Given the fact that the conduct enjoined by the order may be legal³⁸ (if not constitutionally protected) in the absence of the order, requiring such compliance on the basis of the on-site admonition of a police officer is patently unreasonable.

II. ANALYSIS

Procedural due process generally requires, at the very least, that an individual receive notice and an opportunity to be heard in order for the state to deprive him or her of “life, liberty

³⁵ MCLA 600.2950(12). MCLA 600.2950a(9) deals with immediately effective ex parte stalking personal protection orders:

An ex parte personal protection order shall not be issued and effective without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by 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 a personal protection order can be issued.

In essence, the only difference between the two statutes consists in the use of the phrase “shall issue” in MCLA 600.2950(12), whereas MCLA 600.2950a(9) uses the phrase “shall not issue.” As such, there is no requirement that the court issue an ex parte PPO in a stalking case, leaving the matter up to judicial discretion. *See, e.g.*, BENCHBOOK, *supra*, note 20 at 261.

³⁶ Notice of the protection order is required by the statute, *see* MCLA 600.2950(18), but the order is enforceable prior to the effectuation of notice. *See* MCLA 600.2950(12).

³⁷ Specifically, MCLA 600.2950(22):

If the individual restrained or enjoined has not received notice of the personal protection order, the individual restrained or enjoined shall be given an opportunity to comply with the personal protection order before the law enforcement officer makes a custodial arrest for violation of the personal protection order. The failure to immediately comply with the personal protection order shall be grounds for an immediate custodial arrest.

³⁸ *See generally* MCLA 600.2950(1)(a)—(j), describing the types of conduct that may be enjoined by a domestic relations protection order.

or property.”³⁹ Exactly *what* process is required, though, is a much more nuanced question. The Supreme Court has noted that due process “is a flexible concept—[and] the process required by the clause with respect to termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur.”⁴⁰

A. Due Process Clause Concerns with Ex Parte Protection Orders

1. Interests Subject to Deprivation by Ex Parte Orders

The due process issue raised by ex parte protection orders concerns the temporary deprivation of liberty and property interests which may be effectuated through the immediate enforceability of an unnoticed protection order. As a preliminary matter, however, it is necessary to establish that an individual who has been enjoined by a protection order has a liberty or property interest at stake.⁴¹

In fact, there are numerous ways in which an ex parte protection order may lead to a deprivation of an individual’s liberty and property interests, since ex parte protection orders may enjoin a wide range of behaviors.⁴² For example, a personal protection order may enjoin the respondent from being within a certain distance of the petitioner.⁴³ Such an order would effectively bar the respondent from unwittingly walking down the same street as the petitioner,

³⁹ U.S. CONST., Amend. XIV., sec. 1; *and see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding welfare benefits to qualify as a property interest); *Goss v. Lopez*, 419 U.S. 565 (1975) (students have may have a property interest in their education, entitling them to due process, based on the state’s creation of such an entitlement to education); *but see, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (finding an untenured professor did not have either a liberty or property interest in the job from which he was terminated).

⁴⁰ *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 320 (1985).

⁴¹ It should be apparent that the enforcement of ex parte personal protection orders does not actually deprive an individual of life itself.

⁴² *See supra*, note 33 and accompanying text.

⁴³ This form of injunctive relief is not specifically mentioned in MCLA 600.2950(1), but falls under the catch-all provision of MCLA 600.2950(1)(j), which permits the court to enjoin “[a]ny other specific act or conduct that imposes on or interferes with personal liberty or that causes a reasonable apprehension of violence.”

clearly implicating the respondent’s liberty interest in freedom of movement.⁴⁴ PPO injunctions against interfering with a petitioner at his or her place of employment or education⁴⁵ implicate the liberty interests of the respondent by prohibiting him or her from visiting these locales, particularly if the respondent works or studies at the same locations. If a PPO enjoins a respondent from possessing firearms,⁴⁶ the respondent is subject to a deprivation of both the property interests in any firearms he or she already owns, along with the liberty interest in possessing firearms in the first place.⁴⁷ Furthermore, a PPO may cause a respondent to suffer a deprivation of the liberty interest in his or her reputation as long as other substantive constitutional rights are implicated by the injunction.⁴⁸

Finally, and perhaps most significantly, an *ex parte* order may implicate an individual’s liberty and property interests by forcing the respondent to vacate his or her own home when the PPO petitioner shares a domicile with the respondent.⁴⁹ A PPO which prohibits respondent’s

⁴⁴ *Cf.*, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding state statutes denying welfare to individuals who had not resided in the state for a set time unconstitutional due to their impermissible interference with the right to travel).

⁴⁵ *See* MCLA 600.2950(1)(g).

⁴⁶ *See* MCLA 600.2950(1)(e).

⁴⁷ The Second Amendment has not been incorporated through the Fourteenth Amendment, and as such is not applicable to the states. *See, e.g.*, *Miller v. Texas*, 153 U.S. 535, 538 (1894). The Michigan Constitution, however, guarantees “[e]very person . . . a right to keep and bear arms for the defense of himself and the state.” MICHIGAN CONST. 1963, art. 1, § 6. *But see* *Kampf v. Kampf*, 237 Mich.App. 377, 382-83, 603 N.W.2d 295 (1999) (finding that this state constitutional right is not offended when a PPO eliminates a respondent’s right to keep and bear arms for use in “hunting or other sporting events”).

⁴⁸ *See* *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding that reputational harms may constitute a deprivation of one’s liberty interests: “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential”); *and see* *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Court announced that reputational harms may impact upon an individual’s liberty interests only when,

as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It [is] this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which . . . [is] sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the “liberty” or “property” recognized in those decisions.

Id. at 711.

⁴⁹ In some states, such strategic use of PPOs is especially common in divorce cases, although Michigan law specifically excludes individuals engaged in divorce proceedings from seeking PPO protection against each other

“entry onto premises”⁵⁰ thus deprives the respondent of his or her real property rights in the home itself and his or her personal property rights in any belongings contained therein.

