
Volume 122


Issue 3 *Dickinson Law Review Symposium Issue:*
Access to Justice: Innovations and Challenges in
Providing Assistance to Pro Se Litigants

Spring 2018

“PFA” Record Expungement as a Tool for Settlement: Due Process and the Pennsylvania Protection from Abuse Act

Kyle Semroc

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Criminal Procedure Commons](#), [Law and Society Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), [Legal Writing and Research Commons](#), and the [Legislation Commons](#)

Recommended Citation

Kyle Semroc, “PFA” Record Expungement as a Tool for Settlement: Due Process and the Pennsylvania Protection from Abuse Act, 122 DICK. L. REV. 939 (2018).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/9>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

“PFA” Record Expungement as a Tool for Settlement: Due Process and the Pennsylvania Protection from Abuse Act

Kyle Semroc*

ABSTRACT

The Pennsylvania Protection from Abuse Act (PFAA) empowers victims of domestic violence to obtain protection orders through a hearing process. Once the Protection from Abuse (PFA) process is initiated, a statewide registry system automatically generates a civil record. Currently, no statutory language governing the expungement of a PFA record exists in Pennsylvania, and courts have decided that a right to expungement exists only in limited circumstances. The courts are silent, however, on whether a protection order by consent of the parties with no admission of abuse is available for expungement.

This Comment begins by describing the procedure by which a plaintiff files for a protection order and discusses the due process protections embedded within each step of the process. Expungement in the criminal context provides a contrast to the civil context in the subsequent section. Next, this Comment discusses case law related to the expungement of civil records in the PFA context. Finally, an analysis of relevant PFA case law reveals that a protection order by consent with no admission of abuse likely cannot be expunged from a defendant’s civil record.

The purpose of the PFAA is to stop current abuse and prevent instances of further abuse. If a consent order could be expunged from a civil record, a defendant may be significantly more willing to agree to such an order and, thus, the court would

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2018. I would first like to thank George Bivens, Hanna Borsilli, and Jordan Yatsko for supporting me throughout this writing process. I would also like to thank Daniel Hargreaves, Esq. for showing me how an effective litigator and zealous advocate counsels clients, navigates the courthouse, and commands the courtroom. Lastly, I would like to thank my parents, Phyllis and Gary Semroc, for teaching me the power of positive attitude, the necessity of perseverance, and the benefits of living a simple life.

be able to serve the best interests of the victims of domestic abuse.

Therefore, a PFA attorney should be able to efficiently and effectively settle a PFA matter before the dispute ever reaches the final hearing; the potential for expungement would provide a PFA attorney with a powerful tool for settlement and, thus, the Pennsylvania Legislature should amend the PFAA to include an expungement provision. Because expungement is presently not available for consent orders, this Comment proposes amending the PFAA and two additional alternatives to circumvent the prohibition on expungement.

TABLE OF CONTENTS

I.	INTRODUCTION.....	941
II.	BACKGROUND	942
	A. <i>The Pennsylvania Protection from Abuse Act</i>	942
	1. <i>PFA Definitions</i>	942
	2. <i>PFA Hearing Process and Relief</i>	945
	3. <i>Purpose of the PFAA</i>	947
	B. <i>Expungement Law in the Criminal Realm</i>	948
	1. <i>Basis for Criminal Record Expungement</i>	948
	2. <i>Wexler Balancing Test</i>	949
	C. <i>Expungement Law in the Civil Realm</i>	951
III.	ANALYSIS	952
	A. <i>PFA Record Expungement Case Law</i>	952
	1. <i>Carlacci v. Mazaleski</i>	953
	2. <i>Commonwealth v. Charnik</i>	954
	3. <i>Commonwealth v. Nelson</i>	956
	B. <i>PFA Record Expungement Due Process Analysis</i> .	957
	1. <i>PFA Case Precedent Synthesis</i>	957
	2. <i>Public Policy Considerations</i>	959
	C. <i>Three Proposed Resolutions</i>	960
	1. <i>Grant Defendant a Wexler Hearing as Part of the Consent Order</i>	960
	2. <i>Reschedule the Final Hearing to Create a Cooling-Off Period</i>	962
	3. <i>Amend the PFAA to Allow Expungement of Consent Orders</i>	963
IV.	CONCLUSION	965

I. INTRODUCTION

The Pennsylvania Protection from Abuse Act (PFAA)¹ does not contain a provision related to the expungement of Protection from Abuse (PFA) records. Courts in Pennsylvania have held that a limited right to expunge a PFA record exists as “an adjunct of due process.”² The Pennsylvania Supreme Court, however, has yet to decide whether a final order³ by consent⁴ of the parties granting the plaintiff’s petition for protection from abuse⁵ can be expunged from a defendant’s civil record.

This lack of guidance poses a problem for parties seeking to settle PFA matters prior to the final hearing in the form of a consent order.⁶ If clear guidelines related to the expungement of consent orders existed, then attorneys could use the availability of expungement as a bargaining tool during settlement negotiations for consent orders.⁷ The opportunity for expungement may create the incentive for a defendant to agree to a more favorable consent order for the plaintiff and bring about a cessation of abuse.

The purpose of this Comment is to provide an overview of the PFAA, synthesize Pennsylvania Supreme and Superior Court decisions related to the expungement of civil records, and provide solutions to the lack of statutory expungement guidelines for PFA orders. The inquiry of this Comment is limited to PFA matters in the Commonwealth of Pennsylvania and those civil records that are archived by the Protection from Abuse Database (PFAD) system.⁸

1. 23 PA. CONS. STAT. § 6101 (2017).

2. *Carlacci v. Mazaleski*, 798 A.2d 186, 190 (Pa. 2002).

3. *See* PA. R.A.P. 341(b)(1) (“A final order is any order that disposes of all claims and of all parties.”). *See also* 20 WEST’S PA. PRAC., APPELLATE PRACTICE § 341:3.1.1L (“An order granting a petition for protection from abuse and disposing of all claims raised in the petition is final under Pa. R.A.P. 341(b), notwithstanding that other matters, such as a child custody dispute, may be ongoing between the parties.”).

4. *See* PA. R. PHILA. CO. FAMILY DIV. 1901.11(a) (“The parties may agree to the entry of a final order by consent.”).

5. § 6106(a) (“An adult or an emancipated minor may seek relief under this chapter . . . by filing a petition with the court alleging abuse by the defendant.”).

6. § 6108(a) (“The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children.”). This Comment uses “consent agreement,” “final order by consent,” and “consent order” interchangeably throughout. *See infra* Part II.A–IV.

7. Aaron Weems, *Expungement of PFA Records an Important but Often Overlooked Tool*, THE LEGAL INTELLIGENCER (May 6, 2016, 8:57 PM), <http://www.thelegalintelligencer.com/id=1202756926860/Expungement-of-PFA-Records-an-Important-but-Often-Overlooked-Tool>.

8. § 6105(e) (“The Pennsylvania State Police shall establish a Statewide registry of protection orders and shall maintain a complete and systematic record and index of all valid temporary and final court orders of protection, court-approved

Part II.A of this Comment discusses the nuances of the PFAA and describes the hearing procedure⁹ in addition to illuminating the purpose of the Act.¹⁰ Part II.B of this Comment outlines the way in which courts handle record expungement in the criminal realm¹¹ as a contrast to expungement in the civil realm, as discussed in Part II.C.¹²

Part III.A of this Comment summarizes the three crucial cases related to PFA record expungement.¹³ Part III.B of this Comment synthesizes the PFA record expungement cases to provide a likely answer as to whether an order by consent with no admission of abuse is available for expungement under current Pennsylvania law and considers the public policy implications of PFA record expungement.¹⁴ Finally, Part III.C provides three proposed resolutions to the lack of statutory authority and Pennsylvania Supreme Court precedent for expungement of a consent agreement.¹⁵ This Comment ultimately suggests that amendment of the PFAA to allow expungement in limited circumstances would coincide with the purpose of the Act.

II. BACKGROUND

A. *The Pennsylvania Protection from Abuse Act*

1. *PFA Definitions*

The Pennsylvania Protection from Abuse Act (PFAA) governs acts of abuse committed by family or household members, sexual or intimate partners, and persons who share biological parenthood.¹⁶ The purpose of the PFAA is to prevent the escalation of disputes among those with “familial relationships” where injury is likely to occur.¹⁷ If no requisite familial relationship as defined by the statute exists, then the plaintiff will not have standing to pursue a pro-

consent agreements and a foreign protection order filed pursuant to section 6104(d). . . .”).

