



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
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June 14, 2021

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**Re: *Alan Reid Weil v. No Defendant***  
**Case No. CL-2021-7714**

***Kathleen M. Dietrich v. Commonwealth of Virginia***  
**Case Nos. CL-2020-19281, CL-2020-19285, CL-2021-7734**

Dear Counsel:

Occasionally, domestic relations law intersects criminal law, as it now does in this case.<sup>1</sup> The issue before the Court is whether it may permit a parent in a child custody dispute to unseal and use the expunged criminal court or police records of an opponent-parent. The Court holds it

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<sup>1</sup> See, e.g., *Burt v. Burt*, CL-2021-351, 2021 WL 2384490 (Va.Cir.Ct., Fairfax, May 20, 2021) (holding the constitutional right against self-incrimination does not protect a divorcing spouse from producing in discovery existing, incriminating documents that could prove adultery unless the act of producing the discovery is itself incriminating).

OPINION LETTER

may not permit a parent to unseal and use an opponent-parent's expunged records, nor may the parent intervene in the opponent-parent's ongoing petition to expunge other criminal records.

## I. A REQUEST TO RECONSTRUCT AN EXPUNGED FILE.

Petitioner Alan R. Weil ("Father") is in a child custody dispute with Kathleen M. Dietrich ("Mother"). The parties were divorced by Final Order of Divorce on January 30, 2017. (Father's Pet. Ex. 1.) They entered into a consent "Custody and Visitation Order" ("Custody Order") on March 17, 2020. However, on November 6, 2020, Mother filed a "Motion to Modify [the] Custody and Visitation Order" ("Modification Motion"). (Father's Pet. Mem. at 1.)

On April 27, 2021, Father learned that Mother had expunged some of her criminal records associated with the events that led to the entry of the Custody Order.<sup>2</sup> Father wants to use those records against Mother at the Modification Motion hearing.<sup>3</sup> Specifically, Father requests that he, his attorney, and any necessary witnesses "be permitted to review, use, and disclose any of [Mother's] expunged court and/or police records, including the information contained therein, from January 1, 2019 to the present in the context of any actions currently pending or which may later arise in the parties' divorce case regarding the parties' minor children." (Father's Pet. at 2.)

Separately, and in addition, Father learned that Mother petitioned for the expungement of additional criminal records that have not yet been expunged. He filed a "Motion for Leave to Intervene and to Use Expunged Records Pursuant to §19.2-392.3 of the Code of Virginia" in the pending expungement hearings to, implicitly, oppose the grant of the expungement and to, explicitly, obtain the right to use the records against Mother during the Modification Motion hearing.<sup>4</sup>

Father's stated reason for using expunged criminal records is to help the Court adjudicate the best interests of the children at the Modification Motion hearing. Father claims he should be permitted to use the expunged records because the Court must consider the physical and mental condition of each parent during the Modification Motion hearing.

Mother opposes both Father's use of the expunged records and Father's intervention in her petitions for expungements not yet granted.

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<sup>2</sup> The Court's discussion of Father's allegations in no way confirms or denies the existence of any expunged cases of Mother. The Court has not looked for, opened, reviewed, or disclosed any expungement files in preparing this Opinion. For the purposes of this Opinion Letter, the Court assumes, without deciding, Father's allegations are true.

<sup>3</sup> This is the subject matter of *Alan Reid Weil v. No Defendant*, CL-2021-7714.

<sup>4</sup> This is the subject matter of *Kathleen M. Dietrich v. Commonwealth of Virginia*, CL-2020-19281, CL-2020-19285, and CL-2021-7734. At oral argument, Father disavowed any interest in blocking the expungement. However, to intervene in a pending civil action, one inherently is in the position of supporting or opposing something. *See* VA. SUP. CT. R. 3:14. The Court understands Father's position is that he wants to intervene to gain access to and use of the records subject to the expungement petitions.

## II. ACCESS TO EXPUNGED CRIMINAL FILES IS RARE.

Under current law, a court may grant a petitioner's request to expunge (seal) her criminal records<sup>5</sup> in very narrow circumstances—where she is (1) acquitted, (2) a *nolle prosequi* is taken,<sup>6</sup> or (3) the charge is otherwise dismissed, including dismissal by accord and satisfaction.<sup>7</sup> VA. CODE ANN. § 19.2-392.2(A)(1) and (2). Thus, under current law, a criminal defendant may generally expunge her criminal file if she wins her trial and is acquitted, the prosecutor drops the case unconditionally,<sup>8</sup> or the defendant and victim settle a dispute on a civil basis. It is a legislative grant to wipe clean police and court records under circumstances when one is accused, but not convicted, of a crime.<sup>9</sup>

Once a court awards an expungement, the records are sealed and it is a crime for one having or acquiring access to the records to open, review, or disclose them to others. VA. CODE ANN. § 19.2-392.3(A). A violation is a Class 1 misdemeanor. VA. CODE ANN. § 19.2-392.3(C). There is one express exception in the statute. Upon petition by the Commonwealth's Attorney, a court can grant law enforcement access to expunged records for: (1) employment vetting of a future police officer, or (2) use in a pending criminal investigation where nondisclosure could jeopardize the investigation or endanger life or property. VA. CODE ANN. § 19.2-392.3(B).