Still greater infringements on liberty and property interests are possible insofar as a PPO contains incorrect information or is misunderstood by the police officers on the scene. Consider the following scenario: the PPO petitioner travels from her house to respondent’s house, calls the police, and has him arrested for violating the PPO which, on its face, *enjoins him from being present in his own house!* Unfortunately, this scenario is no mere hypothetical; such a deprivation occurred in the Michigan Court of Appeal’s case of *People v. Freeman*.⁵¹ Michigan’s PPO statute specifically provides that an individual who is not married to the PPO petitioner may not be restrained from entering premises in which he or she has a property interest if the petitioner has no property interest in the same property.⁵² However, the information contained in the PPO in the *Freeman* case was inaccurate and misleading, and the police officers responding to the petitioner’s call “reasonably believed” that the petitioner/defendant was violating the protection order. Inexplicably, the defendant did not raise the PPO as an issue in the case, which ultimately turned on his evasion of arrest by the responding officers.⁵³ The Court

(Although individuals in the process of divorce can still get a protective order against their spouse under MCLA 552.14). One commentator has noted that “[t]he minimal threshold of assault or threat of assault necessary to obtain a protective order without committing perjury can, unfortunately, be satisfied at some point by almost anyone undergoing even a relatively amicable divorce.” Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C.L. REV. 441, 448 (1997). An inescapable, and disconcerting, fact is that [a]llegations of abuse are often used as an offensive first weapon in a divorce case. In most states, the mere allegation of abuse will trigger an immediate ex-parte order to put the alleged perpetrator out of the house, granting effective custody and control of both the marital residence and the children to the victim. Unfortunately, even in the case of false allegations, the “horse is already out of the barn,” and the courts are slow to reverse their orders.

Barbara Salomon, *Guilty Until Proven Innocent: Representing the Alleged Abuser*, 17-WTR FAM. ADVOC. 30, 31-32 (1995).

⁵⁰ See MCLA 600.2950(1)(a).

⁵¹ 240 Mich.App. 235 (2000).

⁵² MCLA 600.2950(5).

⁵³ The Defendant attempted to flee from the responding officers. *Freeman*, 240 Mich.App. at 235-36.

found that the officers who arrested the defendant had a reasonable suspicion that he was guilty of violating the PPO, and the Court held that his arrest was valid. However, the Court expressed concern that careless drafting of PPOs could lead to more mistakes, ultimately undermining the public's "trust" in the PPO system.⁵⁴ Such concern is by no means unfounded, and *Freeman* exemplifies the dangers inherent in the enforcement of unnoticed ex parte orders.⁵⁵

2. The Time and Nature of Due Process Hearings

Having established that there are numerous instances in which a domestic relationship personal protection order may cause a deprivation of the respondent's liberty or property interests, the relevant inquiry becomes: (1) what type of hearing is required, and (2) when must the requisite hearing be held. The seminal case on the issue of due process hearings in the civil context is *Matthews v. Eldridge*,⁵⁶ in which the U.S. Supreme Court announced a balancing test for determining when a hearing is required in a civil case. In determining the constitutional permissibility of a deprivation of a liberty or property interest in the civil context, one must

⁵⁴ *Id.* at 237, fn. 1 (emphasis added):

Although the personal protection order itself is not at issue in this case, we express our concern raised by the facts of this case. This case illustrates the need to draft such orders carefully in order to avoid inconsistencies and confusion. Here, for example, the complainant's residence is listed in the body of the order as 38 N. Riviera Drive. The caption of the order, however, states that the complainant can be reached at 1419 Capital Avenue, # 32. The complainant was at defendant's address at 1419 Capital Avenue, # 32, when defendant was arrested for violating the order. *Surely, a defendant must question the wisdom of an order that makes it a violation of a court order to be in his own home, particularly when the complainant has a separate residence and makes the complaint to the police while at the defendant's residence.* This would appear to allow personal protection order to be used as a sword rather than a shield, contrary to the intent of the legislation that was quite properly designed and intended to protect spouses and others from predators. When personal protection orders are allowed to be misused because of careless wording or otherwise, then the law is correspondingly undermined because it loses the respect of citizens that is important to the effective operation of our justice system.

⁵⁵ Another concern, not specifically addressed by the Court of Appeals, is that the general atmosphere created by personal protection orders will itself lead police to err on the side of arresting anyone they suspect may be guilty of a PPO violation. Such over-zealous police work, while ostensibly effectuating the purposes of the PPO statute, certainly raises concerns under the Warrant Clause. *See infra*, Section C.

⁵⁶ 424 U.S. 319 (1976).

consider “the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”⁵⁷

Prior to its decision in *Matthews v. Eldridge*, the Supreme Court addressed the constitutionality of ex parte orders which work a deprivation of a property interest in the case of *Fuentes v. Shevin*.⁵⁸ In *Fuentes*, the Court was faced with the issue of whether state statutes which provided for the seizure of an individual’s possessions upon the ex parte application of “any other person who claims a right to them and posts a security bond” offends due process when “[n]either statute provides for notice to be given to the possessor of the property, and neither statute provides gives the possessor an opportunity to challenge the seizure at any kind of prior hearing.”⁵⁹ The Court recognized that while both statutes provided for post-deprivation hearings, such hearings are insufficient to satisfy due process; indeed, the Court held that “[i]f the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when deprivation can still be prevented.”⁶⁰

This case, however, represented a “high water mark” of procedural requirements in the case of deprivation of property interests. Shortly thereafter, the Court addressed the

⁵⁷ 424 U.S. 319 (1976).

⁵⁸ 407 U.S. 67 (1972).

⁵⁹ *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972).

⁶⁰ *Fuentes*, 407 U.S. at 81. The general proposition that “individuals must receive notice and an opportunity to be heard before the Government deprives them of property,” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (citations omitted), has been established by various other Supreme Court cases as well. *See, e.g.*, *United States v. \$8,850*, 461 U.S. 555, 562, n. 12 (1983); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1962) (Harlan, J., concurring); *and Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

constitutionality of a similar replevin statute in *Mitchell v. W.T. Grant Company*.⁶¹ In this case, however, the Court distinguished *Fuentes* since the statute at issue in *Mitchell* required that “the requisite showing [in the ex parte hearing] . . . be made to a judge, and judicial authorization obtained.”⁶² Furthermore, the statute at issue in *Mitchell* required a very narrow inquiry into whether there was a vendor’s lien and whether there’s been a default, as opposed to the statutes at issue in *Fuentes*, which required a broader and more fact-intensive determination that the debtor was “at fault.” As such, the Court found that this statute posed “far less danger that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.”⁶³

Since the *Matthews* decision, the Court has distinguished between seizures of moveable property and seizures of real property. Since an ex parte protection order effectively ejecting an individual from his home constitutes a seizure of real property,⁶⁴ this distinction is relevant to this due process analysis. In *United States v. James Daniel Good Real Property*,⁶⁵ the Court found that the seizure of forfeitable real property through ex parte proceedings “cannot be classified as de minimis for purposes of procedural due process[;] . . . the private interests at stake in the seizure of real property weigh heavily in the *Matthews* balance.”⁶⁶ As such, the government must establish that exigent circumstances justify an ex parte seizure of real property, “show[ing] that less restrictive measures [than seizure]—*i.e.*, a *lis pendens*, restraining order, or bond—would not suffice to protect the Government’s interests in preventing the sale, destruction, or continued unlawful use of the real property.”⁶⁷ Absent the establishment of clear exigencies,

⁶¹ 416 U.S. 600 (1974).

