Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GOVERNMENTAL AFFAIRS

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RONALD M. GEORGE
Chief Justice of California
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KATHLEEN T. HOWARD
Director, Office of Governmental Affairs

April 24, 2006

Hon. Judy Chu, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: SB 1015 (Murray), as proposed to be amended - Oppose
Hearing: Assembly Appropriations Committee – April 26, 2006

Dear Assembly Member Chu:

While Senator Murray has accepted amendments that would mitigate the work load issues for the court raised by SB 1015, the Judicial Council continues to oppose SB 1015 because it would require the court to redact from marital dissolution files information that the court has used in making its determinations in a case. The April 19, 2006 amendments to SB 1015, make redaction of certain information routine, and deny the court the discretion to determine whether the redaction is necessary to protect the interests of the party requesting it. These amendments provide that the court shall, upon request of a party, redact specified information regarding a party to a dissolution proceeding.

In our previous letter regarding SB 1015 we highlighted the difference between information in a court file that the court needs to make its determinations, and that information which is not relevant to the court. We indicated that we are prepared to adopt a rule of court and/or develop educational materials to assist litigants in keeping the latter information out of their court file entirely. Current law already allows for the redaction of social security numbers, and many parties already truncate their bank account numbers and residential property descriptions so that they can avoid disclosure that might lead to identity theft. To the extent that the Legislature is concerned about keeping that information out of the file, we believe that we can instruct the parties on how to achieve that end without making it the responsibility of the court.

SB 1015 would, however, also require the court to redact financial information that the court does need in order to make property distribution and support determinations in the case, including the balances in any bank or brokerage account, the annual salary or income, and the net worth of a party. This requirement is troubling because it places the court in the position of shielding from public view that basis of its decisions. As we stated in our previous letter of opposition to SB 1015, requiring the courts to keep hidden information that was the basis for the court's decision weakens public trust and confidence in the courts, and creates the appearance that the court has something to conceal. Moreover, the language in the bill is vague, especially the language concerning "net worth."

In addition, the language added to SB 1015 has the potential to create a significant new workload for the courts in family law matters. Annually there are approximately 150,000 marital dissolution cases filed. With two parties in each case, the number of requests for redaction that courts could be faced with is substantial. Thus court staff may be required to review and redact tens of thousands of court files, and then be certain to maintain two court files in each of these cases. One file that would be available to the public, and one file that would be the working file for the court, because the redacted information would need to be accessible to the judicial officer hearing the case. We greatly appreciate the willingness of Senator Murray to adopt amendments that would allow the court to impose a fee to recover the actual costs of providing these services, and believe that the revenues generated by such a fee will mitigate the workload impact of SB 1015 for the courts if it is enacted.

However, because these amendments do not address our fundamental policy objections to the bill we urge that you vote "no" on SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Appropriations Committee
Hon. Kevin Murray, Member of the Senate
Mr. Chuck Nicol, Principal Consultant, Assembly Appropriations Committee
Ms. Julianne Huerta, Consultant, Assembly Republican Office of Policy
Mr. Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Director of Legislation, Office of Planning and Research

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March 10, 2006

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

Subject: SB 1015 (Murray), as amended March 9, 2006
Hearing: Assembly Judiciary Committee – March 14, 2006

Dear Assembly Member Jones:

The Judicial Council has not yet taken a position on SB 1015, but we have identified some areas of concern for the courts that we would like to bring to the attention of the Committee. SB 1015 would amend Family Code section 2024.6 to require the court, upon request by a party to a marital dissolution proceeding, to order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy." In addition, the bill would authorize privately compensated temporary judges to make orders for redaction pursuant to this section.

One area of concern raised by these provisions is the workload increase that would result from their implementation. We are in the process of developing an estimate of the fiscal impact of these changes, but even without precision on the costs, it is clear that the implementation of these provisions would consume significant amounts of judicial officer time. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary as described above. Because that determination is a legal judgment, against a new standard that is

not clearly defined, it appears that a judicial officer, rather than clerical staff, would be required to perform that function.