Despite this narrow exception, Father effectively argues there are unlimited reasons for a court to permit access to expunged records. He points to text of the statute for support. It reads, in full:

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<sup>5</sup> The expungement seals more than just a court file. It seals “police records” and “court records” relating to the criminal charge. VA. CODE ANN. § 19.2-392.2(A)(2).

<sup>6</sup> A *nolle prosequi* is a dismissal of criminal charges without prejudice. VA. CODE ANN. § 19.2-265.3; *cf. Roe v. Commonwealth*, 271 Va. 453, 459 (2006) (distinguishing a dismissal from a *nolle prosequi*). Under current law, a prosecutor must ask a court for a *nolle prosequi* and must show good cause for it. *Id.*

<sup>7</sup> An “accord and satisfaction” is a process that permits a court to dismiss a criminal misdemeanor for which there is a civil remedy and where the victim tells the court he received civil satisfaction for the injury. VA. CODE ANN. § 19.2-151.

<sup>8</sup> Deferred dispositions—where an accused pleads guilty or the court finds facts sufficient to find the accused guilty of a crime at a hearing, but the court dismisses the case anyway after the completion of specific terms—are ineligible for expungement under current Virginia law. *Commonwealth v. Jackson*, 255 Va. 552 (1998); *Gregg v. Commonwealth*, 227 Va. 504 (1984) (only the “innocent” qualifies for expungement).

<sup>9</sup> The General Assembly dramatically overhauled the expungement law, effective July 1, 2021. Next month, the Commonwealth will automatically seal, or permit one to petition to seal, certain criminal convictions and deferred dispositions. 2021 Acts of Assembly Ch. 524. Thus, expungements will soon be available to both the innocent and the guilty, in many contexts. Once the new law on sealing criminal convictions is in effect, however, the rationale behind this Opinion Letter remains the same—the General Assembly has chosen, as a policy matter and upon weighing the benefits of sealing to convicted persons versus others' desires to see the records, that certain criminal records are to be sealed.

It shall be unlawful for *any person* having or acquiring access to an expunged court or police record to open or review it or to disclose to another person any information from it *without an order from the court* which ordered the record expunged.

VA. CODE ANN. § 19.2-392.3(A) (emphasis supplied). Father reasons in a syllogism: (1) the Court has plenary power to grant access to an expunged record, and (2) since it is unlawful for “any person” to access the record, then (3) “any person” may petition for access. (Father’s Pet. Mem. at 2.)

Because Father filed two related, but distinct, motions, the Court will address each *seriatim*.<sup>10</sup> First, he seeks access to already expunged records. Second, he seeks to intervene in pending expungement proceedings initiated by Mother for yet other criminal cases.

#### **A. Father Lacks Standing to Access Expunged Records.**

Father asserts standing to access Mother’s expunged records on the theory that the Court has plenary power to grant access to any person with a good reason for access. He reaches this conclusion by citing that the statute proscribes “any person” from disclosing expunged records—unless the court orders otherwise. VA. CODE ANN. § 19.2-392.3(A). He reasons he is “a person” prohibited from accessing the expunged records, and the Court has a general power grant to permit access to expunged records, so he has standing to ask the Court to grant an exception for him to access the records. Father claims the law-enforcement exception is non-exclusive. Distinguishing his request from this sole enumerated exception, he notes the sole written exception applies to the unique case of *ex parte* hearings. By contrast, Father argues, he is not seeking an *ex parte* hearing and that § 19.2-392.3(A) permits a court to order the access to expunged records otherwise proscribed.

However, as he acknowledges, the statute expressly mentions only one circumstance wherein parties can access expunged files—in the context of law enforcement needing them when hiring police officers and when conducting certain criminal investigations. VA. CODE ANN. § 19.2-392.3(B). The Supreme Court of Virginia, interpreting this statute, wrote:

A court’s authority to permit a “review” of an expunged police or court record is *strictly limited* to the provisions of Code § 19.2-392.3. That section merely empowers a Commonwealth’s Attorney to seek such a review when the record is “needed by a law-enforcement agency for the purposes of employment application as an employee of a law-enforcement agency or for a pending criminal

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<sup>10</sup> The Court refers to the subject matter of the motions. Three of the four motions are identical: they seek leave to intervene in three of Mother’s pending expungement cases.

investigation [provided] the investigation will be jeopardized or that life or property will be endangered without immediate access to the record.”

