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Domestic Restraining Orders: Traps for Unwary Parents

By James M. Lynch | January 19, 2017

Criminal Law Family Law Child Custody Restraining Orders

Massachusetts lawyer James M. Lynch reviews how Abuse Prevention Orders can affect unwary parents.

The standard domestic Abuse Prevention Order issued by the Trial Courts in Massachusetts under **G.L.c. 209A** (209A Orders) presents a veritable blast of red flags for defendants. Each of those red flags represents a real danger to the liberty of the person who is now obligated to stay away from the complaining party. Cases where the parties don't have any children together present the easiest of all situations: the Defendant must stay away and have no direct or indirect contact with the Plaintiff/complainant. Simple enough. Such 209A restraining orders typically leave no room for doubt in determining what the Defendant's obligation is.

When parties have children under the age of 18, however, the dangers inherent in 209A orders are often obscured by a very narrow exception the judge may carve out to accommodate for child visitation. In these instances, many defendants are either unaware of just how narrow the child visitation exception is – or just how easy it is to run afoul of that exception and end up in jail. It is when children and visitation are in play that a gray area opens – one fraught with peril for the party on the business end of the 209A Order.

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Read the Fine Print in the 209A Order

The standard 209A Order is pre-printed form that allows the trial judge to hand-write the specifics of each case into the form. The form also allows for some variation if the judge deems it appropriate. Section A(8) of the Order form deals with visitation with the following check box: "*You may only contact the Plaintiff to arrange this visitation.*" The form goes on with a series of boxes for the judge to check for permitted contact – i.e., phone, email, text or "other" with space for the judge to hand-write in an alternative method of contact. Because this exception is set apart and clearly delineated, it is easy for all to see. Not so clearly delineated, however, is the following language seemingly buried in Section A(2) :

> "YOU ARE ORDERED NOT TO CONTACT THE PLAINTIFF, in person, by telephone, in writing, electronically or otherwise, either directly or through someone else, and to stay at least _____ yards from the Plaintiff**even if the Plaintiff seems to allow or request contact."**[emphasis added].

This highlighted warning is the part of the 209A Order that is probably the part that is most overlooked and the part that most commonly gets defendants with children in trouble.

Wait, what? He/she can contact me but I can't contact her/him?

Yes, exactly!

It's relatively easy to follow the strict prohibitions contained in the 209A Order immediately following its issuance. But over time, when the parents have settled into a routine, the emails or the texts sometimes can become more relaxed, as well. That is where the hidden danger for the Defendant arises, particularly in cases where a custody case is still ongoing. For example, there are a variety of other matters besides those involving children where parents feel the need to communicate directly in an active divorce case including, child or spousal support, health insurance, or even general household matters. All these other contacts about non-permitted matters can get shoe-horned into permitted communications about child visitation. Thus, the parties to the 209A Order unwittingly begin setting dangerous precedents relating to contact – dangerous only to the Defendant who is the only one at risk. All the while, the offender thinks these other topics are given cover by the fact that the core message of child visitation emails, texts or phone communications. They aren't.

Exceptions for Emergencies?

There are other seemingly benign contacts between parties to a 209A Order, not involving visitation issues, that can draw any unsuspecting Defendants into unforced errors in 209A cases. It is not uncommon, for instance, for a plaintiff spouse to invite the defendant spouse back into the vacated home to perform emergency household repairs. The house is almost always a joint marital asset that needs to be protected. Perhaps a leaking pipe needs to be fixed immediately. This type of contact may seem like a common-sense exception to the 209A Order but the fact is that the clear language found in the standard 209A Order doesn't provide for such emergencies. The police have a word for these types of unpermitted contacts: they call them "Evidence". In the event things go sour between the parties at some point in the future, the Defendant will have created a paper trail of violations – however seemingly innocent – and the police will arrest. But even if the police are never called, a divorce litigant who is also on the receiving end of a 209A Order gives the other party in the divorce a great deal of leverage on other issues when he/she engages in such unpermitted contacts.

Risks to the Plaintiff: How Initiating Contact Outside of the Restraining Order can Also Harm a Plaintiff

Clearly, the party facing incarceration – the Defendant – carries the greater risk when it comes to initiating contact outside of the terms of a 209A order. This does not mean that such contact is risk free for Plaintiffs, however. A Plaintiff who invites contact with a Defendant that is not permitted by a 209A risks exposure to a motion to vacate filed by the Defendant. Indeed, the most common grounds upon which 209A orders are vacated arise out of Plaintiffs who contact the Defendant in a manner that demonstrates that he or she is not actually in fear of the Defendant. A Plaintiff who invites a Defendant to engage in impermissible contact may be seen as baiting the Defendant into a violation. If the Defendant avoids taking the bait, and instead files a motion to vacate the 209A order in Court, he or she has a high likelihood of success.

The second risk faced by Plaintiffs whose 209A order limited contact to “issues affecting the children” is more general. The reality is that provisions that permit contact between parties for child-related matters can be abused. A clever Defendant may adhere to the “letter of the law” by framing every contact as child-related, while harassing the Plaintiff through the tone, frequency and content of communications. Even my example of emergency household repairs can be morphed into a child-related issue if the Defendant chooses his or her words carefully.

The final risk to Plaintiffs in these scenarios is the weakening effect that child-related communication provisions have on the criminal process if a Defendant is arrested. Massachusetts law requires that a 209A order be sufficiently unambiguous to provide the Defendant with clear notice of the conduct he or she must avoid. See *Commonwealth v. Butler,* 40 Mass. App. Ct. 906, 907 (1996) (due process considerations require that restraining orders provide `a person of ordinary intelligence a reasonable opportunity to know what the order prohibited, so that he might act accordingly’). Plaintiffs are well served to seek orders limiting the *method* of communication between the parties to email, where phone calls and even text messages may be inadequate for preserving evidence of a Defendant’s words. Further, where possible, Plaintiffs should seek specificity in the type of child-related topics to be discussed, where communications that are restricted to “visitation scheduling and transportation” is far narrower than a provision broadly allowing communications “relating to the health, safety or welfare of the child”.

Unfair as it may seem, the only person obligated to obey the prohibitions in a 209A Order is the Defendant and he/she would be wise to stay on point and limit written and recorded messages with the other party to matters of child visitation. Failure to do so can have disastrous consequences.

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Schedule a consultation with James M. Lynch today at (781) 253-2049 or send him an email.