We have sought information from the courts regarding the number of motions filed seeking the sealing of pleadings under the current section 2024.6 provision, and have learned that some courts are receiving many of these requests each month, while others receive a small number. Given that there were approximately 150,000 petitions for marital dissolution filed 2004, the potential workload statewide is quite substantial. Add this workload to a court system that is already overburdened, and desperately in need of additional judges, and the result of enactment of this legislation could be serious repercussions for those trying to access the court system.

Additionally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these cases. This provision raises concerns because it is inconsistent with the current practice that ensures the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, it appears that further examination of the need to allow these temporary judges to perform this particular function is required.

We look forward to working with the Committee and the author to try to address these concerns as the council reviews the recent amendments and develops a formal position on SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Kevin Murray, Member of the Senate
Mr. Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Ms. Karen Pank, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Assistant Director of Legislation, Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

Trevino, Yvette

From: Kenny, Tracy
Sent: Wednesday, April 12, 2006 9:25 PM
To: Trevino, Yvette
Subject: SB 1015 fiscal

With the proposed amendments, SB 1015 will result in an unknown number of new hearings in order to determine which parts, if any, of a litigants family law pleadings should be redacted to protect their privacy. The existing statute, which allowed litigants to seal their pleadings with financial information was only about a year and a half old when the court of appeal found it unconstitutional, but during that time, usage was very infrequent in most courts. If the workload under SB 1015 was similar, then the fiscal impact would not be significant. However, there was one court, Sacramento, which received an average of 21 requests per month. If they had to gold an additional 21 hearings, and, and manage the ensuing redactions, it would be burdensome. But because the bill requires a noticed motion, and gives the court significant discretion not to redact, it is possible that fewer people will bother trying to conceal their information. To access someone's family law file you typically would have to go to the courthouse and request it. For the vast majority of people, there is no one out there who would be interested in doing that, so there is little to fear from leaving the file open. The people who would want to use the procedure are those who are public figures, and/or very wealthy. Those people also have big files, so the workload per case could be significant. However, in drafting the rule of court required by SB 1015, we could include a provision similar to the one in California Rule of Court 243.1, allowing for a case to be sent to a referee to resolve, and apportioning the costs for the referee to the parties. In courts like Los Angeles, that would likely have to be the route taken. We have the authority under existing law to recover the costs for referees, so we don't need authority in SB 1015.

Thus the fiscal impacts are hard to pin down with any certainty, but probably could be mitigated in some cases. For general information there are approx. 150,000 filings annually that meet the definition in the bill (disso, separation or annulment).

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KATHLEEN T. HOWARD
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March 27, 2006

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

Subject: SB 1015 (Murray), as amended March 9, 2006 - Oppose
Hearing: Assembly Judiciary Committee – April 4, 2006

Dear Assembly Member Jones:

I regret to inform you that the Judicial Council is opposed to SB 1015, which would amend Family Code section 2024.6 to require the court, upon request by a party to a marital dissolution proceeding, to order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy." In addition, the bill would authorize privately compensated temporary judges to make orders for redaction pursuant to this section. The council is opposed because the bill would have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments.

SB 1015 appears to have two primary goals, protecting parties from identity theft, and affording parties the right to seek a high degree of financial privacy in marital dissolution proceedings. The council believes that the first goal can be achieved without compromising the openness of court proceedings or records. Currently litigants are advised on their forms to redact any social security numbers from documents filed with the court. SB 1015 could be amended to direct the council to adopt a rule of court advising parties of the allowable means to keep other information

out of the files by, for example, truncating bank account numbers and describing residential property in a manner that does not disclose the entire address. This information, which identifies the specific location of an asset, need not be anywhere in the court file because the court will not be considering it in making its determinations. By contrast, the income, expense, and other financial asset information that SB 1015 appears to protect is often at issue in a contested dissolution matter, and does need to be available to the court as it hears and considers the case. Requiring the court to redact the information that was the basis of its determinations regarding support and distribution of property puts the court in the awkward position of shielding from public view the very facts that underlie its rulings.