*Ein v. Commonwealth*, 246 Va. 396, 399 n. 2 (1993) (emphasis supplied; internal quotations and brackets in original). Thus, the high court does not embrace the *ex parte* distinction Father presents.

This limitation makes sense. Father’s interpretation would be the exception that swallows the rule. If he is correct, the Court has unbridled discretion to grant access to expunged files. There is not even a requirement that a petitioner show good cause. Compare with VA. CODE ANN. § 19.2-265.3 (a court may only grant a *nolle prosequi* “for good cause shown.”). To accept Father’s interpretation of the statute, law enforcement could bypass the exacting limitations placed on them by petitioning for access to expunged records in open court instead of *ex parte*. Moreover, Father’s interpretation would permit anyone to petition the Court for permission to unseal expunged records—including potential employers, banks, landlords, prospective spouses, prospective business partners, or anyone else interested in learning more about the character and history of a person. In a different context, the Supreme Court of Virginia recently disavowed “all persons, anywhere, at any time, or in any manner” language as an exception to legal standing principles. *Bonanno v. Quinn*, No. 200963, 2021 WL 2149443, at \*7 (Va. May 27, 2021). If the General Assembly intended such a broad grant of discretion, or a universal grant of standing, one would not expect to have to read tea leaves within the statutory language to see it.

#### **B. Father Lacks Standing to Intervene in Mother’s Pending Petition for Expungement.**

A petition for expungement is a matter between one previously accused of a crime and the Commonwealth. VA. CODE ANN. § 19.2-392.2(D). There are only two parties: the petitioner and the Commonwealth’s Attorney. VA. CODE ANN. § 19.2-392.2(G). Virginia Code § 19.2-392.2(G) states: “The Commonwealth shall be made party defendant to the proceeding. Any party aggrieved by the decision of the court may appeal, as provided by law in civil cases.” This subsection clearly states that the Commonwealth is a party to an expungement action, and therefore only the petitioner and the Commonwealth are potentially “aggrieved” parties who may appeal. If only the petitioner and Commonwealth may appeal an expungement action, then it naturally follows that only the petitioner and Commonwealth have standing in an expungement action, not anyone who desires to support or oppose the petition.<sup>11</sup> There is no provision for other rationally curious persons—such as alleged victims, reporters, or divorcing spouses—to participate. See *Ein*, 246 Va. at 400.

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<sup>11</sup> See *Ein*, 246 Va. at 400 (discussing that only the Commonwealth was entitled to notice of an expungement proceeding where petitioner failed to give notice of the proceeding to defendants in a related civil action. In *Ein*, the Court’s discussion focuses on § 19.2-392.2(F), which is the language in § 19.2-392.2(G) under the current Code of Virginia.).

“In general, only an ‘aggrieved’ party has standing to pursue a claim in court.” *Historic Alexandria Found. v. City of Alexandria*, No. 200195, 2021 WL 2149459, at \*3 (Va. May 27, 2021) (citing *Friends of the Rappahannock v. Caroline Cty. Bd. of Supervisors*, 286 Va. 38, 47 (2013)). “In order for a petitioner to be ‘aggrieved,’ it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner ‘must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.’” *Historic Alexandria Found.*, 2021 WL 2149459, at \*3 (quoting *Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Virginia Beach*, 231 Va. 415, 419-20 (1986)) (internal citations omitted).

Thus, Father lacks standing to participate in any pending expungement proceedings. Father is not a proper party to any of the expungement proceedings, nor would he be considered “aggrieved” to have standing to pursue a claim in the expungement proceedings since he does not have a direct interest in matters between only Mother and the Commonwealth. His reliance on the use of the term “any person” in the first sentence of the expungement statute is misplaced. VA. CODE ANN. § 19.2-392.3(A). The statute plainly uses the term “any person” in the context of limiting disclosure of expungement records, not as a promotion of “any person” to “party” status. Indeed, Father would lack standing to appeal a court’s grant of an expungement. *Ein*, 246 Va. at 400; *See also Bonanno*, 2021 WL 2149443, at \*3 (distinguishing “persons” from “parties” for the purpose of standing).

