



Judge expunges restraining order obtained by fraud

Lawyers predict more 'Adams' motions to follow

See opinion digest for *Chamberlain v. Khanlian* on page 27.



ARNEL

A state District Court judge has ordered the expungement of a restraining order that had been procured by fraud against a female pharmacy school student, in a case that some lawyers predict could trigger similar motions to clear parties' permanent records.

The Office of the Commissioner of Probation, which maintains CARI, had opposed the defendant student's motion to expunge her record, arguing that nothing in G.L.c. 209A permitted a judge to expunge the record. It also argued that the defendant was not entitled to expungement under *Adams* since she did not raise her fraud argument in a timely manner.

The ruling is believed to be the first time a 209A order has been expunged by a trial court judge since the Appeals Court, in March's *Commissioner of Probation v. Adams* decision (Lawyers Weekly No. 11-043-06), gave judges the authority to expunge civil abuse protection orders from the Court Activity Record Information system — the domestic violence registry.

But District Court Judge Gregory C. Flynn disagreed and, after finding that fraud was present, wrote

Continued on page 30

By Noah Schaffer

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The first time Laurence D. Shind ran for public office, it didn't go well. The Boston-based attorney had his sights on an opening on Wellesley's Natural Resources Commission. Unlike Shind, his opponent had lived in Wellesley

her entire life and had substantial name-recognition from her work as a nursery school teacher.

On election day, Shind was trounced at the polls, receiving only 19 percent of the vote.

The silver lining to Shind's cloud was that the town moderator took notice of his interest in local government and he was sub-

sequently asked to be on Wellesley's Advisory Committee, which handles municipal finance issues.

One thing led to another, Shind says. "I got to know a lot of Town Meeting members and got asked to run for an open Board of Selectmen seat," he recalls.

This time around, Shind won

Continued on page 23

'Hazards' may not be deemed confidential under new order

'Melanie's Law' challenged



Judge expunges 209A order obtained by fraud

Continued from page 1

that "failing to expunge would allow false information to remain in the record."

The two-page order is *Chamberlain v. Khanlian*, Lawyers Weekly No. 16-019-06.

'Floodgates' opened

Philip L. Arnel of Dedham, the defendant's lawyer, said of Flynn's decision, "The consequences are far-reaching, because it more or less opens the floodgates to past, present and future aggrieved defendants who are the victims of a 209A order obtained by fraudulent means."

He told Lawyers Weekly that the state's interest in the case could have arisen out of the possibility that now "the Office of the Commissioner of Probation will be hit with many of these motions, and would likely be forced to deal with them on a case by case basis, instead of universal opposition across the board."

Arnel said, "Initially when I questioned why they would oppose something that was so strikingly unfair to my victimized client, they replied that they were preserving the integrity of the record. I responded by asking them how do you preserve the integrity of something that has no integrity to begin with?"

Through a spokeswoman, the Office of the Commissioner of Probation declined to comment to Lawyers Weekly.

"These [restraining] orders are a necessary evil, but are often abused, especially in family law cases," continued Arnel.

"Unfortunately, that is true," added family-law attorney Marilynne R. Ryan of Walpole. "I think this is something that has been needed for some time, and I hope it will act as a disincentive."

Ryan agreed with Arnel that many past recipients of 209A orders might go to the courts looking to get them expunged.

"I wouldn't be surprised if there was a flur-

CASE: *Chamberlain v. Khanlian*, Lawyers Weekly No. 16-019-06

COURT: District Court

ISSUE: Should a 209A order be expunged where there was evidence it was obtained fraudulently?

DECISION: Yes

ry of activity," she said. "But I think that people who are aggrieved by this kind of conduct deserve to receive an expungement, and I agree that the current remedy is insufficient without an expungement."

Ryan said, "If there's a danger of fraudulently obtained orders, you've got to make [the person who is targeted] whole."

Another family law practitioner, Martha R. Bagley of Boston, agreed that many times participants in divorce cases obtain 209A orders as a weapon. But she questioned whether the criteria set by the Appeals Court in *Adams* will result in a flood of motions to expunge.

"Proving fraud is costly, and difficult to litigate," she said. "It's the same if you ask for recent decisions on 209A where the defendant has a constitutional right to a full evidentiary hearing on the merits of the restraining order. Many litigants cannot afford to do a trial. So I think you have to be mindful that many people going through divorces have limited resources."

"If you are pro se, which is dominant in Suffolk County and becoming more prevalent in Middlesex County, the litigants will lack the sophistication to know they can do this, let alone pull it off," added Bagley. "So it is a very

interesting question whether your party has the resources to prove the fraud."