One of the Judicial Council's key strategic goals is to enhance public understanding of and confidence in the judicial branch. The courts are entrusted with the responsibility to provide justice to all litigants seeking the intervention of the courts. In order to maximize public trust and confidence in the courts it is crucial to preserve a policy of presumptive openness of court proceedings and records. There may be cases where privacy concerns outweigh the public's right to know what the courts are doing, but those situations should be the exception and not the rule. Currently litigants can seek to seal portions of their court files under California Rule of Court 243.1 when there is an overriding interest that outweighs the public interest, and other facts are found to establish that sealing is appropriate.

The Judicial Council recognizes that many of the issues considered by the court in marital dissolution matters are of a sensitive nature, but these proceedings are open to the public, and the court is exercising significant discretion in making its determinations in each case. That discretion ensures that each litigant can receive individual justice, but the council is concerned that any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case.

The council is also concerned about the significant workload increase that would result from the implementation of SB 1015. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary to "protect the parties overriding right to privacy." Because that determination is a legal judgment, and is arguably vague, a judicial officer, rather than clerical staff, would be required to perform that function.

We have sought information from the courts regarding the number of motions filed seeking the sealing of pleadings under the current section 2024.6 provision, and have learned that some courts are receiving many of these requests each month, while others receive a small number. Given that there were approximately 150,000 petitions for marital dissolution filed in 2004, the potential workload statewide is quite substantial. Add this workload to a court system that is already overburdened, and desperately in need of additional judges, and the result of enactment

of this legislation could be serious repercussions for those trying to access the court system. We are particularly concerned that these new duties would not be accompanied by the authority to recoup the costs of providing this new and mandatory service to litigants, and recommend that the committee amend SB 1015 to allow the courts to recover these costs if it determines that the bill should move forward.

Finally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these dissolution cases. This provision raises serious concerns for the council because it is inconsistent with the current practice that ensures that the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, the council opposes any attempt to provide this authority to privately compensated temporary judges.

For these reasons the Judicial Council opposes SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Kevin Murray, Member of the Senate
Mr. Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mr. Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Director of Legislation, Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

[redacted]
Tracy Kenny

MOCK-UP

AMENDED IN ASSEMBLY APRIL 17, 2006

AMENDED IN ASSEMBLY MARCH 9, 2006

AMENDED IN ASSEMBLY FEBRUARY 16, 2006

AMENDED IN SENATE AUGUST 30, 2005

AMENDED IN SENATE AUGUST 17, 2005

AMENDED IN SENATE AUGUST 15, 2005

AMENDED IN SENATE JULY 1, 2005

SENATE BILL No. 1015

Introduced by Senator Murray

February 22, 2005

An act to amend Section 2024.6 of the Family Code, relating to dissolution of marriage, *and declaring the urgency thereof, to take effect immediately.*

legislative counsel's digest

SB 1015, as amended, Murray. Dissolution of marriage: financial declarations.

Existing law permits a party to request that documents listing or identifying the parties' assets and liabilities be sealed in specified family law proceedings, including dissolution of marriage.

This bill would revise those provisions to include documents listing or identifying the parties' income or expenses, permit *specified portions of* those records to be redacted, *subject to a finding by the court,* and make related changes. The bill would require the Judicial Council to adopt rules governing procedures for redacting and restoring those records. *This bill would make legislative findings and*

declarations relating to dissolution of marriage and financial information.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: ~~majority~~ *2/3*. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) The fundamental right of privacy protects against unwarranted intrusion into private financial affairs, including those affairs disclosed in a dissolution of marriage, nullity of marriage, or legal separation proceeding.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets, liabilities, income or expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income or expenses.

(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft.

(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic databases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties. Existing state law is inadequate to protect these widespread privacy concerns.

(e) Local court rules regarding the disclosure of sensitive financial information vary from county to county. This act is intended to provide uniformity with respect thereto.

(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. ~~Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records.~~

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) Notwithstanding any other provision of law, upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court shall order redacted ~~any~~ *the specified* portion of a pleading *filed with the court* that lists the parties' financial assets, liabilities, income, or expenses, or provides the location of, including a residential address, or identifying information about, those assets, ~~liabilities, income, or expenses. Subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy. The request may be made by ex parte application. Nothing redacted pursuant to this section may be restored except upon petition to the court and a showing of good cause.~~ *liabilities, income, or expenses, if the court expressly finds facts that establish all of the following:*

(1) There exists an overriding interest that overcomes the public's right of access to public records.

