

State of New Hampshire  
Supreme Court

NO. 2012-0135

2012 TERM  
JUNE SESSION

In the Matter of S. Rebecca S. Carmody v. Craig T. Carmody

RULE 7 APPEAL OF FINAL DECISION OF  
NINTH CIRCUIT - FAMILY DIVISION COURT - MANCHESTER

BRIEF OF CRAIG T. CARMODY

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## QUESTION PRESENTED

- I. RSA 173-B:5, X provides that “[w]ithin 15 days prior to the expiration of the protective orders, the defendant may request, by motion to the court, the return of any and all firearms and ammunition.” The court understood this to mean that the window for requesting return of firearms is strictly limited to the 15 day period prior to the expiration of the order; whereas the plain meaning of the statutory language is that the window in which the claimant can request return is only restricted by the earliest date when such request can be made. Did the court err in its interpretation of the statute and by failing to order the return of the claimant’s firearms?

Preserved: MOTION FOR RECONSIDERATION (Dec. 21, 2011), *Appx.* at 17.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Craig Carmody served in the military, and upon retirement received as gifts from his squad several firearms, which have sentimental value. *Trn.* at 2.

Later, in 2005 Mr. Carmody divorced Rebecca Carmody, moved to Vermont, and left behind that chapter of his life. *Trn.* at 2. As part of the divorce proceeding there had been a temporary domestic violence order, which by agreement of the parties and approval of the court, was withdrawn in May 2005. During its short pendency, the order required Mr. Carmody to relinquish his firearms. ORDER (Dec. 14, 2011), *Appx.* at 15.

Six years later, in 2011, the Greenfield, New Hampshire police chief approached Mr. Carmody's divorce lawyer, reminded him of the guns, and asked that he do something to get them out of the department's storage. *Trn.* at 2; ORDER (Dec. 14, 2011), *Appx.* at 15. Thereafter, Mr. Carmody petitioned the court for their return. MOTION & AFFIDAVIT FOR RETURN OF FIREARMS (Nov. 9, 2011), *Appx.* at 10.

Mr. Carmody's former wife is not concerned about the matter. Her divorce lawyer wrote a letter to the court saying they "have no objection to Mr. Carmody's Motion for Return of Firearms and neither she nor I intend to appear at the hearing." LETTER FROM SUZANNE D. DECKER, ESQ., TO COURT (Nov. 21, 2011), *Appx.* at 12.

The court held a hearing, at which Mr. Carmody and his lawyer appeared. As promised, neither the former Ms. Carmody nor her attorney attended. ORDER (Dec. 14, 2011), *Appx.* at 15. The court found, based on a report it received from the State Police, that Mr. Carmody has no disqualifications for possession of firearms. ORDER (Dec. 14, 2011), *Appx.* at 15. No reason was proffered by anyone for not returning Mr. Carmody's military mementoes. *Trn.* at 2.

Based on its reading of the statute, however, the Manchester Family Division (*John C. Emery, J.*) refused to return them. The court denied Mr. Carmody's request for reconsideration, and he appealed.

### SUMMARY OF ARGUMENT

After setting forth the firearms return statute, Mr. Carmody explains that the lower court misconstrued its terms, and provides a more reasonable construction based on its language and legislative history. He then asks this Court to order the return of his firearms which were relinquished in 2005.

## ARGUMENT

### I. New Hampshire's Firearm Return Statute

As interpreted by the lower court, the New Hampshire firearms return statute would force claimants into a very narrow time frame to claim their property.

New Hampshire's firearm return statute provides in substantial part:

(a) *Within 15 days prior to the expiration of the protective orders, the defendant may request, by motion to the court, the return of any and all firearms ... held by the law enforcement agency while the protective order was in effect.* Upon receipt of such a motion, the court shall schedule a hearing no later than 15 days after the expiration of the order. The court shall provide written notice to the plaintiff who shall have the right to appear and be heard, and to the law enforcement agency which has control of the firearms.... The scope of the hearing shall be limited to:

(1) Establishing whether the defendant is subject to any state or federal law or court order that precludes the defendant from owning or possessing a firearm; and

(2) Under circumstances where the plaintiff has requested an extension of the protective order, whether the plaintiff has established by a preponderance of the evidence that the defendant continues to represent a credible threat to the safety of the plaintiff.

(b) If the court finds that the defendant is not subject to any state or federal law or court order precluding the ownership or possession of firearms, or if the court denies the plaintiff's request to extend the protective order, *the court shall issue a written order directing the law enforcement agency to return the requested firearms ... to the defendant.*

(c) Law enforcement agencies shall not release firearms ... without a court order granting such release. The law enforcement agency may charge the defendant a reasonable fee for the storage of any firearms .... The fee shall not exceed the actual cost incurred by the law enforcement agency.... The defendant may make alternative arrangements ... for the storage of firearms, at the defendant's own expense, upon approval of the court....

(d) No law enforcement agency shall be held liable for alleged damage or deterioration due to storage or transportation to any firearms ... held by a law enforcement agency, so long as due care is used.

RSA 173-B:5, X (emphasis added).