⁶² *Mitchell v. W.T. Grant Company*, 416 U.S. 600, 616 (1974).

⁶³ *Mitchell*, 416 at 618.

⁶⁴ See *supra*, notes 49-50 and accompanying text.

⁶⁵ 510 U.S. 43 (1993).

⁶⁶ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 54-55 (1993).

⁶⁷ *James Daniel Good Real Property*, 510 U.S. at 62.

an ex parte hearing before a magistrate judge does not suffice to bring such seizures within the realm of constitutional permissibility.⁶⁸

In *Connecticut v. Doehr*,⁶⁹ the Supreme Court examined a Connecticut statute that “authorize[d] prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond . . .”⁷⁰ The Court found that such a statute does not satisfy the minimum demands of due process.⁷¹ While this case is clearly distinguishable from the issuance of ex parte protection orders, which *arguably* require the establishment of “extraordinary circumstances”⁷² and are at least reviewed by a judge,⁷³ the Court’s discussion of the due process clause is enlightening. The Court acknowledges that the effects of Connecticut’s statute “do not amount to complete, physical, or permanent deprivation of real property,” but “even the temporary or partial impairment to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.”⁷⁴ By analogy, the much more serious deprivations wrought by ex parte protection orders must require significant exigencies in order to “pass constitutional muster.”

In essence, this line of cases indicates that, absent sufficient exigent circumstances, a deprivation of one’s interest in real property, even though temporary, violates the due process clause when such a deprivation has occurred without notice and an opportunity to be heard.⁷⁵ Therefore, in the case of an individual’s ejection from his home by virtue of an unnoticed ex parte order, the individual’s interests at stake in the home weigh heavily in the *Matthews*

⁶⁸ See generally *id.*

⁶⁹ 501 U.S. 1 (1991).

⁷⁰ *Connecticut v. Doehr*, 501 U.S. 1, 4 (1991).

⁷¹ *Doehr*, 501 U.S. at 24.

⁷² See *supra*, note 35 and accompanying text.

⁷³ See *supra*, note 34 and accompanying text.

⁷⁴ *Doehr*, 501 U.S. at 12.

⁷⁵ See *James Daniel Good Real Property*, 510 U.S. at 62.

balance.⁷⁶ However, the oft-asserted weight of the state's interest in protecting victims of domestic violence from their abusers could very easily trump such concerns in when the government's interference with a private interest is less extreme or the underlying private interest is less important.⁷⁷ Ultimately, the issue of whether enforcement of an ex parte PPO violates due process must be analyzed on a case-by-case basis, paying attention to the *Matthews* factors. An order enjoining illegal or harassing conduct will almost certainly survive the *Matthews* test, while on the other extreme, an ex parte order evicting a respondent from a shared home is almost certainly unconstitutional, at least without additional procedural safeguards.⁷⁸

3. Lower Court Decisions Regarding Deprivations Through Ex Parte Orders

Although the Supreme Court has never directly addressed the issue, many lower courts have rejected the argument that ex parte protection orders offend due process.⁷⁹ This is generally due to the fact that the state is seen as having a compelling state interest in combating domestic violence which outweighs the respondent's property interests. For example, in *Boyle v. Boyle*,⁸⁰ the defendant claimed that an ex parte protective order barring him from his house and children

⁷⁶ See, e.g., *supra*, notes 56-57 and accompanying text.

⁷⁷ Cf. *id.*

⁷⁸ See *infra*, Section III.

⁷⁹ See, e.g., Mary Schouvelieller, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 613 Fn. 103 (1996):

Although no United States Supreme Court case directly addresses ex parte civil protection orders, a number of courts have addressed and rejected claims that such orders violate due process in domestic abuse cases. See *Blazel v. Bradley*, 698 F. Supp. 756, 768 (W.D. Wis. 1998) (holding that ex parte orders do not violate due process generally but do if the order was wrongly issued); *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 229-32 (Mo. 1982) (upholding the Missouri Adult Abuse Act's provision for temporary ex parte relief); *Marquette v. Marquette*, 686 P.2d 990, 995-96 (Okla. Ct. App. 1984) (upholding restrictions on respondent's visitation with his children because the procedural safeguards, which provided for a hearing within ten days, supplied adequate due process); *Boyle v. Boyle*, 12 Pa. D & C.3d 767 (1979) (finding that Pennsylvania's Protection From Abuse Act, which provided for the ex parte eviction of respondent, was constitutional); *Shramek v. Borhen*, 429 N.W.2d 501, 504-06 (Wis. Ct. App. 1988) (rejecting respondent's claim that the notice provided him was insufficient) . . . [H]owever, all of these cases, with the exception of *Blazel*, addressed temporary ex parte relief in cases of immediate threat of violence.

⁸⁰ 12 Pa.D & C.3d 767 (1979).

unconstitutionally deprived him of liberty and property without due process of law. The Pennsylvania Supreme Court rejected this argument, holding that the “government’s interest in protecting its citizens outweighed the individual’s Fourteenth Amendment due process rights.”⁸¹

Several other state courts have relied on the temporary nature of protection orders in upholding their constitutionality. In Minnesota, for instance, ex parte orders are “temporary and limited to situations involving an ‘immediate threat of violence.’”⁸² As such, ex parte orders may be enforced without notice “in extraordinary circumstances where the risk of injury is plain.”⁸³

The Michigan Court of Appeals upheld the constitutionality of ex parte PPOs in *Kampf v. Kampf*.⁸⁴ In *Kampf*, the Respondent’s wife obtained a personal protection order enjoining him from entering the premises of her home and work, assaulting, stalking and threatening her, contacting her by telephone, and purchasing or possessing a firearm.⁸⁵ Respondent argued that the personal protection order statute pursuant to which this order was issued “violates the due process guarantee of notice and an opportunity to be heard.”⁸⁶ The Court rejected Respondent’s argument, holding that “[t]here is no procedural due process defect in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued.”⁸⁷

⁸¹ Boyle v. Boyle, 12 Pa.D & C.3d 767, 774.