(2) The overriding interest supports redaction of the pleading or portion of a pleading.

(3) A substantial probability exists that the overriding interest will be prejudiced if the pleading is not redacted.

(4) The proposed redaction is narrowly tailored.

(5) No less restrictive means exist to achieve the overriding interest.

(b) In making the determination described in subdivision (a), the court shall balance a particularized showing of the public interest in open access to judicial proceedings against the asserted privacy rights of spouses, children, and other interested parties.

(c) Subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy. The request under this section shall be made by noticed motion. Nothing redacted pursuant to this section may be restored except upon petition to the court and a showing of good cause.

~~(b)~~

(d) Commencing not later than July 1, 2007, the Judicial Council form used to declare assets and liabilities and income and expenses of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets, liabilities, income, or expenses listed therein. If the party making the request pursuant to subdivision (a) uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists or identifies financial information and is therefore subject to this section. By the same date, the Judicial Council shall also adopt rules setting forth the procedures to be used for redacting and restoring pleadings pursuant to this section.

~~(c)~~

(e) (1) For purposes of this section, "pleading" means a document *filed with the court* that sets forth or declares the assets, liabilities, income, or expenses of one or both of the parties, including, but not limited to, a marital settlement agreement exhibit, schedule, transcript, or any document incidental to a

declaration or marital settlement agreement that lists or identifies financial information.

(2) The Judicial Council may also adopt a rule to authorize the court to charge a reasonable fee to recover the actual cost of redaction described in subdivision (d). Those fees may include, but are not limited to, administrative costs and expenses incurred by the court for the time court personnel spend on redaction and file maintenance. Any fees collected pursuant to this paragraph shall be deposited in the Trial Court Trust Fund as described in Section 68085.1 of the Government Code.

~~(d) For purposes of this section and notwithstanding any other provision of law, a privately compensated temporary judge may order pleadings redacted pursuant to the provisions of this section.~~

~~(e)~~

(f) The party requesting redaction of a pleading pursuant to subdivision (a) shall serve a copy of the unredacted pleading, a proposed redacted pleading and the request for redaction on the other party or parties to the proceeding and file the proof of service with the request for redaction with the court.

~~(f)~~

(g) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a pleading redacted pursuant to this section in any manner that is not otherwise prohibited by law.

~~(g)~~

(h) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings.

(j) All information redacted pursuant to this section shall be made available to and used by the Judicial Council only for statistical purposes as described in Section 2024.7.

SEC. 3. Section 2024.7 is added to the Family Code, to read:

2024.7. The Judicial Council shall, if funds are appropriated for that purpose, conduct a study regarding gender fairness in the family courts, which shall include an analysis of the information redacted pursuant to Section 2024.6. The Judicial Council shall report the results of the study to the Legislature 18 months after receiving that appropriation, and every 10 years thereafter.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety

within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Because of the imminent threat of identity theft posed by current law and to protect the right of privacy guaranteed by the federal and state constitutions, with respect to dissolution proceedings, it is necessary that this act take effect immediately.

O

Divorce Shield Takes Step Forward

The Recorder
By Cheryl Miller

SACRAMENTO — A bill that would force judges to redact certain divorce filings sailed through a committee hearing Wednesday even though its author made controversial changes that critics say were politically motivated and likely unconstitutional.

The Assembly Appropriations Committee approved Senate Bill 1015, which would now require a court to redact from a public file the Social Security number, address, bank account number, annual income and net worth of any requesting party in a divorce case.

Sen. Kevin Murray, D-Culver City, added the must-redact language to his bill two weeks after a skeptical Assembly Judiciary Committee deleted similar provisions. Committee Chairman Dave Jones, D-Sacramento, said then that he would not support a bill that didn't give judges some discretion over shielding financial information.

"But the purpose of the bill was to ensure that a party could keep his personal information private," Murray said Wednesday. "Bills change between committees all the time."