## **II. Court's Misconstruction of Firearm Return Statute**

There is no question here that Mr. Carmody is eligible for the return of his firearms: the protective order was not extended, the former Ms. Carmody does not object, and the court found no disqualifications. Rather the court refused their return because it interpreted paragraph X(a) – “[w]ithin 15 days prior to the expiration of the protective orders” – to mean that Mr. Carmody was supposed to have made his request during a short 15-day window in 2005, and having missed that, he cannot thereafter ever retrieve them. The court wrote:

This statute limited the defendant to applying within 15 days prior to the expiration of the court's order of protection for applying for the return of the firearms. The statute provides no other provision for the court to return the firearms. The imposition of the timing for filing is significant in that the Legislature effectively constrained the filing of the motion to return to this narrow time frame (15 days prior to expiration) where previously, the defendant could have applied any time after the order expired.

ORDER (Dec. 14, 2011), *Appx.* at 15. The court thus concluded:

The defendant had notice that the order was expiring in May 2005. Despite this knowledge, the defendant waited seventy-eight months before he filed his motion to return firearms. As the defendant has failed to comply with the Legislature's timing for filing the motion, the court has no choice but to deny the motion.

ORDER (Dec. 14, 2011).

The family division's construction, however, is neither in accord with the statutory language, nor it's legislative purpose.

## **III. Purposes of 1999 Enactment of Firearm Return Statute**

The firearm return statute, section X, was enacted in 1999. LAWS 1999 ch. 240 §5, X (HB 722), *Appx.* at 39, 44. Before that, gun confiscation pursuant to protective orders was in the section of the statute discussing “temporary relief.” RSA 173-B:6, VII (1994 version), *Appx.* at



22, 29 (“Temporary relief may include ... directing the defendant to temporarily relinquish to the peace officer any or all deadly weapons.) There was no specific firearm return statute as part of the law creating protective orders.

Rather, it appears that a person who surrendered firearms lost them for the duration of the protective order, and that after its expiration petitioned for their return. Although the statute does not explicitly say that is the method of return, its silence suggests no other procedural conclusion. That also was the conclusion of the legislative committee which wrote and advocated for passage of the firearm return statute. LEGISLATIVE RECORD for HB-722 (1999), *Appx.* at 20. (Under the current statute firearms can be taken for the duration of a DVP.”)

The purpose of the 1999 amendments was to fill the procedural gap by enacting a specific firearm return statute, so that a person can know exactly when and how to go about retrieving their firearms. *Id.* (“Rep. Andrew Christie, Jr. for Criminal Justice and Public Safety: This bill is a reorganization of the present Domestic Violence Statute, RSA 173-B. The various components are rewritten so that the process is easier to follow and understand. ... A subcommittee met six times to work on this bill.”) Thus the committee indicated:

In this rewrite, provisions for a motion to return firearms can be filed with the court 15 days prior to the expiration of an order and the court shall schedule a hearing no later than 15 days after the expiration of the order. The court is required to notify the plaintiff of this hearing.

LEGISLATIVE RECORD for HB-722 (1999), *Appx.* at 20. The legislative committee likewise told police departments how they can recoup costs of firearm storage, and allowed owners to make alternative storage arrangements.

#### **IV. Firearm Return Statute Tells Owners How to Get Their Guns Back**

The legislatively-required process is now simple and easy to follow. The statutory term “within” in section X(a) allows the requester to file a motion before the end of the protective period, and requires the court to hold a hearing no more than 15 days after. These times give owners an opportunity to regain their property reasonably close to the expiration of the protective order. By saying “shall” in section X(b) it directs the court to order the return if the movant meets the statute’s qualifications. By depriving an owner for no longer than is justified by the state’s interest, the statute appropriately implements constitutional gun ownership rights, N.H. CON’ST. pt. I, art. 2-a (“All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.”); U.S. CONST. amd. 2; Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639 (2010), and constitutional property and due process rights.

While the firearm return statute sets a firm no-earlier-than date, it nowhere creates an end-date. There is no time provision after which the property or its value escheats to the police department or storage facility. The statute nowhere purports to permanently deprive owners of their guns. Nowhere does the statute create a narrow and impractical 15-day window within which an owner must either petition or forever forgo.

The language of the statute and its intent seeks constitutional and procedural clarity for police, courts and owners. It does not seek to create a legal loophole leaving owners without property they want, and police departments with property they can’t get rid of. The statute does not support the Family Court’s interpretation.

## CONCLUSION

The lower court's interpretation of the statute is mistaken. This Court should order the return of Mr. Carmody's firearms, and further, issue a written opinion to prevent other courts from future misconstruction.

Respectfully submitted,

Craig Carmody  
By his Attorney,

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Dated: June 19, 2012

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## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Craig Carmody requests that Attorney Joshua L. Gordon be allowed oral argument because the issues raised in this case are novel and because its outcome is important for New Hampshire jurisprudence.

Although the former Ms. Carmody's lawyer has withdrawn her appearance by letter to this Court, and has disclaimed an interest in this case by letter to the lower court, I hereby certify that on June 19, 2012, copies of the foregoing will be forwarded to the former Ms. Carmody.

Dated: June 19, 2012

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Joshua L. Gordon, Esq.

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