⁸² Mary Schouvelieller, *Leaping Without Looking: Chapter 142’s Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. 593, 612 (1996) (citing Baker v. Baker, 494 N.W.2d 282 (Minn. 1992)).

⁸³ Baker v. Baker, 494 N.W.2d at 287.

⁸⁴ 603 N.W.2d 295 (1999).

⁸⁵ Kampf v. Kampf, 603 N.W.2d 295, 297(1999).

⁸⁶ Kampf, 603 N.W.2d at 299 (internal citations omitted).

⁸⁷ Kampf, 603 N.W.2d at 299 (internal citations omitted).

When considered in conjunction with the Supreme Court’s decisions regarding due process, the results reached by lower courts seem untenable.⁸⁸ Although ex parte orders may frequently satisfy the minimum requirements of due process, there are situations where an ex parte order “crosses the line” and offends due process. As already noted, due process requires an inquiry into the various interests at stake, the risk of erroneous deprivation of those interests, and the burden on the government in providing additional process.⁸⁹ Once these variables have been identified, it is necessary to balance them against each other.⁹⁰ While balancing these variables is not an exact science,⁹¹ many state court decisions upholding the validity of ex parte orders seem to forgo their comparison altogether.⁹² Despite the best intentions of these courts, however, the categorical assertion that the state has a compelling interest in combating domestic violence⁹³ is a patently insufficient justification for abrogating the protections afforded by the Due Process Clause.

C. Constitutional Dimensions of Warrantless Arrests Pursuant to Unnoticed Ex Parte PPOs

1. Overview of the Warrant Clause

Another troubling aspect of ex parte protection orders becomes evident when a respondent is arrested for violating an order of which he or she had no knowledge whatsoever. The respondent’s actions may violate no laws, but he or she may nevertheless be subject to a warrantless arrest for contempt for disobeying a protection order. Arrest clearly works a

⁸⁸ See *supra*, notes 56-78 and accompanying text.

⁸⁹ *Matthews*, 424 U.S. at 335.

⁹⁰ *Id.*

⁹¹ See *supra*, note 40 and accompanying text.

⁹² See, e.g., notes 79-80.

⁹³ Cf., e.g., *Boyle*, 12 Pa.D & C.3d at 774.

deprivation of an individual's liberty interests, and procedural due process applies. Freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action."⁹⁴ This is true whether the physical restraint is the result of civil or criminal proceedings. It is well established that "if confinement is to rest on a theory of civil contempt, . . . due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt."⁹⁵ However, along with due process concerns, warrantless arrest on the basis of unnoticed ex parte orders also implicates the interest in personal liberty which is protected by the Warrant Clause of the Fourth Amendment.

As a preliminary matter, it is necessary to acknowledge that warrants and ex parte protection orders, while analogous in some ways,⁹⁶ are analytically distinguishable.⁹⁷ However, when the result of either a warrant or an ex parte protection order is that an individual is taken into police custody, this distinction is without substance.

Supreme Court jurisprudence has long established that no warrant is required in order to arrest an individual whom police reasonably believe is guilty of a felony.⁹⁸ It is also permissible to arrest an individual for a misdemeanor, even if the underlying offense is not punishable by jail-time,⁹⁹ as long as the offense was committed in the presence of the police officer.¹⁰⁰

⁹⁴ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

⁹⁵ *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1972).

⁹⁶ *See, e.g., Akhil Reed Amar, Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1117 (1998). Mr. Amar opines that "[b]ecause warrants at the founding issued ex parte, and pre-empted the possibility of various after-the-fact opportunities for judicial review of the search, warrants were carefully hedged by certain limitations that did not apply to warrantless action. By analogy, temporary restraining orders (TROs), because they issue ex parte, are hedged by certain limitations that do not apply outside the TRO context."

⁹⁷ The primary difference is that the ex parte order does not actually permit the police to arrest the individual enjoined. Rather, it simply provides that the individual may be arrested, without a warrant, for violating the terms of the order. *But see infra*, Sec. II(C)(2)(b) (discussing anticipatory warrants, which may operate in a manner that is very similar—although not identical—to PPOs in this regard).

⁹⁸ *United States v. Watson*, 423 U.S. 411 (1976) (in which the Supreme Court held that the warrantless arrest of an individual suspected of mail fraud, a felony, in a public place pursuant to the tip of a reliable informant was constitutionally permissible).

⁹⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (establishing that "the standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.' If an officer

However, it is impermissible to effectuate the warrantless arrest of a suspect in his home absent exigent circumstances,¹⁰¹ and the Supreme Court has “emphasized that ‘at the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home.’”¹⁰² Thus, absent some exigency, officers would not have a right to enter the home of a respondent who violates a PPO enjoining entry into his or her home. Moreover, the Supreme Court has never actually acknowledged the validity of warrantless arrests of individuals whom an officer reasonably believes to have committed a misdemeanor *outside* of the arresting officer’s presence.¹⁰³ Furthermore, the Supreme Court has never considered whether an individual may be arrested for violating a court order of which he had no notice.¹⁰⁴ As such, an arrest for a violation of a PPO which occurred outside of the officer’s presence may be unconstitutional under the Fourth Amendment. Given the relevant precedent, the question proponents of ex parte protection orders must contend with is whether an arrest based upon the violation of an unnoticed personal protection order can *possibly* comport with the Supreme Court’s jurisprudence on the issue of warrantless arrests.

has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” (citation omitted).

¹⁰⁰ *Watson*, 423 U.S. at 418 (discussing the continuing applicability of “the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest”(citations omitted)).

¹⁰¹ *See generally* *Payton v. New York*, 445 U.S. 573 (1980) (holding that a warrant is required to enter a suspect’s home for the purpose of arresting him, absent exigent circumstances).

¹⁰² *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (*quoting* *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¹⁰³ *Cf. generally* *Atwater*, 523 U.S. 318. The Supreme Court has generally interpreted the Fourth Amendment in light of the prevailing common law rules in effect at the time the Amendment was enacted. Under the common law, police could generally not arrest for misdemeanors without a warrant, with a narrow exception carved out allowing officers to arrest for breach of the peace. *See id.* at 353. The *Atwater* Court clearly goes against the common law rule, but the holding should arguably be confined to the narrow facts of the case, in which the misdemeanor traffic offense which led to Ms. Atwater’s arrest was committed *in the presence* of the arresting officer. However, there is *some* authority suggesting that the states may have the power to permit the warrantless arrest of an individual suspected of having committed a misdemeanor outside of the officer’s presence. *See, e.g.,* *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (“we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer’s presence. Thus, ‘it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states.’” (*quoting* E. FISHER, *LAW OF ARREST* 130 (1967); other citations omitted)).