9. § 6107 (outlining the procedure a plaintiff must follow to obtain a protection from abuse court order).

10. *See infra* Part II.A.

11. 18 PA. CONS. STAT. § 9122 (2017) (providing the method by which criminal defendants may expunge criminal history record information).

12. *See infra* Part II.B–C.

13. *See* Carlacci v. Mazaleski, 798 A.2d 186 (Pa. 2002); Commonwealth v. Charnik, 921 A.2d 1214 (Pa. Super. Ct. 2007); Commonwealth v. Nelson, 690 A.2d 728 (Pa. Super. Ct. 1997); *infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. 23 PA. CONS. STAT. § 6102 (2017).

17. *See* McCance v. McCance, 908 A.2d 905, 910 (Pa. Super. Ct. 2006) (“The entire thrust of the Protection from Abuse Act and rules of civil procedure is to

tection order.¹⁸ A PFA petitioner is required to establish that abuse has occurred by a preponderance of the evidence instead of the criminal evidentiary burden of proof beyond a reasonable doubt.¹⁹ Cases exist in which the abusive events in question do not rise to the level of criminal culpability, but the victim is still able to file for a civil protection order.²⁰ Five ways exist for a defendant possessing a familial relationship with a plaintiff to commit abuse and thus be subject to a protection order under the PFAA.²¹

The first type of abuse listed in the PFAA for which a plaintiff may seek a protection order is physical abuse.²² Bruising and other similar marks on an alleged victim can constitute evidence of bodily injury.²³ Instances of pushing, hitting, and choking a victim can indicate that the defendant has inflicted or attempted to inflict some form of bodily injury.²⁴ The PFAA, however, does not require that actual physical injury occur in order to meet the statutory definition of abuse.²⁵

The second type of abuse occurs when a defendant places a plaintiff in reasonable fear of imminent serious bodily harm.²⁶ Past instances of abuse can form the basis for current reasonable fear of imminent serious bodily harm in the mind of the plaintiff.²⁷ The perpetrator of this type of abuse need not act with specific intent to place a victim in reasonable fear of imminent serious bodily harm.²⁸

create an efficient, simple and rapid vehicle for the resolution of family disputes.” (quoting *Mahorsky v. Mahorsky*, 22 Pa. D. & C.3d 210, 213 (Ct. Com. Pl. 1982))).

18. *See Slusser v. DeBoer*, 985 A.2d 974, 975 (Pa. Super. Ct. 2009) (stating that relationship through consanguinity is covered under Title 23, Section 6102 of the Pennsylvania Consolidated Statutes in addition to familial relationship by law).

19. *See Boykin v. Brown*, 868 A.2d 1264, 1265 (Pa. Super. Ct. 2005).

20. *See Miller ex rel. Walker v. Walker*, 665 A.2d 1252, 1257 (Pa. Super. Ct. 1995) (finding that appellant’s argument that his conduct did not rise to the level of criminal culpability does not defeat the trial court’s protection from abuse order).

21. § 6102.

22. *See* § 6102(a) (stating that the first type of abuse is “attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon”).

23. *See B.T.W. ex rel. T.L. v. P.J.L.*, 956 A.2d 1014, 1016 (Pa. Super. Ct. 2008).

24. *See Custer v. Cochran*, 933 A.2d 1050, 1058 (Pa. Super. Ct. 2007).

25. *See DeHaas ex rel. E.D. v. DeHaas*, 708 A.2d 100, 102 (Pa. Super. Ct. 1998).

26. § 6102(a)(2).

27. *See Buchhalter v. Buchhalter*, 959 A.2d 1260, 1264 (Pa. Super. Ct. 2008) (stating that “facts surrounding the prior PFA consent order are relevant to an understanding as to the reasonableness of [petitioner’s] fear relative to the present petition”).

28. *See Raker v. Raker*, 847 A.2d 720, 726 (Pa. Super. Ct. 2004) (stating that husband’s entrance into wife’s half of duplex in the middle of the night, coupled

Actual physical injury as a result of the abuse is not required.²⁹ A threat to kill, regardless of the existence of any actual or attempted violence, is sufficient to meet the definition of abuse under this section.³⁰ The court may infer reasonable fear as a result of witness testimony at a hearing.³¹

The infliction of false imprisonment, as defined by the Pennsylvania Crimes Code,³² is the third form of abuse detailed by the PFAA.³³ The act of restraining a victim is tied to the deprivation of his or her liberty and thus the legislature considers this an act of abuse.³⁴

The fourth type of abuse occurs when the perpetrator physically or sexually abuses a minor child.³⁵ This definition of abuse is broader than that used in Child Protective Services Law³⁶ and the Pennsylvania Crimes Code.³⁷

with past incidents of abuse by husband towards wife, were sufficient to establish that wife reasonably feared serious bodily injury from husband).

29. *See* McCance v. McCance, 908 A.2d 905, 911 (Pa. Super. Ct. 2006) (finding that defendant's "verbal chiding, intimidating demeanor (blocking [plaintiff's] vehicular access), threat of retaliation, and striking of [plaintiff's] vehicle to the point of damaging it coalesce to constitute abusive behavior").

30. *See* R.G. v. T.D., 672 A.2d 341, 342 (Pa. Super. Ct. 1996). *See also* Counterman v. Shoemaker, 14 Pa. D. & C.4th 217, 219 (Ct. Com. Pl. 1992), *aff'd*, 625 A.2d 95 (Pa. Super. Ct. 1992) (stating that plaintiff was placed in reasonable fear of bodily injury when defendant called plaintiff's phone, stated that he had a gun, and threatened to kill plaintiff, her fiancé, and her family).

31. *See* Karch v. Karch, 885 A.2d 535, 539 (Pa. Super. Ct. 2005) (remarking that "the court determines a witness's credibility and may infer fear based on the witness's testimony describing the defendant's actions").

32. 18 PA. CONS. STAT. § 2903 (2017).

33. 23 PA. CONS. STAT. § 6102(a)(3) (2017).

34. *See* Snyder v. Snyder, 629 A.2d 977, 984 (Pa. Super. Ct. 1993). The court stated:

[T]he appellant has admitted to restraining the appellee during two of the incidents. During one incident, he admitted restraining her for a period of ten to fifteen minutes. We believe there was sufficient evidence for the court to conclude by a preponderance of the evidence that the appellant knowingly restrained the appellee so as to interfere substantially with her liberty.

Id.

35. § 6102(a)(4).

36. 23 PA. CONS. STAT. §§ 6301—6385 (2017).

37. *See* Miller *ex rel.* Walker v. Walker, 665 A.2d 1252, 1258 (Pa. Super. Ct. 1995). The court stated:

[F]or a remedy to be available under PFAA, it is [not necessary that physical harm to a child be as serious as that which is required for a child to be removed from his home and placed in protective custody. Corporal punishment inflicted recklessly or in enraged manner may result in bodily injury permitting issuance of protection order under PFAA.

Id.

The final type of abuse under the PFAA deals with a course of conduct that places a person in reasonable fear of bodily injury.³⁸ Unlike the second type of abuse, although the acts and events individually may not amount to abuse, the totality of the actions, when viewed in relation to one another, can constitute abuse under this provision.³⁹ The reviewing court often looks to the timeline of events that the petitioner experiences and assesses the reasonableness of the petitioner's fear at each stage.⁴⁰ Once any one of these alleged acts of abuse occurs, a prospective plaintiff may initiate the PFA hearing process.⁴¹

2. PFA Hearing Process and Relief

To begin the PFA process, an adult or emancipated minor must file a petition with the court in which he or she alleges that the defendant has perpetrated some form of abuse.⁴² The plaintiff in a PFA matter has the option to petition the court for an emergency temporary protection order by alleging that the plaintiff or the plaintiff's minor child is in immediate and present danger of abuse.⁴³ If the plaintiff seeks this emergency relief, the court must conduct an *ex parte* proceeding and use a standard lower than a preponderance of the evidence to evaluate the plaintiff's claim.⁴⁴ A temporary order remains in effect until the court either modifies or terminates the order or a plaintiff files a motion to withdraw the temporary order.⁴⁵

When a PFA plaintiff successfully petitions the court for either emergency or non-emergency temporary relief, the court must hold a hearing within ten business days, during which the plaintiff must attempt to prove the allegations set forth in the complaint by a pre-

38. 23 PA. CONS. STAT. § 6102(a)(5) (2017).