Because he is not a party, Father’s entire syllogism collapses. He cites the general intervention rule for authority for his assertion of intervention. VA. SUP. CT. R. 3:14. However, this rule permits one to intervene as a plaintiff or defendant—someone who could be a party—to assert a claim or defense germane to the subject matter of the proceeding. *Id.* It provides no path for a third party to intervene merely for the purpose of having access to records produced in the underlying litigation, as if they are a party. In the context of an expungement, which is between the formerly accused and the state, a former spouse with a pending custody dispute has no claim or defense germane to the subject matter of the proceeding. Father certainly is not seeking to intervene as a plaintiff (petitioner). He cannot intervene as a defendant (respondent) because he has no statutory role in the granting or denial of an expungement. His desire to intervene as a spectator, or to win special access to court or police records, has no support in the Rules. Father lacks standing to intervene.

**C. Denying Father Access to the Expunged Records Does Not Prohibit Him from Defending Against Mother’s Modification Motion.**

Father claims that denying him access to Mother’s expunged records will prevent him from being able to defend against the Modification Motion. Father seeks to use the expunged records to present evidence of the events and circumstances which led to the Custody Order.

Father claims the Custody Order resulted from Mother engaging in a pattern of “erratic and dangerous behavior, often in the presence of the children” that resulted in criminal charges. (Father’s Pet. Mem. at 3.) He believes the records will provide necessary background information about Mother and her alleged mental illness. He wants the Court to consider the effects of the circumstances surrounding the charges on the parties’ children and their best interests. (*Id.*)

Father is wrong in his assertion that denying him access to Mother’s expunged records prevents him from presenting evidence about the Custody Order or defending against the Modification Motion, thereby preventing the Court from considering the children’s best interests. While Father is unable to use expunged court or police records to defend against the Modification Motion, he is still able to put on evidence of Mother’s mental health and behavior in other ways.

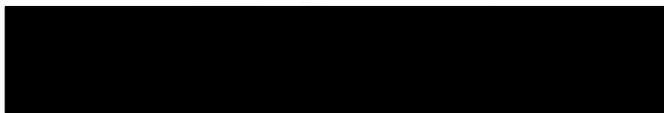
Consider this hypothetical: a third party observes a fist fight between two other individuals. Assume one of the fighting individuals is charged with assault and battery, that individual enters an accord and satisfaction to dismiss his case, and he subsequently obtains an expungement. The third-party witness to the assault is not silenced by the expungement statute, nor is his memory of the event wiped away. The witness may be called to testify as to what he saw, even if the records are expunged. The event merely cannot be proved using the expunged court or police records. Therefore, Father is incorrect in claiming that he cannot defend against the modification action without access to the expunged records—he just cannot use the expunged records as his evidence to defend.

### III. CONCLUSION.

For the reasons stated herein, the Court holds that a parent in a child custody dispute may not open, use, or disclose expunged criminal records of an opponent-parent, nor may the parent intervene in the opponent-parent’s petition to expunge other criminal cases.

Appropriate Orders are attached.

Kind regards,

A large black rectangular redaction box covers the signature of David A. Oblon.

David A. Oblon  
Judge, Circuit Court of Fairfax County  
19<sup>th</sup> Judicial Circuit of Virginia

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KATHLEEN M DIETRICH,	)	
<i>Petitioner,</i>	)	Case Nos: CL-2020-19281
v.	)	CL-2020-19285
	)	CL-2021-7734
COMMONWEALTH OF VIRGINIA,	)	
<i>Respondent.</i>	)	

**ORDER**

THIS MATTER came before the Court June 11, 2021, on non-party Alan Reed Weil’s “Notice and Motion for Leave to Intervene and to Use Expunged Records Pursuant to § 19.2-392.3 of the Code of Virginia” in CL-2020-19281 and CL-2020-19285, and “Motion for Leave to Intervene and to Use Expunged Records Pursuant to § 19.2-392.3 of the Code of Virginia” in CL-2021-7734 (collectively, “Motions to Intervene”). And, for the reasons set forth in the accompanying Opinion Letter dated June 14, 2021, which is incorporated herein by reference; it is

ORDERED the Motions to Intervene are DENIED.

THESE CAUSES CONTINUE.

JUN 14 2021

\_\_\_\_\_  
Entered

  
Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED  
IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS  
MUST BE FILED WITHIN 15 DAYS.

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

ALAN REED WEIL, )  
    *Plaintiff,* )  
v. )                    CL-2021-7714  
    ) )  
NO DEFENDANT, )  
    *Defendant.* )

**ORDER**

THIS MATTER came before the Court June 11, 2021, on petitioner Alan Reed Weil’s “Petition for Leave to Use Expunged Records Pursuant to § 19.2-392.3 of the Code of Virginia” (“Petition”). And, for the reasons set forth in the accompanying Opinion Letter dated June 14, 2021, which is incorporated herein by reference; it is

ORDERED the Petition is DENIED.

THIS IS A FINAL ORDER.

JUN 14 2021

\_\_\_\_\_  
Entered

  
Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED  
IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS  
MUST BE FILED WITHIN 15 DAYS.