¹⁰⁴ *See supra* note 103.

2. Possible Justifications for Warrantless Arrests of Violators of Unnoticed Ex

Parte PPOs

a. Exigent Circumstances

The first possible justification for the warrantless arrest of alleged violators of personal protection orders, in light of the Supreme Court’s Warrant Clause jurisprudence, is that there exist exigent circumstances which bring the arrest within the fold of constitutional permissibility.¹⁰⁵ As attractive as this argument is, it is ultimately without merit. One reason for this is the fact that “exigency only excuses a warrant and not probable cause.”¹⁰⁶ Therefore, “the police must have both probable cause to believe that a crime had occurred or was occurring as well as a reasonable belief that exigency existed....”¹⁰⁷ Thus, in order to even come within the purview of the exigency exception to the warrant clause, one must first have probable cause to believe that an underlying offense is being committed.

Michigan’s ex parte protection orders, on the other hand, may issue as long as there is “reasonable cause to believe that the individual to be restrained or enjoined may commit *1 or more* of the acts listed in [M.C.L. 600.2950](1).”¹⁰⁸ However, the protection order may enjoin *any* of the conduct listed in M.C.L. 600.2950(1).¹⁰⁹ For example, even if there is no reasonable cause to believe that an individual is likely to attack or molest the petitioner,¹¹⁰ he may be enjoined from doing so if there is a reasonable likelihood that he possesses a firearm.¹¹¹ In other words, if the requirements for obtaining a protection order were applied to arrest warrants, an

¹⁰⁵ See *supra*, note 103 and accompanying text.

¹⁰⁶ Kapila Juthani, Note, *Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy*, 59 N.Y.U. ANN. SURV. AM. L. 51, 81-82 (2003).

¹⁰⁷ See *supra*, Juthani at 82.

¹⁰⁸ MCLA 600.2950(4) (emphasis added).

¹⁰⁹ See MCLA 600.2950(1).

¹¹⁰ See MCLA 600.2950(1)(b).

¹¹¹ MCLA 600.2950(1)(e).

anticipatory arrest warrant could issue conditioned upon the suspect engaging in legal act #1 based on probable cause that the suspect will engage in legal act #2! Since ex parte protection orders do not necessarily require probable cause that an individual has committed or is committing a criminal offense in order to be enforceable,¹¹² the standard of “exigency” which applies in the context of the warrant clause does not necessarily even come into play.

Furthermore, even if an ex parte protection order is supported by probable cause and a reasonable suspicion of exigent circumstances,¹¹³ the order may still be constitutionally defective insofar as it enjoins conduct that is either a misdemeanor offense or a course of conduct which would be legal but for the existence of the injunction. There are no Supreme Court cases which apply the “exigent circumstances” exception to the Warrant Clause to the arrest of an individual suspected of a misdemeanor infraction or the violation of a civil protective order when that individual’s offense occurred outside the presence of the arresting officer.¹¹⁴ Insofar as the Supreme Court has addressed this issue at all, it has “conclude[d] that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on ‘unreasonable searches and seizures,’” and has held “that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.”¹¹⁵ Quite simply, the very nature of a misdemeanor offense (i.e., an offense which is not as serious as a felony) mitigates against its “gravity” for purposes of the exigency exception.

¹¹² MCLA 600.2950(1) and (4).

¹¹³ See *supra*, notes 106 and 107 and accompanying text.

¹¹⁴ I have searched for cases in which the Supreme Court upheld the warrantless arrest of an individual for committing a misdemeanor outside the officer’s presence based on exigent circumstances, and have been unable to find any case expressly approving such a course of action. *But see supra*, note 103.

¹¹⁵ *Welsh*, 466 U.S. at 753 (discussing the approaches of the lower courts to the “exigent circumstances” exception to the warrant requirement as it relates to entry into a suspect’s home).

b. Anticipatory Warrants

Another possible argument in favor of arresting violators of unnoticed, ex parte protection orders, is that the PPO itself effectively serves as a conditional warrant. This is an attractive argument, given the fact that courts in the majority of U.S. states have upheld the constitutionality of “anticipatory warrants,” provided that the conditions triggering these warrants are explicit.¹¹⁶ Whether such warrants are actually valid is still an open question since the Supreme Court has never addressed the issue. However, assuming that such anticipatory warrants do in fact comport with the due process clause, they are readily distinguishable from the warrantless arrest of an individual based upon violation of an unnoticed personal protection order.

First of all, anticipatory warrants require a particularized description of the specific conditions which trigger the warrant. Furthermore, there must be probable cause to believe that these conditions will occur prior to the issuance of the warrant. The Second Circuit provides a good discussion of the various requirements for a constitutionally-sound anticipatory warrant in *United States v. Garcia*.¹¹⁷ The Court explains that

An anticipatory warrant, by definition, is a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises; if those events do not transpire, the warrant is void. This is not to say, however, that such warrants are not based on probable cause. To the contrary, when a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur, and when the magistrate conditions the warrant on that delivery, there is sufficient probable cause to uphold the warrant. Thus, the fact that the

¹¹⁶ In Michigan, the seminal case acknowledging the validity of anticipatory warrants is *People v. Kaslowski*, 608 N.W.2d 539, 543 (Mich. App. 2000) (permitting anticipatory warrants as long as they “adequately established the narrow circumstances upon which the police were authorized to execute the warrant”). Overall, courts in over half the states have upheld the validity of anticipatory warrants, including Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wisconsin. See Norma Rotumo, *Validity of Anticipatory Search Warrants—State Cases*, 67 A.L.R.5th 361 (2004).