39. *See* *Mescanti v. Mescanti*, 956 A.2d 1017, 1024 (Pa. Super. Ct. 2008) (re-marking that, when determining whether abuse has occurred as a result of a course of conduct, the court should consider the totality of the defendant's actions).

40. *See id.* at 1023 (determining that “[w]ife established, by a preponderance of the evidence, that [h]usband engaged in a course of conduct that placed [w]ife in reasonable fear of bodily injury”).

41. § 6107.

42. § 6106(a).

43. § 6107(b)(1).

44. *Id.* *See also* *Drew v. Drew*, 870 A.2d 377, 378 (Pa. Super. Ct. 2005) (“The *ex parte* hearings conducted in order to secure a temporary PFA Order . . . require only that the petitioner convince the court he or she is in ‘immediate and present danger of abuse.’” (quoting § 6107(b)(1))).

45. § 6107(b)(2).

ponderance of the evidence.⁴⁶ Because of the mandatory duty to hold a hearing, the court may grant the plaintiff or defendant a continuance in the event that the hearing cannot be held on the scheduled date.⁴⁷ If the court grants an *ex parte* temporary order and continues the proceedings, the temporary order remains in full effect until the court holds a final hearing.⁴⁸ Even if the court does not issue a temporary order after it continues and reschedules the final hearing, the court may, subsequent to the first *ex parte* hearing but prior to the final hearing, allow the plaintiff the opportunity to present new evidence of abuse, at which time the court may issue an *ex parte* temporary order “as it deems necessary.”⁴⁹

For a final hearing to satisfy due process, the court must give the plaintiff the chance to present witnesses, testify regarding his or her version of the facts, and cross-examine the opposing party and his or her witnesses.⁵⁰ The court must also afford the defendant the same opportunities as listed above.⁵¹ The plaintiff is not “rigorously limited to the specific allegations” set forth in his or her petition and is free to present evidence of prior abuse not detailed in the petition during the hearing.⁵² No right to court-appointed counsel for either the plaintiff or the defendant exists during PFA hearings; the court must merely advise the parties of their right to obtain representation.⁵³

As a result of a PFA hearing or settlement negotiation, the court may grant any protection order or approve any consent agreement to stop the current abuse and prevent the defendant from abusing the plaintiff in the future.⁵⁴ The court possesses broad powers of relief and can issue a protection order to keep the defendant away from the plaintiff,⁵⁵ evict the defendant from a shared

46. § 6107(a). *See also Drew*, 870 A.2d at 378 (commenting on the use of “shall” in Title 23, Section 6107(b)(1) of the Pennsylvania Consolidated Statutes to create a mandatory requirement for the court to hold an evidentiary hearing).

47. *Burke ex rel. Burke v. Bauman*, 814 A.2d 206, 208 (Pa. Super. Ct. 2002) (citing § 6101) (stating that evidentiary hearings are mandatory and thus a continuance may be granted by the court at the request of either party).

48. § 6107(b)(2) (“The order shall remain in effect until modified or terminated by the court after notice and hearing.”).

49. *See Ferko-Fox v. Fox*, 68 A.3d 917, 926 (Pa. Super. Ct. 2013) (citing § 6107(c)) (stating, “trial courts have discretion to continue evidentiary hearings regarding final PFA orders and enter appropriate temporary *ex parte* orders to cover the intervening time”).

50. *See Lanza v. Simconis*, 914 A.2d 902, 906 (Pa. Super. Ct. 2006).

51. *Id.*

52. *See Snyder v. Snyder*, 629 A.2d 977, 981 (Pa. Super. Ct. 1993).

53. *See Weir v. Weir*, 631 A.2d 650, 657 (Pa. Super. Ct. 1993).

54. § 6108(a).

55. § 6108(a)(1).

residence,⁵⁶ award temporary custody rights to the plaintiff if minor children are involved,⁵⁷ and order that the defendant relinquish any weapons to the sheriff's department.⁵⁸ The court wields broad powers of relief to achieve its ultimate goal of preventing abuse.⁵⁹

3. *Purpose of the PFAA*

The purpose of the PFAA is to protect victims of domestic violence from the perpetrators of physical and sexual abuse.⁶⁰ The PFAA seeks to protect a wide range of people from current and future abuse, including spouses, household members, intimate partners, and children.⁶¹ A court may suspend certain rights held by a defendant, such as the right to possess firearms,⁶² in order to achieve the court's ultimate goal of abuse prevention.⁶³ To achieve this goal, courts often utilize an eviction proceeding tied to the temporary protection from abuse order.⁶⁴

The protections guaranteed by the PFAA are necessary due to the turmoil arising from the breakdown of deep familial relationships between husbands, wives, children, and other people in intimate relationships.⁶⁵ The Pennsylvania General Assembly, in drafting the PFAA, recognized the practical need to temporarily suspend the procedural due process rights of the defendant.⁶⁶ The drafters of the PFAA also recognized that this suspension could not

56. § 6108(a)(2).

57. § 6108(a)(4).

58. § 6108(a)(7).

59. *See* *Heard v. Heard*, 614 A.2d 255, 260 (Pa. Super. Ct. 1992) (citing *Cipolla v. Cipolla*, 398 A.2d 1053, 1054 (Pa. Super. Ct. 1979)).

60. *See* *Lawrence v. Bordner*, 907 A.2d 1109, 1112 (Pa. Super. Ct. 2006).

61. *See* *Weir v. Weir*, 631 A.2d 650, 654 (Pa. Super. Ct. 1993).

62. § 6108 (a)(7) (detailing that a court may “[o]rder[] the defendant to temporarily relinquish to the sheriff . . . the defendant’s firearms and prohibit[] the defendant from acquiring or possessing any firearm for the duration of the order and requir[e] the defendant to relinquish to the sheriff any firearm license”).

63. *See* *Kelly v. Mueller*, 861 A.2d 984, 993 (Pa. Super. Ct. 2004), *vacated*, 912 A.2d 202 (Pa. 2006).

64. *See* *McCance v. McCance*, 908 A.2d 905, 908 (Pa. Super. Ct. 2006) (“The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.” (quoting *Viruet v. Cancel*, 727 A.2d 591, 595 (Pa. Super. Ct. 1999))).

65. *See* *Cipolla v. Cipolla*, 398 A.2d 1053, 1054 n.1 (Pa. Super. Ct. 1979).

66. *See* *Heard v. Heard*, 614 A.2d 255, 259 (Pa. Super. Ct. 1992) (“To meet the special circumstances of abuse cases, the legislature fashioned procedures which suspend, temporarily, the due process rights of the alleged abuser.” (quoting *In Re Penny R.*, 509 A.2d 338, 340 (Pa. Super. Ct. 1986))).

be without limit and must be subject to judicial restraint.⁶⁷ When a PFA matter is initiated, the PFAD system automatically generates a record of the filings and proceedings.⁶⁸ This Comment will discuss the issues created by this automatic generation of civil records combined with a lack of statutory authority for PFA expungement,⁶⁹ but this Comment will first provide an overview of how expungement operates in the criminal context in order to illuminate a possible framework for how expungement could operate in the context of a PFA.⁷⁰

B. Expungement Law in the Criminal Realm

1. Basis for Criminal Record Expungement

Although statutory authority is the primary mechanism for criminal record expungement,⁷¹ a criminal defendant, in certain limited circumstances, has a due process right to petition for expungement of an arrest record that is not dependent upon statutory authority.⁷² The Pennsylvania General Assembly has laid out guidelines for when expungement of criminal records is appropriate, including situations such as when no disposition has been received by the court,⁷³ when an individual subject to arrest information has reached the age of 70 and has not been arrested or prosecuted for at least ten years,⁷⁴ and when the charged offense is a summary offense and the individual seeking expungement has not been arrested or prosecuted for at least five years following conviction for that offense.⁷⁵

An arrest record may place certain difficulties and hardships on a defendant, and criminal record expungement is intended to afford a defendant some form of due process protection against

67. See *In Re Penny R.*, 509 A.2d at 340 (stating that “[c]ontinued suspension, irrespective of motivating factors, cannot be countenanced without judicial limits, subject to substantive or procedural restraint”).

68. § 6105(e)(3) (“The registry of the Pennsylvania State Police shall be available at all times to inform courts, dispatchers and law enforcement officers of any valid protection order involving any defendant.”).

69. See *infra* Part II.C.1.

70. 18 PA. CONS. STAT. § 9122 (2017).

71. “Expunge” is defined as, “to remove from a record, list, or book; to erase or destroy.” *Expunge*, BLACK’S LAW DICTIONARY (10th ed. 2014).

