

A Lack of Privacy

Confidentiality Of Family Law Files Would Foster Candor

By Fred Silberberg

Our court system was designed to be public to insure accountability and equity. However, we need to balance that interest against the rights of privacy of citizens engaged in domestic disputes. The information contained in family law files can cause great harm to innocent victims, both children and adults.

Take the case of Beth and Jim Smith. After 10 years of marriage, Beth and Jim are involved in a divorce. It is a bitter one, initiated by Beth after she learned that Jim had been having an affair. This couple has two children and custody is an issue. Beth has alleged that Jim, in addition to being a philanderer, has a drinking problem. The file is full of declarations containing a myriad of sordid details.

Not only is custody at issue, but

there is a dispute over finances. Beth wants Jim to provide child and spousal support and pay her attorney fees. She also wants Jim to pay the costs of their older daughter's private-school tuition for the coming year.

Because there are financial issues, the parties must file income and expense declarations with the court. In family law cases, nearly all pretrial hearings are conducted without live testimony, but with declarations only. Beth has thus filed a declaration with the parties' last year's tax return, several of Jim's paycheck stubs, his employment agreement and copies of bank records. Although not crucial to the hearing, Beth also attaches copies of credit card statements showing charges at hotels Jim frequented with his lover and copies of mobile phone bills showing telephone calls to that person, just to embarrass him. Beth was willing to expose Jim in any way possible, going so far as to attach test results from a medical laboratory, suggesting that Jim was having himself tested for sexually transmitted diseases. These documents are now in the court file.

Jim has been employed for several years by a large corporation in an upper-level management position.

He is up for a promotion that could result in a significant salary increase. Jim has also been thinking of taking a position with a competitor and has interviewed for that job. Both his present employer and his prospective employer are about to decide. At the same time, his older daughter has applications pending at several private schools and her school of choice is highly competitive.

Jim's prospective and current employer discover that a divorce is pending and decide to look at the court file. Also, the school to which his daughter is applying also checks court filings relating to families who apply for admission. The case file and its contents are public record and anyone can copy the file. Without realizing it, Beth has just shot her entire family in the proverbial foot.

In litigation, we are hoping that the truth emerges. If family law litigants know that anyone can see what they say in their declarations, they may be less likely to be truthful. The public availability of these files actually has a chilling effect on candid testimony. Consider the battered spouse who is afraid to let others know about her private hell, or the chronically ill person who needs additional financial support but

fears that disclosure of his or her condition will result in future uninsurability. These concerns would be addressed by making all family law files confidential.

Furthermore, the lack of confidentiality forces some to seek private judges to ensure privacy, which results in a two-tiered system of justice. In those cases that enter into side agreements to ensure confidentiality, it creates an incentive to violate the agreement knowing that enforcement would require public disclosure, something the other spouse will avoid at all costs.

There is little logic in laws that prevent credit bureaus from disclosing financial information or that protect the confidentiality of medical records while this very same information may be placed in public view in the event of a divorce. A properly run family court system with judges who are well trained and appropriately monitored should abrogate the need for public disclosure of family law files.

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