¹¹⁷ 882 F.2d 699 (2nd Cir. 1989).

contraband is not “presently located at the place described in the warrant” is immaterial, so long as “there is probable cause to believe that it will be there when the search warrant is executed.” Nor should it be otherwise, for even a warrant based on a known presence of contraband at the premises rests also on the expectation that the contraband will remain there until the warrant is executed.¹¹⁸

In other words, an anticipatory warrant is constitutionally valid only insofar as (1) there is probable cause to believe the underlying offense will be committed and (2) the specific conditions which trigger the warrant are actually met. Ultimately, anticipatory warrants serve the purpose of the Fourth Amendment “by allowing an agent to obtain a warrant in advance of the delivery” of contraband, rather than “forcing him to go to the scene without a warrant, and, if necessary, proceed under the constraints of the ‘exigent circumstances’ exception, subject always to the risk of ‘being second-guessed’ by judicial authorities at a later date as to whether the known facts legally justified the search.”¹¹⁹

Despite superficial similarities, anticipatory warrants are quite distinct from ex parte protection orders. An anticipatory warrant must be supported by probable cause to believe that the conditions outlined with specificity within the warrant will actually come to pass,¹²⁰ whereas an ex parte protection orders need not allege that specific conduct is even remotely likely to occur in order to enjoin the conduct.¹²¹ Moreover, the conduct enjoined by ex parte protection orders need not even be illegal.¹²² Therefore, while a court could arguably issue an anticipatory arrest warrant for a misdemeanor infraction upon the fulfillment of some condition other than a police officer’s direct observation of the infraction, the fact remains that the warrant is still directed at arresting the suspect for underlying criminal activity—and as such, the suspect is at

¹¹⁸ U.S. v. Garcia, 882 F.2d 699, 702 (2nd Cir. 1989).

¹¹⁹ Garcia, 882 F.2d at 703 (quoting W. LAFAVE, SEARCH AND SEIZURE 700-01 (1978)).

¹²⁰ See supra, note 116 and accompanying text.

¹²¹ See supra, notes 108-111 and accompanying text.

¹²² See supra, note 33 and accompanying text.

least constructively on notice to avoid the activity. PPOs, however, provide no such constructive notice to those against whom they may be immediately enforced.

Ultimately, warrantless arrests pursuant to unnoticed, ex parte protection orders fail to satisfy even the most minimal requirements of the Due Process Clause, and all creative arguments in favor of their constitutional validity are fatally flawed. The problems which ex parte protection orders are intended to address, however, remain as urgent as ever. The next section of this Comment explores possible alternatives to the current system.

III. PROPOSALS

Despite the problems with the current statute, domestic relations PPOs do serve an important function in society's efforts to eradicate domestic violence. As such, eliminating PPOs altogether would be ill-advised. Several changes to the current statute, however, are necessary in order to bring this form of injunctive relief within the limits prescribed by Due Process and the Warrant Clause. First of all, the statute should be amended so that no individual is subject to arrest for violating an ex parte protection order until that individual has received notice of the order. The current provision allowing officers responding to a complaint to provide this notice and require immediate compliance with the terms of the PPO under pain of arrest¹²³ is simply insufficient to protect the liberty interests of the individual enjoined by the order.¹²⁴ Therefore, the legislature ought to amend the statute to require proof of service prior to informing law enforcement of the existence of a personal protection order.¹²⁵

¹²³ MCLA 600.2950(22).

¹²⁴ See *supra*, notes 36-38 and accompanying text.

¹²⁵ See APPENDIX, 600.2950(17).

Second, an ex parte order enjoining an individual from entering his or her own home is almost certainly unconstitutional.¹²⁶ Injunctions against entering one's place of employment or schooling implicate similarly weighty private interests, and may also be unconstitutional. As such, the legislature ought to require a pre-deprivation hearing in order to enjoin any of these actions. If, however, such ex parte orders are nevertheless upheld, additional procedural safeguards could mitigate the deprivations they cause. The current statute simply requires that a hearing be held within fourteen days of the filing of a petition to rescind or modify a protection order.¹²⁷ In the event that an ex parte protection order enjoins or restrains an individual from entering his or her domicile, place of employment, or place of education, the deprivation caused by the order could be reduced by requiring a hearing immediately upon petitioner's filing of a motion to rescind or modify the order. Although due process is not an exact science,¹²⁸ it would be ideal to hold the hearing within twenty-four hours of the deprivation. Although requiring such an expedited hearing would strain judicial resources, the private interests affected in these cases and the risk of erroneous deprivation of these interests is substantial given the ex parte nature of the proceedings which lead to the injunction.¹²⁹

Finally, after eliminating the aspects of the domestic relations personal protection order statute which offend Due Process and the Warrant Clause,¹³⁰ one might wonder what assistance can be given to victims of domestic violence in the period between the granting of an ex parte protection order and the effectuation of service upon the respondent, especially when the respondent is evading service.¹³¹ Fortunately, there are effective, constitutional methods of

¹²⁶ See *supra*, Section II(A)(2).

¹²⁷ See MCLA 600.2950(14); when a PPO enjoins a respondent from possessing a firearm, however, the current statute requires that a hearing be scheduled within five days of the filing or a motion to rescind or modify! *Id.*

¹²⁸ See *supra*, note 40.

¹²⁹ See *supra*, Section II(A)(2).

¹³⁰ See *infra*, APPENDIX.

¹³¹ See *supra*, notes 13-14 and accompanying text.

curtailing such abuses. For example, when there is evidence indicating that the individual restrained or enjoined by the order is evading service, the petitioner could request a second, expedited hearing in order to determine whether evasion is in fact occurring. In the event that the respondent is shown, perhaps by a preponderance of the evidence, to be intentionally evading service, the court would be empowered to make a finding on the record to that effect, and charge the respondent with actual knowledge of the ex parte protection order and constructive knowledge of its terms.¹³² While this requirement would cause some delay in the enforceability of a protection order, it would serve as an important procedural safeguard by insuring that individuals who truly have not received notice of the protection order through no fault of their own are not held accountable for violations of an ex parte order.

CONCLUSION

Michigan's domestic relations personal protection order statute makes a mockery of the constitutional rights of anyone unlucky enough to find him or herself the target of PPO. The weight of the individual interests at stake coupled with the risk that an ex parte proceeding will cause an erroneous deprivation of those interests leads to the conclusion that the enforcement of many ex parte protection orders does not comport with the minimum requirements of procedural due process. Although each case must be analyzed separately to determine whether enforcement of an ex parte PPO violates due process, it is safe to say that the more substantial the private interest affected, the more likely the PPO will fail to satisfy due process.¹³³ Furthermore, subjecting an individual to warrantless arrest for violating an ex parte order of which he or she had no knowledge offends the Warrant Clause. Rather than continuing to

¹³² See *infra*, APPENDIX at 600.2950(18).

¹³³ See *supra*, Section III.

acquiesce to the demands of victims' rights advocates while depriving citizens of their constitutional rights, Michigan's legislature ought to take immediate action. By amending Michigan's current statute, most of the protections currently afforded to victims of domestic violence may be retained while steering clear of constitutional pitfalls.