The latest version of SB 1015 also creates a five-part balancing test judges would use to decide if additional financial records should be redacted — a nod, Murray said, to opponents who wanted more weight given to the public's right to access court files.

But opponents said the test is worthless if the must-redact language stays.

"This bill has the same fatal flaw: it takes away judicial discretion," said Thomas Newton, general counsel for the California Newspaper Publishers Association.

Murray also added a requirement that the Judicial Council study "gender fairness" in family courts after women's groups complained the bill could hurt wives trying to uncover their estranged husbands' assets. Courts could also charge new fees to cover the costs of record-sealing.

But the changes did not appease either group, which remain opposed to the bill.

"It makes it appear that the court has something to hide in these very sensitive cases," said Tracy Kenny, a lobbyist for the Judicial Council. "We don't think that's good policy for the state."

Critics accuse lawmakers of pushing SB 1015 for Ron Burkle, the billionaire supermarket magnate and Democratic Party patron who is embroiled in a messy divorce. In 2004, the Legislature hurriedly adopted a bill similar to SB 1015 that Burkle cited in trying to seal his pleadings. But the Second District Court of Appeal in February struck down the law as unconstitutional.

Murray on Wednesday said, as he has for weeks, that he has not spoken to Burkle or his associates about SB 1015, which he said is more narrowly crafted to pass judicial muster. The secretary of state has no records of Burkle donating money to Murray's campaigns.

The senator said his motivation is simply protecting Californians' privacy from would-be identity thieves and publishers trying to boost circulation by reporting "salacious personal and private details."

But SB 1015 does have subtle ties to Burkle. At least two lobbyists from the Sacramento firm Platinum Advisors have appeared at committee hearings on the bill. Although they did not testify, they could be seen talking privately with legislative staff during the bill's discussion. Platinum Advisors' founder is Darius Anderson, a Democratic fundraiser who was chief of staff for Burkle's Yucaipa Companies between 1993 and 1998. Burkle and Anderson are also partners in Treasure Island Community Development LLC, the firm chosen by the city of San Francisco to redevelop the former Navy base.

Platinum Advisors does not list Burkle or Yucaipa Companies as a client through Feb. 15, the most recent filing available at the secretary of state's office. Anderson did not immediately return telephone or e-mail messages on Wednesday.

Murray acknowledged that "many" people have been involved in drafting SB 1015, including Assembly Speaker Fabian Nuñez. But the speaker's input "has not affected members questioning" the bill, Murray said.

Any questioning has not slowed SB 1015, however, which has been fast-tracked by legislative leaders and could see a full vote in the Assembly this week.

Divorce privacy bill advances

Assembly panel approves limits on who could see financial information.

By Jim Sanders -- Bee Capitol Bureau
Published 2:15 am PDT Thursday, April 27, 2006

Public access to financial records in California divorce cases would be restricted under legislation that cleared a key Capitol hurdle Wednesday.

Senate Bill 1015 would require divorcing spouses to reveal sensitive financial records to each other but not necessarily to outsiders.

The measure was approved 12-3 Wednesday by the Assembly Appropriations Committee and could be voted upon by the full Assembly as early as today.

Under SB 1015, a request from either spouse would require judges to seal the person's net worth, annual salary and balances in bank, brokerage or other financial accounts.

Judges also would be required to redact Social Security numbers and home addresses.

State Sen. Kevin Murray, a Culver City Democrat who proposed SB 1015, said it is needed to preserve privacy and discourage identity theft.

"There are two things (Californians) don't like to be available to the public - one is their medical records, two is their financial information," Murray told the Assembly committee.

Murray said he can imagine only two reasons why the public would want access to "salacious details" of a divorce - either to extort the family or to profit by publishing them.

SB 1015 is supported by the California Bar Association's family law section, Murray said.

But First Amendment advocates, who oppose SB 1015, claim that financial information is at the heart of divorce cases and is crucial to assessing whether courts handle them fairly.

Tom Newton, representing the California Newspaper Publishers Association, said public records are a linchpin of public courts.