72. See *Commonwealth v. V.G.*, 9 A.3d 222, 224 (Pa. Super. Ct. 2010) (citing *Commonwealth v. Waughtel*, 999 A.2d 623, 625 (Pa. Super. Ct. 2010)).

73. § 9122(a)(1).

74. § 9122(b)(1).

75. § 9122(b)(3). Other situations justifying expungement include when an individual has been dead for three years under Section 9122(b)(2) or when an individual’s offense satisfies the conditions expressed in Section 9122(a)(2). §§ 9122(b)(2), 9122(a)(2).

these hardships.⁷⁶ For example, information related to an arrest may inflict substantial damage to an individual's reputation.⁷⁷ The arrestee may additionally suffer economic losses that are direct and serious.⁷⁸ Even if an arrestee is acquitted of the charges involved, the arrestee may be restricted from applying for or denied certain opportunities for schooling, employment, or professional licenses.⁷⁹ Furthermore, police may utilize an arrest record as a factor to determine whether to arrest an individual in a new criminal matter, or whether to exercise discretion in a charging decision.⁸⁰

2. *Wexler Balancing Test*

The expungement of a criminal record is an uphill battle for a defendant because statutory authority typically governs criminal record expungement and is limited in scope and availability.⁸¹ When a petitioner seeks the expungement of a criminal record, the court can, under even more limited circumstances, grant a hearing in which the court weighs factors set forth in *Commonwealth v. Wexler*⁸² to determine whether expungement is appropriate.⁸³ The defendant in *Wexler* was arrested and charged with corruption of a minor after police found marijuana and drug paraphernalia in his minor daughter's bedroom.⁸⁴ The Commonwealth also filed criminal conspiracy charges against the juvenile's mother.⁸⁵

After the juvenile daughter entered a consent decree in juvenile court, the Commonwealth filed a petition for *nolle prosequi*⁸⁶ of the charges against the juvenile's parents.⁸⁷ The court granted the petition for *nolle prosequi* and the co-defendants subsequently filed a petition to expunge the arrest records related to the aforementioned incident.⁸⁸ Following a hearing, the hearing judge denied the petition to expunge the arrest records.⁸⁹ The

76. See *Commonwealth v. Giulian*, 141 A.3d 1262, 1269–70 (Pa. 2016). See also *Commonwealth v. Butler*, 672 A.2d 806 (Pa. Super. Ct. 1996).

77. See *Commonwealth v. Malone*, 366 A.2d 584, 587–88 (Pa. Super. Ct. 1976) (quoting *Menard v. Mitchell*, 430 F.2d 486, 490–91 (D.C. Cir. 1970)).

78. *Id.*

79. *Id.*

80. *Id.*

81. § 9122.

82. *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981).

83. *Id.*

84. *Id.* at 878.

85. *Id.* at 879.

86. “*Nolle prosequi*” is defined as “a legal notice that a lawsuit or prosecution has been abandoned.” *Nolle Prosequi*, BLACK'S LAW DICTIONARY (10th ed. 2014).

87. *Wexler*, 431 A.2d at 879.

88. *Id.*

89. *Id.*

co-defendants appealed and the Pennsylvania Superior Court affirmed the denial of the petition.⁹⁰ The Pennsylvania Supreme Court reversed and held that the petition to expunge the arrest records should have been granted.⁹¹

If a court decides that expungement may be appropriate, then the court must compare the detriment to the benefit resulting from the existence of the defendant's criminal record.⁹² The court ultimately considers the strength of the Commonwealth's case against the petitioner regarding the underlying criminal allegations versus the petitioner's interest in reducing the stigma and harm to the petitioner stemming from a criminal record.⁹³ The court can consider why the Commonwealth would want to retain the records in light of the detriment it causes to the petitioner.⁹⁴ The court may also inquire into the petitioner's age, prior criminal record, and past employment opportunities as well as the time between the arrest and the petition to expunge and any specific harsh effects that the petitioner alleges in considering the expungement petition.⁹⁵

The procedure for a *Wexler* hearing is fairly simple. If the judge orders the expungement of the defendant's arrest record, the attorney for the Commonwealth may object to the expungement.⁹⁶ If the attorney's objections are timely filed, the judge must hold a hearing on the objections.⁹⁷ During this hearing, the burden is on the Commonwealth to prove that the record should be maintained.⁹⁸ The Commonwealth must convince the judge with specificity that the defendant is not entitled to an expungement of his or her arrest record.⁹⁹

Wexler hearings typically occur in the context of a request for expungement of a criminal history record containing instances of non-conviction, such as acquittal or *nolle prosequi*.¹⁰⁰ The Com-

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Commonwealth v. Iacino*, 411 A.2d 754, 759 (Pa. Super. Ct. 1979)). See also *Commonwealth v. Wallace*, 97 A.3d 310, 319 (Pa. 2014) (“[G]ranting an expungement in this case would neither enhance Appellee’s employment opportunities nor assist Appellant in casting off the stigma of the charges, as the rest of Appellee’s arrest record and record of his felony convictions still exist.”).

94. See *Wexler*, 431 A.2d at 879 (quoting *Iacino*, 411 A.2d at 759).

95. *Id.*

96. PA. R. CRIM. P. 320.

97. See *Wexler*, 431 A.2d at 879 (quoting *Iacino*, 411 A.2d at 759).

98. *Id.*

99. *Wexler*, 431 A.2d at 881 (“The mere assertion of a general interest in maintaining accurate records of those accused of crime is not convincing.”).

100. *Id.* at 880.

monwealth must then argue that the value of retaining the arrest record substantially outweighs the benefits of expungement, which is a significant burden.¹⁰¹ Although criminal record expungement is typically governed by statutory authority,¹⁰² the granting of a *Wexler* hearing is one of the limited situations in which a defendant may rely solely on due process protections in order to expunge parts of a criminal record.¹⁰³ No similar statutory authority exists in the context of civil record expungement.¹⁰⁴

C. *Expungement Law in the Civil Realm*

The expungement of civil records is governed solely by case precedent derived from due process protections.¹⁰⁵ Temporary protection orders that never make it to the final hearing phase, due to acts like voluntary or court ordered withdrawal, can be expunged from a civil record.¹⁰⁶ In *P.E.S. v. K.L.*,¹⁰⁷ plaintiff P.E.S. filed a Petition for Protection from Abuse against defendant K.L., and the court denied the plaintiff's request for a temporary protection order.¹⁰⁸ The court scheduled a final hearing for the following week but neither the plaintiff nor the defendant attended the hearing.¹⁰⁹ Even though both parties failed to appear, the court created a record based on the petition and marked the case as active in the computer system.¹¹⁰ Four months later, K.L. sought to have the record of the petition removed from the computer system and filed a Motion to Dismiss and Expunge the Record.¹¹¹ K.L. argued that because the case was designated as "active," the court record damaged his reputation due to his unique position as a custody evaluator and guardian ad litem.¹¹² The court granted K.L.'s Motion to Dismiss but refused to grant the Motion to Expunge.¹¹³

The Pennsylvania Superior Court held that the expungement of a PFA order is appropriate when the petitioner is not granted a

101. *Id.*

102. § 9122.

103. 103. *See Wexler*, 431 A.2d at 879.

104. *See P.E.S. v. K.L.*, 720 A.2d 487, 489 (Pa. Super. Ct. 1998).

105. *See id.* at 489–90.

106. *Id.* at 491.

107. *P.E.S. v. K.L.*, 720 A.2d 487 (Pa. Super. Ct. 1998).

108. *Id.* at 488.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* At the time that this case was appealed to the Pennsylvania Superior Court, K.L. was the Director of Custody Evaluation Services of Philadelphia, Inc. *Id.*

113. *Id.*

temporary protection order or when both of the parties fail to appear at the final hearing and no further action is taken on the petition.¹¹⁴ The court likened expungement in situations where the final hearing does not occur to that of an improper or illegal involuntary mental health commitment.¹¹⁵ The Pennsylvania Superior Court found that expungement of K.L.'s record was appropriate and placed substantial weight on his unique position as a child custody specialist and the plaintiff's failure to pursue her abuse petition.¹¹⁶ A permanent civil record stating that K.L. committed abuse could have potentially ruined K.L.'s reputation and career, despite the underlying facts of the petition having never been proven by a preponderance of the evidence.¹¹⁷

If a PFA petitioner is successful in convincing the court at the *ex parte* hearing stage that he or she is in immediate danger, then the court automatically generates a civil record regardless of whether the underlying allegations have been proved by a preponderance of the evidence and without giving notice to the PFA defendant.¹¹⁸ The automatic generation of a civil record, combined with the lack of a statutorily authorized expungement mechanism, can create a great hardship for a wrongly accused defendant.¹¹⁹

III. ANALYSIS

A. PFA Record Expungement Case Law

Although the Pennsylvania Supreme Court has yet to decide whether a consent order is eligible for expungement,¹²⁰ case law concerning other issues related to PFA record expungement helps illuminate how the Pennsylvania Supreme Court could potentially rule on this issue.¹²¹ If the PFA proceedings never reach the final hearing and the court does not issue a final order, then the defen-

114. *Id.* at 492.