APPENDIX

(Proposed revisions to MCLA 600.2950¹³⁴)

Michigan Compiled Laws Annotated

Chapter 600. Revised Judicature Act of 1961

Revised Judicature Act of 1961

Chapter 29: Provisions Concerning Specific Actions

600.2950. Injunction against specific persons, conditions; personal protection orders, terms, reasonable cause, exceptions; application of section; entry into law enforcement information network

Sec. 2950. (1) Except as provided in subsections (27) and (28), by commencing an independent action to obtain relief under this section, by joining a claim to an action, or by filing a motion in an action in which the petitioner and the individual to be restrained or enjoined are parties, an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner from doing 1 or more of the following:

(a) Entering onto premises, **although in the event that the petitioner and the enjoined individual live in the same domicile, this relief is subject to subsections (14).**

(b) Assaulting, attacking, beating, molesting, or wounding a named individual.

(c) Threatening to kill or physically injure a named individual.

(d) Removing minor children from the individual having legal custody of the children, except as otherwise authorized by a custody or parenting time order issued by a court of competent jurisdiction.

(e) Purchasing or possessing a firearm.

(f) Interfering with petitioner's efforts to remove petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

(g) Interfering with petitioner at petitioner's place of employment or education or engaging in conduct that impairs petitioner's employment or educational relationship or environment.

¹³⁴ The entire text of 600.2950, along with proposed changes, is included. Proposed deletions are indicated by “struck through” type, thus: ~~deletion~~. Proposed additions are indicated by type which is bold and underlined, thus: **addition**.

although in the event that the petitioner and the enjoined individual are employed in the same location or attend the same school or educational environment, this provision is subject to subsection (14).

(h) Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address.

(i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code, 1931 PA 328, MCL 750.411h and 750.411i.

(j) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

(2) If the respondent is a person who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of his or her employment, a police officer certified by the commission on law enforcement standards act, 1965 PA 203, MCL 28.601 to 28.616, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of his or her employment, the petitioner shall notify the court of the respondent's occupation prior to the issuance of the personal protection order. This subsection does not apply to a petitioner who does not know the respondent's occupation.

(3) A petitioner may omit his or her address of residence from documents filed with the court under this section. If a petitioner omits his or her address of residence, the petitioner shall provide the court with a mailing address.

(4) The court shall issue a personal protection order under this section if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1). In determining whether reasonable cause exists, the court shall consider all of the following:

(a) Testimony, documents, or other evidence offered in support of the request for a personal protection order.

(b) Whether the individual to be restrained or enjoined has previously committed or threatened to commit 1 or more of the acts listed in subsection (1).

(5) A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1)(a) if all of the following apply:

(a) The individual to be restrained or enjoined is not the spouse of the moving party.

(b) The individual to be restrained or enjoined or the parent, guardian, or custodian of the minor to be restrained or enjoined has a property interest in the premises.

(c) The moving party or the parent, guardian, or custodian of a minor petitioner has no property interest in the premises.

(6) A court shall not refuse to issue a personal protection order solely due to the absence of any of the following:

(a) A police report.

(b) A medical report.

(c) A report or finding of an administrative agency.

(d) Physical signs of abuse or violence.

(7) If the court refuses to grant a personal protection order, it shall state immediately in writing the specific reasons it refused to issue a personal protection order. If a hearing is held, the court shall also immediately state on the record the specific reasons it refuses to issue a personal protection order.

(8) A personal protection order shall not be made mutual. Correlative separate personal protection orders are prohibited unless both parties have properly petitioned the court pursuant to subsection (1).

(9) A personal protection order is effective and immediately enforceable anywhere in this state, ~~when signed by a judge. Upon service, a personal protection order~~ **and** may also be enforced by another state, an Indian tribe, or a territory of the United States, **upon service**.

(10) The court shall designate the law enforcement agency that is responsible for entering the personal protection order into the law enforcement information network as provided by the L.E.I.N. policy council act of 1974, 1974 PA 163, MCL 28.211 to 28.216.

(11) A personal protection order shall include all of the following, and to the extent practicable the following shall be contained in a single form:

(a) A statement that the personal protection order has been entered to restrain or enjoin conduct listed in the order and that violation of the personal protection order will subject the individual restrained or enjoined to 1 or more of the following:

(i) If the respondent is 17 years of age or more, immediate arrest and the civil and criminal contempt powers of the court, and that if he or she is found guilty of criminal contempt, he or she shall be imprisoned for not more than 93 days and may be fined not more than \$500.00.

(ii) If the respondent is less than 17 years of age, immediate apprehension or being taken into custody, and subject to the dispositional alternatives listed in section 18 of chapter XIII of the probate code of 1939, 1939 PA 288, MCL 712A.18.

(iii) If the respondent violates the personal protection order in a jurisdiction other than this state, the respondent is subject to the enforcement procedures and penalties of the state, Indian tribe, or United States territory under whose jurisdiction the violation occurred.

(b) A statement that the personal protection order is effective and immediately enforceable anywhere in this state **upon service**, ~~when signed by a judge, and that, upon service, a personal protection order~~ also may be enforced by another state, an Indian tribe, or a territory of the United States.

(c) A statement listing the type or types of conduct enjoined.

(d) An expiration date stated clearly on the face of the order.

(e) A statement that the personal protection order is enforceable anywhere in Michigan by any law enforcement agency.

(f) The law enforcement agency designated by the court to enter the personal protection order into the law enforcement information network.

(g) For ex parte orders, a statement that the individual restrained or enjoined may file a motion to modify or rescind the personal protection order and request a hearing within 14 days after the individual restrained or enjoined has been served or has received actual notice of the order and that motion forms and filing instructions are available from the clerk of the court.

(12) An ex parte personal protection order shall be issued and effective ~~without~~ **upon receipt of** written or oral notice ~~to~~ **by** the individual restrained or enjoined ~~or his or her attorney if it clearly appears from specific facts shown by 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 a personal protection order can be issued.~~ **If it clearly appears from specific facts shown by the verified complaint, written motion, or affidavit that the notice will itself precipitate adverse action before the protection order can be issued, the order may be issued without notice but will not be enforceable against the respondent until respondent receives notice of the order.**

(13) A personal protection order issued under subsection (12) is valid for not less than 182 days. The individual restrained or enjoined may file a motion to modify or rescind the personal protection order and request a hearing under the Michigan court rules. The motion to modify or rescind the personal protection order shall be filed within 14 days after the order is served or after the individual restrained or enjoined has received actual notice of the personal protection order unless good cause is shown for filing the motion after the 14 days have elapsed.