Open divorce records allow for comparisons from court to court - or from community to community - in how assets are distributed and justice is meted out, he said.

"You really can't have private justice in the (public) court system - it doesn't work," he said.

Tracy Kenny of the state Judicial Council, which oversees California's courts, said redacting such financial information could leave the impression that judges have "something to hide."

"We don't think that's good policy for the state," Kenny said.

SB 1015 has been criticized as a favor to billionaire grocery store magnate and financier Ron Burkle, a major campaign contributor to Democrats and some Republicans.

Burkle cited an earlier version of the law, passed in 2004, in seeking to shield financial records in his own divorce case.

In January, a state appeals court ruled that the previous law was unconstitutional because its restrictions on public access were too broad.

SB 1015 attempts to remedy legal defects cited by the court.

Frank Quintera, Burkle's spokesman, said Wednesday that SB 1015 "does nothing to protect his privacy" because the media already have Burkle's sensitive financial information.

Burkle supports the thrust of the bill, but is neither its author nor sponsor, Quintera said.

"Like most Californians, I don't think Mr. Burkle believes that, sadly, because your marriage didn't work out that your neighbor or newspapers should have the right to your Social Security number, bank accounts and private information about your children."

Though certain financial records would be withheld upon request under SB 1015, other divorce-case data - such as debts, child support and certain tax information - would be subject to judicial discretion.

Judges would weigh on a case-by-case basis whether the public interest in disclosure outweighs privacy considerations.

To counter claims that SB 1015 would impair the ability to assess the courts, Murray amended his bill this week to require the state's Judicial Council to study gender fairness in family courts, if money is appropriated for that purpose.

About the writer:

- The Bee's Jim Sanders can be reached at (916) 326-5538 or jsanders@sacbee.com.

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FAMILY • May. 01, 2006

Politics Bastardizes Divorce-Privacy Bill Into Tool for Wiliest, Wealthiest

Forum Column

By Fred Silberberg

It is not typical to write this column in the first person, but the topic is a bit different and there is no other way to address it. As those who read this column regularly know, I have long advocated that divorce litigants should have their rights to privacy respected. I do not believe that because someone is forced to use the legal system in California, their private information should become public. Privacy is a right purportedly guaranteed to Californians by our state constitution. Not only is this an infringement on the personal right of privacy, but also it is harmful to children. In fact, I have written on this topic several times in the past.

At the beginning of the year, I decided to sponsor a bill that is now pending in the Legislature. The bill, SB 1015, was intended to recognize the right to privacy, purportedly guaranteed by the California Constitution, of divorce litigants after the Court of Appeal struck down an existing statute that offered some protection of privacy rights in the case known as *Marriage of Burkle*, 525 N.W.2d 439, 442 (Iowa Ct. App. 1994). It would have allowed certain information of a financial nature to be kept out of the publicly viewable portions of the court file. It did not affect the court proceedings themselves, nor keep the public out of same. It simply prevented non-parties from accessing such things as bank account information, balances or details on other such assets.

Upon presenting the bill in the Legislature, I received numerous telephone calls from people who claimed to be representing organizations opposed to the bill. It appeared as though these people had not read the text as their arguments against the bill made it clear they were ignorant of its terms. For example, one opponent who claimed to represent a large women's organization contended that the proposed legislation was harmful to women because it allowed legal proceedings to take place behind closed doors to the exclusion of the public. The bill did no such thing. Others complained that it gave judges too much power by keeping their decisions private, when it also did no such thing.

Aside from the stream of calls that opposed the bill on behalf of various organizations, there was an onslaught by the media, probably the largest group opposing the legislation. I received calls from all over the state, and was interviewed by the press at length as to the impact of the proposed legislation. One reporter calling on behalf of the Los Angeles Times claimed to be doing a neutral piece on the bill and wanted more information on why I proposed the legislation and how it compared with laws in other states. I gave him substantial time and answered his questions. A few days later he wrote an article that not only bashed the proposed legislation, but also made it appear that it was part of some greater scheme being orchestrated by Mr. Burkle himself, whom I had nothing to do with.