115. *See id.* at 491 (“[J]ustice demands that appellant be returned to a position as near as possible as to that which [he or she] enjoyed prior to the [commencement of the action], namely, an unsullied record.” (quoting *Commonwealth v. J.T.*, 420 A.2d 1064, 1065–66 (Pa. Super. Ct. 1980))).

116. *See P.E.S.*, 720 A.2d at 492.

117. *Id.*

118. *See Drew v. Drew*, 870 A.2d 377, 378 (Pa. Super. Ct. 2005) (“The *ex parte* hearings conducted in order to secure a temporary PFA Order . . . require only that the petitioner convince the court he or she is in ‘immediate and present danger of abuse.’”).

119. *Ferko-Fox v. Fox*, 68 A.3d 917, 924 (Pa. Super. Ct. 2013) (“A person may blithely execute a petition inflating claims of abuse.”).

120. 120. *See supra* text accompanying notes 3–6.

121. *See infra* Part III.A.1–3.

dant can petition the court for expungement of the PFA records.¹²² Conversely, if the court holds a hearing and enters a final order, then the PFA records are unavailable for expungement.¹²³ Further, because consent orders are fully enforceable, the violation of a consent order can result in the same consequences for the defendant as a violation of a final order entered after a hearing.¹²⁴

I. *Carlacci v. Mazaleski*

According to the Pennsylvania Supreme Court in *Carlacci v. Mazaleski*,¹²⁵ in cases where the petitioner seeks to protect his or her reputation, a right to petition for expungement of a PFAA record exists.¹²⁶ The court remarked that this right is an “adjunct of due process” and does not depend on express statutory authority.¹²⁷ Further, the court noted that when the parties in PFAA proceedings discontinue the matter before a final hearing occurs, and when the parties stipulate that the temporary PFA order should be declared null and void, expungement is warranted.¹²⁸ Because the proceedings in *Carlacci* did not reach the final hearing phase, the plaintiff never had the opportunity to prove the underlying abuse allegations by a preponderance of the evidence.¹²⁹ In the view of the Pennsylvania Supreme Court, the PFAA proceedings did not “legally evolve[]” past the temporary order stage, and, thus, the maintenance of a civil record was unjustified.¹³⁰

The Pennsylvania Supreme Court likened this situation to that of a criminal defendant who has been tried and acquitted,¹³¹ a situa-

122. *See infra* text accompanying notes 125–36.

123. *See infra* text accompanying notes 137–50.

124. *See infra* text accompanying notes 151–59.

125. *Carlacci v. Mazaleski*, 798 A.2d 186 (Pa. 2002).

126. *See id.* at 190.

127. *Id.* (citing PA. CONST. art. I, § 1) (characterizing due process rights by stating “all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness”).

128. *See Carlacci*, 798 A.2d at 190–91.

129. *Id.* at 190.

130. *See id.* at 191 (quoting *Carlacci v. Mazaleski*, 757 A.2d 988 (Pa. Super. Ct. 1999) (Cercone, J., in dissenting memorandum). President Judge Emeritus Cercone stated in his dissenting memorandum:

Despite the passage of time, the [PFAA] proceedings never legally evolved beyond the temporary order stage as the Trial Court merely continued the original temporary order which was issued *ex parte*. The Trial Court did not issue a permanent order or make any . . . findings of fact that incidents of abuse had occurred.

Id.

131. *Id.* at 191.

tion in which expungement is appropriate as a matter of law without the use of the *Wexler* balancing test.¹³² Further, the use of the *Wexler* balancing test would be “unnecessary and inappropriate” because the test would effectively assess the strength of the prosecution’s case, despite the defendant having already obtained the verdict of acquittal.¹³³ In order to apply the first factor of the *Wexler* balancing test in a PFA matter, the trial court would have to assess the strength of the PFA petition.¹³⁴ The Pennsylvania Supreme Court found that it was not proper to grant a *Wexler* hearing for a PFA petition that had been dismissed by court order before the plaintiff had an opportunity to prove the underlying allegations of abuse.¹³⁵ A *Wexler* balancing test analysis is therefore unnecessary and improper when a court order dismisses the PFA petition or when the PFAA proceedings never evolve past the temporary order stage.¹³⁶

2. Commonwealth v. Charnik

According to the Pennsylvania Superior Court, after a PFA case reaches the final hearing stage and a final order is entered, the record of the proceeding may not be expunged.¹³⁷ In *Commonwealth v. Charnik*,¹³⁸ the defendant sought to expunge a final PFA order after the plaintiff withdrew the final order.¹³⁹ The lower court entered a PFA order after it conducted a full hearing and found that the plaintiff proved the underlying allegations of abuse by a preponderance of the evidence.¹⁴⁰ The superior court found this situation to be more analogous to a conviction record than to a non-conviction record.¹⁴¹

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The court stated:

Just as we found it “improper to go behind a verdict of acquittal and purport to assess the strength of the prosecution’s case” in attempting to apply the first factor of the *Wexler* balancing test in a criminal expungement matter, it is equally improper to assess the strength of a PFAA petition that has since been dismissed by court order before the plaintiff even attempted to meet its burden of proving the allegation of abuse contained in the PFAA petition, in attempting to apply the *Wexler* balancing test in a PFAA expungement matter.

Id. (quoting *Commonwealth v. D.M.*, 695 A.2d 770, 772 (Pa. 1997)).

136. *Id.*

137. *Commonwealth v. Charnik*, 921 A.2d 1214, 1215 (Pa. Super. Ct. 2007).

138. *Commonwealth v. Charnik*, 921 A.2d 1214 (Pa. Super. Ct. 2007).

139. *See id.* at 1215.

140. *Id.*

141. *Id.* at 1218 (quoting *Commonwealth v. D.M.*, 695 A.2d 770, 772 (Pa. 1997) (explaining the difference between conviction records, which can be ex-

The defendant presented the court with a logical argument for extending the language of *Carlacci* to allow for a *Wexler* balancing test in cases where a final hearing is held and a final PFA order is granted but subsequently withdrawn.¹⁴² The court was hesitant to agree.¹⁴³ The defendant's argument ultimately failed because, unlike in the cases of *P.E.S.* and *Carlacci*, the lower court completed the PFA process and afforded the defendant procedural due process by conducting the hearing and giving the defendant a chance to defend against the allegations of abuse.¹⁴⁴ In deciding that expungement was inappropriate in this case, the Superior Court recognized that certain patterns associated with the filing and trying of PFA cases existed and that practical considerations play a role in deciding whether to extend or limit protections granted by the court to defendants.¹⁴⁵

The Pennsylvania Superior Court explained that the expungement of a PFA record is never appropriate once the matter reaches the final hearing phase and a final order is granted.¹⁴⁶ Relying on the specific facts of this case, the superior court voiced a lack of willingness to allow expungement because of limited judicial resources and the practical considerations of expunging a civil record for a defendant who also has a criminal record that included convic-

punged only in limited circumstances authorized by statute, and non-conviction or arrest records, for which expungement is left to judicial discretion in the form of a *Wexler* hearing, such as in cases of *nolle prosequi*).

142. *Id.*

143. *See id.* at 1120. Regarding the defendant's argument, the court stated: Charnik asks this Court to take the *P.E.S.* and *Carlacci* holdings one step further and find that, like non-conviction records, he is entitled to a *Wexler* balancing test on the petition to expunge the PFA record. He claims that this is the "next step" anticipated by *Carlacci*. Although we see the logic in this argument, we decline to extend the language in *Carlacci* until our legislature or our Supreme Court directs.

Id.

144. *Id.* ("Charnik's argument presumes a constitutional entitlement to seek expungement, as recognized in *Carlacci*. *Carlacci* and *P.E.S.*, however, were based on records that existed where the PFA process was not completed and therefore without the safeguards of due process.").

