

Public Access Only for Some

By Fred Silberberg

The purported policy of the law in the state of California is to have open family law proceedings and public access to family law files. Allegedly, the public has a “right to know” what goes on in family law courts, and the open court system is intended to provide a means of oversight and public accountability for the actions of family law judges.

There have been attempts in the past to make family law files confidential, as they are in certain other states, all of which have been met with resistance both in the Legislature and in our courts. Considering the amount of sensitive information that is included in those files, it should be no surprise that some people do not want others to know their personal business. The average family law file contains income and expense declarations detailing what people make, what they spend it on, and who they owe money to. The files contain bank account information, data regarding people’s assets and liabilities, information about their children and where they live. All of this information is publicly available. The ability to seal any of it is strictly curtailed and subject to very specific procedures and limitations. The court proceedings that use this same information are public proceedings. Anyone can attend them. Anyone can hear the details of someone’s financial situation, and other private information.

Well, almost anyone.

Apparently, there is odd exception to this rule. But this exception is not applicable to most of the litigants that come before the court. If you are rich, upper middle class, middle class or even lower middle class, you have to bear all of your private information to the public. If you are lower class, you do not. In that instance, you get confidentiality over your financial information that other people do not. (Government Code Section 68633.)

The judicial system is not entirely supported by taxpayers. Our courts charge fees for services rendered. This is how our cash-strapped counties can make some income to offset their costs. Some people either cannot afford to pay these fees, or claim that they cannot afford to pay them. In those instances, the court provides a procedure where people can apply for a waiver of fees that they would otherwise have to pay. To qualify for a waiver, the court conducts a hearing to examine the applicant’s financial situation and determines whether or not to waive the fees. For these hearings, the courtrooms are closed and anyone

other than staff or the litigants are required to leave. In fact, ongoing cases are often interrupted so that the courtroom can be cleared in order to proceed with a fee hearing.

In a sense, it’s easy to understand why the Legislature may want to spare people from embarrassment or shame associated with the disclosure of their financial situation to the public. But this seems to go directly against the alleged public policy favoring the open nature of family law files and proceedings. Either we have a system of public access across the board or we do not. If we do, then it should be universally applied. If we do not, then other litigants should also be able to protect their own information from public disclosure with a confidential hearing.

Either we have a system of public access across the board or we do not.

There are plenty of people who come to family law court with financial situations that, while not bad enough to qualify for a fee waiver, surely may lead to shame or embarrassment. Certainly, on a daily basis we hear stories of people who have over-extended themselves, who are ‘upside-down’ on their houses, who have had to file bankruptcy, or who owe amounts of money that they cannot pay. In the present economy, the number of these stories has increased dramatically. If these people end up in family law court (which they sometimes do just as a result of being in such situations), their information is subject to public disclosure. These individuals are required to let the public or even the media have access to their information, hear their testimony, simply because they are not “poor enough.” There is simply no equity in that.

If the intent of the policy is also to foster public oversight of the court system, then why is there no need for public oversight when the court makes a determination as to whether a party has to pay fees to our cash-strapped court system? It seems logical that whether the court decides to waive fees for one party, but not another, is an issue where public oversight can insure the fair and even-handed administration of justice. Yet, our Legislature and appellate courts seem to disregard this policy in favor of protecting one class of litigants.

This is not the only example of our state providing one class of

litigants with rights that another does not have. These same rights of confidentiality are applied across the board to parties involved in cases concerning custody or support of a child born out of wedlock. In those situations, the files are confidential and only accessible by the parties or their attorneys of record. Parents who opt to have children out of wedlock are given preferential treatment by our courts over those parents who get divorced. If you are a billionaire who does not want your financial information disclosed, don’t marry the father or mother of children because then your information will remain confidential when the relationship falls apart. If you marry that person, prenuptial agreement or not, the information will be available to the public.

The policy of our law as guaranteed by the state constitution is to treat people fairly and equally. Yet, in clear defiance of this policy, there are at least three different classes of people when it comes to our courts facilitation of open access to the public. Those who are poor, and those who have their children out of wedlock regardless of their financial status, are provided with confidentiality. The rest of us are not.

There are processes available to litigants that provide a means of oversight, such as our appellate courts and the Commission on Judicial Performance. The truth of the matter is that there are procedures in place to insure the fair administration of justice. But the argument that family law courts and documents filed therein must be publicly accessible for these reasons are clearly unsustainable in light of the fact that the courts show preference to certain classes of people. If there is no need for oversight in terms of indigent litigants, and no need for oversight in terms of unmarried litigants, everyone should have the benefit of confidentiality. Either the policy is applied across the board to make everyone’s information public, or it is not.



Fred Silberberg is a certified family law specialist and a partner at Silberberg & Ross in Santa Monica.