None of the responses I received were shocking or unexpected. The political system can at times be a free-for-all, and it was obvious that the press would be opposed to anything that might result in a curtailment of the ability to promulgate tabloid journalism. What is shocking, however, is what has happened to the bill as it has wound its way through the Legislature.

The bill has gone through so many amendments and modifications in order to please various constituencies (including some of those who called to tell me why it shouldn't be proposed), that it no longer does what I intended it to accomplish. In my view, the bill as it now reads is useless. It sets forth a legal bar that must be jumped over, which is both virtually unintelligible and impossible to overcome.

In other words, in the end the political system has failed to protect the rights to privacy of Californians. What is happening with this bill is yet another example of the right to privacy being given lip service by our legislators.

With the bill in its present form, I wonder why anyone up there in Sacramento is even bothering to continue to try and have it enacted. It seems as though those that contacted me to oppose the bill and that had no understanding of what it provided have now prevailed. It also seems as though certain people in the Legislature continue to push the bill solely to get credit for having implemented the legislation, and certainly not because they are trying to protect the constitutional right to privacy.

There was a point in this process where I was told that the bill had to be modified from its original form if it were to be given consideration, so as to placate certain interest groups. Some changes were made to the language that kept the initial purpose and import of the bill clear. A bit more tweaking, and the bill now had the support needed to pass, or so a staff member in the office of state Sen. Kevin Murray, D-Los Angeles, the gentleman who is carrying the bill, told me. As the bill made its way through the committee, however, further revisions were required if the bill was to survive.

The problem is that while the bill continued to get rewritten to placate the concerns of certain groups or members of the Legislature, it no longer provided the protection that was intended. While the earlier version of the bill provided that specific financial information could be redacted from pleadings to prevent public disclosure (while keeping the rest of a document or documents in the court file public), the latest version only allows that upon various conditions being met. Those conditions require a case-by-case analysis of each request to redact that serves to expand the scope of litigation and how much time a judge will have to spend on a case, which was not the intent of the bill as originally written.

As it now sits in draft form, the court can only grant a request to redact if certain findings are made which include a finding that "there exists an overriding interest that overcomes the public's right of access to public records," and that a "substantial probability exists that the overriding interest will be prejudiced if the pleading is not redacted." The court also has to find that there is no lesser "restrictive means to achieve the overriding interest." And most astonishingly, in making the determination as to whether the overriding interest will be prejudiced, the court is to "balance a particularized showing of the public interest in open access to judicial proceedings against the asserted privacy rights of spouses, children, and other interested parties." Note the use of the word "asserted." Clearly the constitutional right to privacy is rendered meaningless when the Legislature does not even believe that the right actually exists.

From a practical standpoint, I don't see how anyone is going to convince a court that there is an overriding interest in keeping specific bank account information or asset information private. Even assuming that some very creative lawyers are able to make that first hurdle, there will be no way to convince a court to balance that against the purported public interest in access to judicial proceedings. While certain critics of the original legislation claimed it invoked a procedure that would be available only to wealthy litigants, the truth is that the original draft of the bill required nothing more than the use of a Judicial Council form, making it accessible to anyone in the court system. The response to these critics by our Legislature is to enact a procedure that is so obscure and has so many steps involved in it, that no one but the wealthiest of litigants will be able to even initiate the paperwork and legal arguments required to get something redacted from the publicly viewable file.

Somehow the critics have shot themselves in the foot.

As the sponsor of the bill, I have attempted to communicate with Sen. Murray's office to see whether there isn't some way to pull what is now pending and try this again in the hope that we can actually implement something that will protect privacy. It doesn't appear that this is going to happen.

If our state constitution guarantees a right to privacy, why is it that our Legislature refuses to honor that? If there is a right to privacy, it should be respected. This bill does not do that; in fact, it does exactly the opposite. It relegates privacy to a new low. Family law litigants in California should be prepared to continue to have themselves publicly exposed. I am all for freedom of the press, but that does not mean freedom to broadcast a citizen's private information to which no one would have access but for the family law proceedings. It appears now that the only way to avoid this is to move to New York or Hawaii, two states where litigants' rights to privacy are both respected and protected.