145. *Id.* at 1221. Regarding the psychological nature of PFA cases, the court stated:

We note, too, that the facts of this case illustrate a typical sequence in an abusive relationship; the abuse, the remorse, the forgiveness, and the repetition of that cycle. Absent extraordinary cause, allowing a hearing to clear a record of abuse after a final order simply because the victim decided to forgive or "withdraw," would not only draft the judiciary into the psychological struggle, but would overwhelm its already limited resources.

Id.

146. *Id.* at 1220–21.

tions for indirect criminal contempt.¹⁴⁷ Indirect criminal contempt (ICC) convictions in general are unavailable for expungement unless the defendant meets one of the limited statutory categories¹⁴⁸ of criminal record expungement.¹⁴⁹ Thus, even if expungement had been an option for the defendant, the court would have likely rejected that opportunity because the defendant's criminal record would still have contained evidence of the PFA violation despite the civil record expungement.¹⁵⁰

3. Commonwealth v. Nelson

Final PFA orders by consent of the parties without an admission of the underlying allegations of abuse by the defendant are both authorized and enforceable under the PFAA.¹⁵¹ The Pennsylvania Superior Court in *Commonwealth v. Nelson*¹⁵² remarked that the enforceability of consent orders was an issue of first impression for the court because prior case precedent focused solely on the enforceability of temporary orders and final orders stemming from a final hearing.¹⁵³

This case arose out of the context of an ICC proceeding,¹⁵⁴ and the defendant argued that he could not be charged with ICC if the underlying allegations in the PFA had never been proven.¹⁵⁵ Neither the PFAA nor subsequent statutory authority expressly requires that consent agreements must be accompanied by an admis-

147. *Id.* at 1221.

148. 18 PA. CONS. STAT. § 9122(b) (2017).

149. *Charnik*, 921 A.2d at 1217 (“Here, Charnik is less than 70 years of age and has not been free of arrest or prosecution for ten years. The trial court’s denial of his petition to expunge the indirect criminal contempt convictions was proper.” (citing § 9122(b) and *Commonwealth v. Wolfe*, 749 A.2d 507 (Pa. Super. Ct. 2000))).

150. *Id.* at 1221 (remarking that “it would be inappropriate, as well as fruitless, to expunge the PFA record when the criminal record would indicate indirect criminal contempt convictions stemming from violation of a PFA order”).

151. *Commonwealth v. Nelson*, 690 A.2d 728, 731 (Pa. Super Ct. 1997).

152. *Commonwealth v. Nelson*, 690 A.2d 728 (Pa. Super Ct. 1997).

153. *See id.* at 731.

154. 23 PA. CONS. STAT. § 6114(a) (2017). The statute states:

Where the police, sheriff or the plaintiff have filed charges of indirect criminal contempt against a defendant for violation of a protection order issued under this chapter, a foreign protection order or a court-approved consent agreement, the court may hold the defendant in indirect criminal contempt and punish the defendant in accordance with law.

Id. After the police, sheriff, or the plaintiff file charges of Indirect Criminal Contempt, a hearing to adjudicate the charges is held within ten days. *Id.* § 6113(f).

155. *See Nelson*, 690 A.2d at 730.

sion of abuse.¹⁵⁶ The Superior Court looked to a dictionary definition of “consent” and found that it connotes “acquiescence without reference to admissions.”¹⁵⁷ Therefore, the plain meaning of the PFAA authorizes consent-based protection orders and renders them fully enforceable.¹⁵⁸ Additionally, PFA orders by consent with no admission of abuse are enforceable because the orders provide sufficient notice to the defendant of potential criminal consequences for violating the order.¹⁵⁹

B. PFA Record Expungement Due Process Analysis

1. PFA Case Precedent Synthesis

The Pennsylvania Superior Court has held that PFA orders issued by consent without an admission of abuse by the defendant are fully enforceable because the orders do not violate a defendant’s due process rights.¹⁶⁰ Because the holding in *Nelson*¹⁶¹ specifically relied on the reasoning that final PFA orders by consent do not violate a defendant’s due process rights, such orders are likely not susceptible to expungement on the same reasoning, that the court afforded adequate due process protections to the defendant.¹⁶² A defendant who willingly consents to the entry of a final PFA order is provided with the opportunity to present a case and defend against the allegations of abuse but chooses not to do so.¹⁶³ The defendant effectively waives his or her right to a final hearing in exchange for a settlement.¹⁶⁴

The Pennsylvania Supreme Court allows expungement in limited cases where the lower court does not afford the defendant an adequate level of due process in order to “protect the reputation of a person who was unlawfully thrust into the . . . process.”¹⁶⁵ A de-

156. *See id.* at 731 (“[T]he court may grant any protection order or approve any consent agreement to bring about the cessation of abuse.” (citing § 6108(a))).

157. *Id.* (citing *Consent*, WEBSTER’S NEW COLLEGIATE DICTIONARY (1974)).

158. *Id.*

159. *See id.* at 730 (stating that “the order provided that any violation of its terms could lead to the arrest and prosecution of appellee for indirect criminal contempt”).

160. *Id.* at 731–32.

161. *Id.* (holding that PFA orders by consent with no admission of abuse are fully enforceable).

162. *See id.* at 732 (finding that defendant was afforded sufficient procedural due process through notice because “an examination of the consent order demonstrates that it specifically informed [defendant] that he could be subjected to prosecution for indirect criminal contempt upon violating its terms”).

163. *Id.*

164. *See id.*

165. *Carlacci v. Mazaleski*, 798 A.2d 186, 189 (Pa. 2002) (citing the reasoning in *Commonwealth ex rel. Magaziner v. Magaziner*, 253 A.2d 263 (Pa. 1969)) (ap-

fendant who consents to the entry of a final PFA order likely has not been “unlawfully thrust” into the process.¹⁶⁶ Such a defendant has entered into an agreement willingly after the court has provided sufficient notice of the consequences of a final order.¹⁶⁷ Unless the defendant challenges the order by filing a motion for reconsideration or an appeal, the order is final.¹⁶⁸ Once the protection order becomes final, the order is not subject to collateral attack without the existence of extraordinary circumstances,¹⁶⁹ such as when judicial oversight causes the losing party to be denied knowledge of the entry of a final judgment.¹⁷⁰

The Pennsylvania Supreme Court decided *Carlacci* based on whether the lower court afforded the defendant procedural due process, not on whether a sufficient finding of abuse existed.¹⁷¹ A defendant who agrees to a PFA order by consent effectively waives his or her right to a hearing and enters into a final order with the knowledge that the protection order may have a negative effect on his or her reputation or lead to criminal consequences in the form of an ICC charge.¹⁷²

Thus, such a defendant cannot later argue that the court deprived him or her of due process because the consent order provides the defendant with sufficient notice of the repercussions of violating the order.¹⁷³ Therefore, case precedent points to the

proving “of the concept of protecting the reputation of a person who was unlawfully thrust into the criminal process by sanctioning the expungement of his criminal record”).

166. *See id.*

167. *See Nelson*, 690 A.2d at 732.

168. *See Luckenbaugh v. Shearer*, 523 A.2d 399, 402 (Pa. Super. Ct. 1987). The court stated:

[O]nce a final order or judgment is entered, an appeal must be filed within thirty days or, the trial court must expressly grant reconsideration within thirty days. If either of these two events do not occur, the judgment is final and except for “extraordinary cause” is not subject to collateral attack by virtue of a petition to open and/or strike.

Id. *See also* P.A. R.A.P. 1701(b)(3) (“After an appeal is taken or review of a quasi-judicial order is sought, the trial court or other government unit may . . . [g]rant reconsideration of the order which is the subject of the appeal or petition . . .”).

169. *See Luckenbaugh*, 523 A.2d at 402.

170. *Id.* at 401.

171. *Carlacci*, 798 A.2d at 190–91.

172. *Nelson*, 690 A.2d at 732.