"I think in the *Adams* case the court was really specific that there has to be a finding of fraud to expunge the record," said Bagley. "The Legislature makes it clear they wanted the records [kept] to protect prospective victims. In a case with fraud, you don't have a victim."

Bagley said that despite their limitations, the expungements are "great. These orders linger and can have lasting effects. I don't know an employer in the commonwealth that doesn't run a [background check on new hires]."

'Adams' test case?

In *Chamberlain*, the defendant had been involved in an argument with a man who was subleasing an apartment room from her, but whom had failed to pay rent. The argument began when the petitioner complained that the defendant was speaking in Arabic.

Based on the petitioner's initial complaint to police, the defendant was slapped with a 10-day restraining order and charged with assault and battery.

The defendant and two eyewitnesses signed affidavits saying that the petitioner's account of the incident was false. The assistant district attorney

agreed to drop charges and remand the criminal case to a clerk-magistrate hearing so it would not appear on the defendant's permanent record.

The petitioner did not attend the 10-day 209A hearing, nor the hearing held after the defendant moved to expunge the restraining order from her record.

In his motion in opposition to expunge the record, John R. Craven, the attorney for the Office of the Commissioner of Probation, said that "there is nothing in [209A] that permits a record to be removed or that authorizes the entry of a judicial order directing expungement of the record from the system."

Craven also argued that in *Adams* the Appeals Court said that subjects of 209A orders who do not raise the issue of fraud either at the initial 10-day hearing or the extension hearing are not entitled to an expungement.

"In this case ... the restraining order was vacated at the ten day hearing because [the petitioner] failed to appear. In the absence of an argument, there can be no fraud. Without a fraud, there can be no expungement," said Craven.

But the judge disagreed and sided with the defendant.

"In light of [t]he allegations made in the relevant pleadings, the factual support presented by the accompanying affidavits, the failure of the petitioner to appear to be heard on the allegations of fraud, the court is clearly convinced that the original restraining order was granted only upon a fraudulent set of facts presented to the Court," said Flynn in his order.

"In consideration of the defendant's potential career path as a licensed pharmacist, I find that her future employment would be adversely affected by the existence of a record of the restraining order," added Flynn.

— NOAH SCHAFFER

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DISTRICT COURT - TRIAL DIVISION

Domestic relations

G.L.c. 209A order -

Motion to expunge

Where a defendant has moved to expunge a G.L.c. 209A protective order, I find that the motion should be allowed pursuant to the standards enunciated in *Commissioner of Probation v. Adams*, 56 Mass. App. Ct. 725 (2006).

Discussion

"The 209A petition was originally filed on April 10, 2006 and an ex parte order issued on that date returnable on April 20, 2006. On that date the defendant appeared with counsel in opposition to the extension of the 209A order. The plaintiff failed to appear on that date and the 209A order expired that day.

"Subsequently, on May 1, 2006, the defendant moved to expunge the record of the 209A order, alleging fraud on behalf of the original petitioner and citing *Commissioner of Probation v. Adams*, [supra], in support of their request. Several affidavits were filed setting forth factual evidence in support of the claim of fraud. The Commissioner of Probation also appeared in opposition to the request to expunge, not taking a position as to the facts of the case but to remind the court that there was no authority to seal or expunge except in accordance with the conditions set forth in *Adams*.

"In light of the allegations made, the court thought it appropriate to give notice to the original petitioner to give him an opportunity to be heard on the factual allegations of fraud. The court requested notice to the petitioner of the Motion to Expunge with all the supporting affidavits. After notice by first class mail and certified mail, the plaintiff failed to appear at the subsequent hearing date, the Commissioner of Probation appeared on that date, not in opposition factually but to seek

compliance with *Adams*.

"In light of the allegations made in the relevant pleadings, the factual support presented by the accompanying affidavits, the failure of the petitioner to appear to be heard on the allegations of fraud, the court is clearly convinced that the original restraining order was granted only upon a fraudulent set of facts presented to the Court.

"In consideration of the defendant's potential career path as a licensed pharmacist, I find that her future employment would be adversely affected by the existence of a record of the restraining order. I further find that failing to expunge would allow false information to remain in the record.

"Accordingly, in conformity with the standards set forth in *Commissioner of Probation v. Adams*, the motion to expunge was allowed."

Chamberlain v. Khanlian (Lawyers Weekly No. 16-019-06) (2 pages) (Flynn, J.) (Waltham District Court) (Docket No. 0651-RO-99) (Aug. 25, 2006).