(14) Except as otherwise provided in this subsection, the court shall schedule a hearing on the motion to modify or rescind the ex parte personal protection order within 14 days after the filing of the motion to modify or rescind. If the respondent is a person described in subsection (2) and the personal protection order prohibits him or her from purchasing or possessing a firearm, the

court shall schedule a hearing on the motion to modify or rescind the ex parte personal protection order within 5 days after the filing of the motion to modify or rescind. **In the event that the protection order enjoins the individual from entry into his or her domicile, place of employment, or place of education, the individual enjoined or restrained by the order shall have the right to a hearing within 24 hours of filing the motion to modify or rescind.**

(15) The clerk of the court that issues a personal protection order shall do all of the following immediately upon issuance ~~and without requiring~~ **receiving proof the order has been served** on the individual restrained or enjoined:

(a) File a true copy of the personal protection order with the law enforcement agency designated by the court in the personal protection order.

(b) Provide the petitioner with not less than 2 true copies of the personal protection order.

(c) If respondent is identified in the pleadings as a law enforcement officer, notify the officer's employing law enforcement agency, if known, about the existence of the personal protection order.

(d) If the personal protection order prohibits respondent from purchasing or possessing a firearm, notify the concealed weapon licensing board in respondent's county of residence about the existence and contents of the personal protection order.

(e) If the respondent is identified in the pleadings as a department of corrections employee, notify the state department of corrections about the existence of the personal protection order.

(f) If the respondent is identified in the pleadings as being a person who may have access to information concerning the petitioner or a child of the petitioner or respondent and that information is contained in friend of the court records, notify the friend of the court for the county in which the information is located about the existence of the personal protection order.

(16) The clerk of the court shall inform the petitioner that he or she may take a true copy of the personal protection order to the law enforcement agency designated by the court in subsection (10) to be immediately entered into the law enforcement information network.

(17) The law enforcement agency that receives a true copy of the personal protection order under subsection (15) or (16) **and proof of service** shall immediately ~~and without requiring proof of service~~ enter the personal protection order into the law enforcement information network as provided by the L.E.I.N. policy council act of 1974, 1974 PA 163, MCL 28.211 to 28.216.

(18) A personal protection order issued under this section shall be served personally or by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the individual restrained or enjoined or by any other manner provided in the Michigan court rules. If the individual restrained or enjoined has not been served, a law enforcement officer or clerk of the court who knows that a personal protection order exists may, at any time, serve the individual restrained or enjoined with a true copy of the order or

advise the individual restrained or enjoined about the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. If the respondent is less than 18 years of age, the parent, guardian, or custodian of that individual shall also be served personally or by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the parent, guardian, or custodian of the individual restrained or enjoined. A proof of service or proof of oral notice shall be filed with the clerk of the court issuing the personal protection order. ~~This subsection does not prohibit the immediate effectiveness of a personal protection order or its immediate enforcement under subsections (21) and (22).~~ **If it appears that the individual restrained or enjoined by the order is evading service, the court in which the order was issued shall, upon the request of the original petitioner, hold a hearing within one day of the request in order to determine whether evasion of service is in fact occurring. In the event that the individual is shown by a preponderance of the evidence to be intentionally evading service, the court will make a finding on the record to that effect, the individual will be charged with actual knowledge of the order and constructive knowledge of its terms, and the order will be immediately enforceable.**

(19) The clerk of the court shall immediately notify the law enforcement agency that received the personal protection order under subsection (15) or (16) if either of the following occurs:

- (a) The clerk of the court has received proof that the individual restrained or enjoined has been served.
- (b) The personal protection order is rescinded, modified, or extended by court order.

(20) The law enforcement agency that receives information under subsection (19) shall enter the information or cause the information to be entered into the law enforcement information network as provided by the L.E.I.N. policy council act of 1974, 1974 PA 163, MCL 28.211 to 28.216.

(21) ~~Subject to subsection (22), a~~ **A** personal protection order is immediately enforceable anywhere in this state by any law enforcement agency that has received a true copy of the order **and proof of service upon the enjoined individual**, is shown a copy of it, **these documents**, or has verified its **their** existence on the law enforcement information network as provided by the L.E.I.N. policy council act of 1974, 1974 PA 163, MCL 28.211 to 28.216.

~~(22) If the individual restrained or enjoined has not been served, the law enforcement agency or officer responding to a call alleging a violation of a personal protection order shall serve the individual restrained or enjoined with a true copy of the order or advise the individual restrained or enjoined about the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the individual restrained or enjoined may obtain a copy of the order. The law enforcement officer shall enforce the personal protection order and immediately enter or cause to be entered into the law enforcement information network that the individual restrained or enjoined has actual notice of the personal protection order. The law enforcement officer also shall file a proof of service or proof of oral notice with the clerk of the court issuing the personal protection order. If the individual restrained or enjoined has not~~

~~received notice of the personal protection order, the individual restrained or enjoined shall be given an opportunity to comply with the personal protection order before the law enforcement officer makes a custodial arrest for violation of the personal protection order. The failure to immediately comply with the personal protection order shall be grounds for an immediate custodial arrest. This subsection does not preclude an arrest under section 15 or 15a of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15 and 764.15a, or a proceeding under section 14 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.14.~~

~~(23)~~ **(22)** An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, shall be imprisoned for not more than 93 days and may be fined not more than \$500.00. An individual who is less than 17 years of age and who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18. The criminal penalty provided for under this section may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct.

~~(24)~~ **(23)** An individual who knowingly and intentionally makes a false statement to the court in support of his or her petition for a personal protection order is subject to the contempt powers of the court.

~~(25)~~ **(24)** A personal protection order issued under this section is also enforceable under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712.A32, and section 15b of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15b.

~~(26)~~ **(25)** A personal protection order issued under this section is also enforceable under chapter 17.

~~(27)~~ **(26)** A court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1) if any of the following apply:

(a) The respondent is the unemancipated minor child of the petitioner.

(b) The petitioner is the unemancipated minor child of the respondent.

(c) The respondent is a minor child less than 10 years of age.

~~(28)~~ **(27)** If the respondent is less than 18 years of age, issuance of a personal protection order under this section is subject to chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

~~(29)~~ **(28)** A personal protection order that is issued prior to the effective date of the amendatory act that added this subsection is not invalid on the ground that it does not comply with 1 or more of the requirements added by this amendatory act.

~~(30)~~ **(29)** As used in this section:

(a) "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(b) "Federal law enforcement officer" means an officer or agent employed by a law enforcement agency of the United States government whose primary responsibility is the enforcement of laws of the United States.

(c) "Personal protection order" means an injunctive order issued by the circuit court or the family division of circuit court restraining or enjoining activity and individuals listed in subsection (1).