173. *See id.* (stating “an examination of the consent order demonstrates that it specifically informed appellee that he could be subjected to prosecution for indirect criminal contempt upon violating its terms”).

likely conclusion that expungement is not available for a final order that was entered into by consent of the parties.¹⁷⁴

2. *Public Policy Considerations*

The ability to expunge a PFA order entered by consent of the parties in limited circumstances benefits the interests of the parties and the judicial system. If the ultimate purpose of the Protection from Abuse Act is to stop current abuse, prevent instances of future abuse, and protect plaintiffs,¹⁷⁵ providing parties with a tool to settle PFA matters amicably through the expungement of a consent order is seemingly in harmony with at least one purpose of the PFAA, to not place “impractical burdens” on the petitioner seeking a protection order.¹⁷⁶

As an indicator that public policy might favor the prohibition of expungement of consent orders, however, the Pennsylvania Supreme Court in *Carlacci* referenced the fact that a prior PFA docket may be considered by the trial court in subsequent PFA proceedings as well as custody proceedings.¹⁷⁷ A defendant’s history of abuse can be a crucial component of a petitioner’s PFA case, especially in instances where the plaintiff must show reasonable fear of imminent serious bodily harm.¹⁷⁸ A record of abuse allows the court to observe patterns of abuse and act accordingly to prevent future abuse.¹⁷⁹ Although, even if a repeat defendant was able to expunge his or her civil record of a prior consent order, the plaintiff in a new PFA proceeding against the same defendant could sim-

174. *Carlacci*, 798 A.2d at 191; *Commonwealth v. Charnik*, 921 A.2d 1214, 1221 (Pa. Super. Ct. 2007); *Nelson*, 690 A.2d at 732.

175. *See* *Heard v. Heard*, 614 A.2d 255, 260 (Pa. Super. Ct. 1992). *See also* *Lawrence v. Bordner*, 907 A.2d 1109, 1112 (Pa. Super. Ct. 2006).

176. *See* *Weir v. Weir*, 631 A.2d 650, 654 (Pa. Super. Ct. 1993) (stating the purpose of the PFAA is “to provide spouses, household members, intimate partners and children with immediate temporary protection from abuse”) (citing *Snyder v. Snyder*, 629 A.2d 977, 980–982 (Pa. Super. Ct. 1993)). *See also* *Snyder*, 629 A.2d at 982 n.2 (“A requirement that Abuse Petitions delineate for the accused abuser all the incidents of abuse would place an impracticable burden on the Petitioner.”).

177. *See* *Carlacci*, 798 A.2d at 190 (stating, “another consequence of maintenance of a PFAA docket record is the possibility that it can be considered by a trial court in any subsequent PFAA proceeding”) (citing 23 PA. CONS. STAT. § 6107(a) (2017)).

178. *See* *Burke ex rel. Burke v. Bauman*, 814 A.2d 206, 209 (Pa. Super. Ct. 2002) (stating, “[i]t is possible for a person to be placed in reasonable fear of imminent bodily injury based on telephone calls, particularly when coupled with the alleged abuser’s past history of violence”) (citing *D.H. v. B.O.*, 734 A.2d 409, 412 (Pa. Super. Ct. 1999)).

179. *See* *Charnik*, 921 A.2d at 1221.

ply testify regarding the past allegations of abuse and the existence of an expunged consent order.¹⁸⁰

In contrast with the creation of a per se rule that grants expungement in PFA cases that do not evolve past the temporary stage is the notion of judicial discretion.¹⁸¹ Although a per se rule helps to relieve some constraint on limited judicial resources, the rule would effectively take discretion away from judges in PFA matters.¹⁸² According to Justice Newman's dissent in *Carlacci*, judicial discretion is an integral part of the expungement process.¹⁸³ Thus, if the courts were to allow the expungement of consent orders, Justice Newman would likely advocate for the use of a *Wexler* hearing to decide expungement instead of an automatic statutory expungement.¹⁸⁴ Both of these options are considered in the following section, in addition to a third option that does not involve consent orders but provides an alternative for PFA attorneys to obtain protection for PFA victims without creating a civil record, which is not currently available for expungement.

C. Three Proposed Resolutions

1. Grant Defendant a *Wexler* Hearing as Part of the Consent Order

The Pennsylvania Supreme Court has yet to decide whether a protection order by consent is available for expungement.¹⁸⁵ Thus, until the Pennsylvania Supreme Court rules on this issue or legislation changes the current law, parties to PFA matters in Pennsylvania should assume that the expungement of consent orders is unavailable. The PFA hearing court could, however, consider granting a *Wexler* hearing to a defendant who agrees to a consent order.¹⁸⁶ The hearing court would not automatically expunge the record, but would allow the defendant a chance to explain the circumstances surrounding the PFA matter.

180. See *infra* text accompanying notes 212–15.

181. See *Carlacci*, 798 A.2d at 191–92 (Newman, J., dissenting).

182. See *id.* (“I do not believe that it serves the interests of the citizens of the Commonwealth to eliminate the exercise of judicial discretion from the expungement process. Therefore, I believe that the balancing test set forth in [*Wexler*] should apply in the instant matter.”).

183. *Id.*

184. *Id.*

185. See *supra* text accompanying notes 3–6.

186. See *Commonwealth v. Wexler*, 431 A.2d 877 (Pa. 1981).

Because the parties can enter into the consent order on the day of the final PFA hearing,¹⁸⁷ granting the defendant a *Wexler* hearing in this limited circumstance would allow the defendant to explain to the hearing court why expungement of the record may be appropriate. Instead of placing the burden on the Commonwealth to argue for the retention of the records, as in the case of a *Wexler* hearing for a criminal expungement matter,¹⁸⁸ the defendant could bear the burden of showing with specificity why the court should not retain the records. The hearing judge would then decide whether expungement is proper based on the testimony of the defendant.

Even though this *Wexler* hearing scenario could potentially result in a favorable outcome for both parties because the court would authorize a protection order for the plaintiff without requiring the plaintiff to endure a hearing and give the defendant the opportunity to explain his or her side for the first time, the court system may be opposed to this solution for fear that it would drain already limited judicial resources.¹⁸⁹

Although the Pennsylvania Supreme Court in *Carlacci* held that the use of the *Wexler* balancing test was unnecessary when PFA proceedings do not progress past the temporary order stage, the court did not address the merits of granting a *Wexler* hearing to the defendant in the case of a final order by consent.¹⁹⁰ If the *Carlacci* court had granted the defendant a *Wexler* hearing, the strength of the plaintiff's case would have been weighed against the defendant's interest in preventing potential harm as a result of the creation of a PFA record.¹⁹¹

During settlement negotiations of a PFA order by consent, a plaintiff could ask the court to grant the defendant a *Wexler* hearing in exchange for a more favorable consent order, such as an extended length of time¹⁹² for the protection order.¹⁹³ However, the

187. See PA. R. PHILA. CO. FAMILY DIV. 1901.11(d) ("The signed consent agreement may be submitted to the Court at the hearing.").

188. *Id.* at 882 ("The assertion of a general policy opposing expungement in all cases is not persuasive." (citing *Commonwealth v. Welford*, 420 A.2d 1344, 1345 (Pa. Super. Ct. 1980))).

189. See *Commonwealth v. Charnik*, 921 A.2d 1214, 1220 n.5 (2007).

190. See *Carlacci*, 798 A.2d at 191.

191. *Wexler*, 431 A.2d at 879.

192. The maximum length of time for a protection order is three years. 23 PA. CONS. STAT. § 6108(d) (2017).

193. § 6108(a)(10) ("The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include granting any other appropriate relief sought by the plaintiff.").

Pennsylvania Superior Court in *Charnik* declined to hold that the defendant was constitutionally entitled to a *Wexler* hearing.¹⁹⁴ Moreover, the court would likely not be persuaded by a plaintiff's request for the court to grant the defendant a *Wexler* hearing because the *Charnik* court viewed the granting of protection for the defendant beyond procedural due process rights with great skepticism.¹⁹⁵ Especially considering the scarcity of judicial resources,¹⁹⁶ a PFA hearing court would likely be unwilling to allow a PFA plaintiff to use the promise of a *Wexler* hearing as a settlement negotiation tool.

2. *Reschedule the Final Hearing to Create a Cooling-Off Period*

To both avoid a final order being entered and provide the plaintiff with the protection sought, the court could allow either the plaintiff or the defendant to simply ask for a continuance and reschedule the final hearing date.¹⁹⁷ As part of this agreement, the plaintiff could also request that if no ICC violations occur prior to the new hearing date, then the plaintiff would automatically voluntarily withdraw his or her PFA petition.¹⁹⁸ A plaintiff may seek to avoid a final hearing at all costs, even if the facts of his or her case weigh heavily in favor of a long-term order. A plaintiff may simply wish to have as little contact with the defendant as possible and, thus, being required to attend a court proceeding in the presence of the alleged abuser may be too stress-inducing and psychologically difficult for the plaintiff to endure.¹⁹⁹ A plaintiff may feel strongly that a protection order is necessary, but could be so fearful of the defendant that the plaintiff would rather withdraw his or her petition than testify at a hearing.

This continued temporary order strategy may be favorable to a fearful PFA petitioner because it would artificially extend the PFA

194. See *Charnik*, 921 A.2d at 1220.

195. *Id.* (“Because we read our Supreme Court’s decision in *Carlacci* as expressly limiting the remedy of expungement of PFA records to those cases where records exist absent the safeguards of due process . . . we decline to extend the language until the legislature or our Supreme Court directs.”).

196. *Id.* at 1220 n.5. (“Like the majority in *Carlacci*, we too question whether this would prove to be a proper use of limited judicial resources.”).

197. § 6107(b)(2) (mandating that a temporary order “shall remain in effect until modified or terminated by the court after notice and hearing”).

198. § 6108(a). See also *Cipolla v. Cipolla*, 398 A.2d 1053, 1054 n.1 (Pa. Super. Ct. 1979) (“The court is empowered to grant broad relief to bring about a cessation of abuse . . .”).

199. See Michael Alan Goldberg, *Fighting through the Fear: DART Helps Domestic Violence Victims Navigate their way through Legal System*, THE REPORTER (April 27, 2013, 8:24 PM), <http://www.thereporteronline.com/article/RO/20130427/NEWS01/130429536>.

proceedings yet prevent the proceedings from ever reaching the final hearing stage. Under the PFAA, the temporary order obtained by the plaintiff would remain in effect up until the date of the final hearing.²⁰⁰ Thus, the plaintiff would be protected by the temporary order, and the defendant would have a significant interest in complying with the temporary order for the amount of time between the continuance request and the final hearing date.

Because the PFA proceedings would technically never reach the final hearing stage, the defendant would have a right to seek expungement of his or her civil record²⁰¹ and the plaintiff could receive a more favorable protection order. The only potential downside to this strategy would be that the PFA matter remains on the court docket until the rescheduled final hearing date and a judge may protest that allowing too many continuances could interfere with the scheduling of new matters.

The benefit to the plaintiff, however, would likely outweigh the burden on the court system because this amount of time may prove to be an effective “cooling-off” period that gives the defendant an even greater incentive to comply with the terms of the temporary order and refrain from abusing the plaintiff further.²⁰² This strategy does not allow for automatic expungement.²⁰³ The defendant would need to file a motion to petition the court for expungement of his or her civil record after the “cooling-off” period is over, which acts as a further procedural safeguard.²⁰⁴

3. Amend the PFAA to Allow Expungement of Consent Orders

Case precedent stemming from the synthesis of the holdings in *Carlacci*,²⁰⁵ *Charnik*,²⁰⁶ and *Nelson*²⁰⁷ prevents a defendant from seeking expungement of a final order by consent because the defendant was likely afforded adequate procedural due process. No statutory authority for expungement of any kind exists in the PFAA

200. § 6107(b)(2).

201. *Carlacci v. Mazaleski*, 798 A.2d 186, 190–91 (Pa. 2002).

202. See *supra* text accompanying notes 197–98. If no ICC violations occur during the “cooling-off” period, then the plaintiff would withdraw the PFA petition on the date of the rescheduled final hearing. See *supra* text accompanying notes 197–98.

203. PA. R. CIV. P. 790(A)(1) (“[E]xcept as provided in Rule 320 and 35 Pa. Cons. Stat. § 780–119, an individual who satisfies the requirements for expungement may request expungement by filing a petition with the clerk of the courts of the judicial district in which the charges were disposed.”).

204. *Id.*

205. *Carlacci*, 798 A.2d at 190–91.

206. *Commonwealth v. Charnik*, 921 A.2d 1214, 1221 (Pa. Super. Ct. 2007).

207. *Commonwealth v. Nelson*, 690 A.2d 728, 731–32 (Pa. Super. Ct. 1997).

and thus the PFAA would have to be amended to include a statutory expungement provision.

This provision could borrow insight from the limited criminal statutory expungement provisions,²⁰⁸ specifically those provisions regarding expungement of summary offenses.²⁰⁹ The amendment to the PFAA could include language that states:

PFA records may be expunged when an individual who is the subject of a final order by consent with no admission of abuse petitions the court for the expungement of the PFA record and has been free of final protection orders and Indirect Criminal Contempt (ICC) violations for three years following the execution of the final order by consent. Expungement under this paragraph shall be permitted only for a final order by consent with no admission of abuse.

Statutorily authorized expungement could provide clarity for a defendant deciding whether to agree to a final order by consent or participate in a final hearing.²¹⁰ If a defendant knew exactly what steps he or she would need to take in order to expunge his or her civil record, then the parties may be able to reach a settlement more amicably and efficiently.

Furthermore, the language as set forth above provides the defendant not only the incentive to comply with the terms of the present consent order, but the incentive to avoid conduct that could lead to the court issuing a new final protection order for three years after the present consent order expires. Much like expungement of a continued temporary order, expungement in this statutory scheme would not occur automatically and would require the defendant to file a motion for expungement with the proper court.²¹¹

The downside to allowing expungement of a final order by consent stems from the scenario of a repeat defendant. The court may consider past instances of abuse when determining reasonable fear of imminent bodily harm.²¹² The court may also consider past protection orders when deciding the merits of a current PFA petition.²¹³ Evidence of past abuse at the center of a final order by

208. 18 PA. CONS. STAT. § 9122 (2017).

209. § 9122(b)(3).

210. 23 PA. CONS. STAT. § 6107 (2017).

211. PA. R. CIV. P. 790(A)(1).

212. *Miller ex rel. Walker v. Walker*, 665 A.2d 1252, 1259 (Pa. Super. Ct. 1995) (“Past abusive conduct on the appellant’s part was a crucial inquiry necessary for entry of a proper order.”).

213. § 6107(a).

consent with no admission of abuse may also be relevant to a court's inquiry in subsequent proceedings.²¹⁴

Therefore, if the court grants expungement of the record of a consent order and the defendant commits an act of abuse that leads to the filing of a new PFA petition, the expunged consent agreement would not be available as evidence in the subsequent proceeding. If the same plaintiff is the most recent victim, however, that plaintiff could simply testify regarding the past instances of abuse that led to the original consent order.²¹⁵ Thus, expungement would have a negative effect only in the limited scenario in which a new plaintiff files a PFA petition against a defendant with a previously expunged civil record.

The benefits of amending the PFAA to include a statutory provision allowing for expungement of consent orders in limited circumstances outweigh the detriments because statutory expungement facilitates amicable settlements, frees up scarce judicial resources,²¹⁶ and provides a great incentive to the defendant to comply with the content of the consent order. All three of these benefits work toward stopping current abuse and preventing future abuse for a PFA plaintiff and, thus, statutory expungement coincides with the intended purpose of the PFAA.²¹⁷

IV. CONCLUSION

PFA record expungement is a significant but frequently disregarded tool for settlement negotiations²¹⁸ because of the lack of statutory guidelines contained within the PFAA²¹⁹ and the absence of Pennsylvania Supreme Court case precedent related specifically to orders by consent with no admission of abuse.²²⁰ The purpose of the PFAA is to stop current abuse and prevent future abuse.²²¹ Providing parties to a PFA matter the bargaining chip of expungement as part of settlement negotiations could facilitate an amicable resolution of the matter.²²²

The Pennsylvania Supreme Court would likely find that consent orders are not available for expungement based on case prece-

214. *See* Buchhalter v. Buchhalter, 959 A.2d 1260, 1263 (Pa. Super. Ct. 2008).

215. *Id.*

216. *See* Commonwealth v. Charnik, 921 A.2d 1214, 1220 n.5 (Pa. Super. Ct. 2007).

217. *See* Lawrence v. Bordner, 907 A.2d 1109, 1112 (Pa. Super. Ct. 2006).

218. *See* Weems, *supra* note 7, at 4.

219. *See supra* Part II.A.

220. *See supra* Part III.B.1.

221. *See supra* Part II.A.3.

222. *See supra* Part III.C.3.

dent and the current wording of the PFAA.²²³ Due to this expected outcome, the option for a PFA plaintiff to use expungement as leverage during settlement negotiations is currently unavailable. Although a plaintiff can circumvent this lack of availability by attempting to use the potential for a *Wexler* hearing²²⁴ or by asking for a continuance for the temporary order,²²⁵ an amendment to the PFAA to allow for the expungement of consent orders in limited circumstances²²⁶ provides clarity, facilitates amicable settlement, and best serves the interests of the parties to a PFA matter and the judicial system.

223. *See supra* Part III.B.1.

224. *See supra* Part III.C.1.

225. *See supra* Part III.C.2.

226. *See supra* Part III.C.3.