Fred Silberberg is a certified family law specialist and a partner at Silberberg & Ross in Brentwood. The firm specializes in family law.

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Date of Hearing: April 26, 2006

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Judy Chu, Chair

SB 1015 (Murray) – As Amended: April 25, 2006

Policy Committee: Judiciary Vote: 7-0

Urgency: Yes State Mandated Local Program: No Reimbursable:

SUMMARY

This bill modifies the existing statute designed to shield financial information in marital dissolution cases, in order to address a finding of unconstitutionality made by the appellate court in a recent decision. Specifically, this bill:

1) Provides that, upon request, through a noticed motion by either party in a divorce proceeding, the court shall order redacted that portion of a filed pleading containing specified financial information—assets, liabilities, income, or expenses, or the location or identifying information about the assets, liabilities, income, or expenses—about the parties, if the court finds all of the following:

   a) An overriding interest that overcomes the public's right of access to public records.
   b) The overriding interest supports redaction.
   c) A substantial probability that the overriding interest will be prejudiced without redaction.
   d) The proposed redaction is narrowly tailored.
   e) No less restrictive means exist to achieve the overriding interest.

2) Requires the court, in making the above determination, to balance the public interest for access to judicial proceedings with the privacy rights of spouses, children, and other interested parties.

3) Provides that any pleading redacted pursuant to this measure may not be restored except upon petition to the court and a showing of good cause.

4) Requires the court upon the request of a party, to order redacted all of the following with regard to the party in a proceeding:

   a) Social security number.
   b) Address of a residence, unless that address is provided as the party's address for service of process.
   c) Name on, and account number and balance of, a bank account, brokerage account, or an account at any other financial institution.
   d) Annual salary or net income.
   e) Net worth.

5) Makes the information redacted available to the Judicial Council only for the purpose of conducting statistical analyses.

6) Requires the Judicial Council, by July 1, 2007, to adopt rules setting forth the procedures for redacting and restoring pleadings pursuant to the above.

7) Allows the courts to charge a few to recover their actual costs associated with redaction and file maintenance related to (4), above.

8) Requires the Judicial Council to conduct a study of gender fairness in the family courts, including an analysis of the information redacted pursuant to this bill. The results of the study are to be reported to the Legislature 18 months after the Judicial Council receives an appropriation for the study, and every 10 years thereafter.

FISCAL EFFECT

In 2004, about 150,000 petitions for marital dissolution were filed with the courts statewide.

1) The number of noticed motions that would be made seeking redaction of financial information is unknown, but would probably involve, at most, a very small percentage of total petitions. This would result in additional court workload that more likely could marginally delay other court proceedings rather than directly increase overall court costs.

   The courts would likely receive additional revenue associated with this new workload. The new Rule of Court to be adopted by the Judicial Council will likely include a provision allowing for a fee to be charged to the parties in cases where a substantial amount of material being submitted for redaction requires the appointment of a court referee. A similar fee is currently authorized under Court Rule 243.1, involving the sealing of court records.

2) The Judicial Council expects that many more parties will request redaction by the courts of specified financial information that does not require a noticed motion. The most recent amendments authorize the courts to charge a fee to recover the actual costs of this function.

3) Costs for the gender fairness study will be in the range of $250,000 every 10 years.

COMMENTS

1) Background and Purpose. In 2004, the Legislature, without dissent, passed AB 782/Chapter 45 (Kehoe)—an urgency measure establishing a new mechanism for divorcing or separating parties that required family courts to seal entire pleadings that contained any of their financial information. The stated purpose of that bill was to protect divorcing couples from being forced to expose their private financial information to public view solely because they were getting divorced. On January 20, 2006, however, the Second District Court of Appeals, based in Los Angeles, held that the key provision of AB 782—Family Code Section 2024.6, was an unconstitutional violation of the First Amendment's right of public access to court proceedings.

   SB 1015 seeks to address the court's declared constitutional infirmities in Family Code Section 2024.6 by, among other things, modifying Family Code Section 2024.6 to require targeted redaction of financial information rather than the broad sealing of entire court

documents.

Amendments adopted by the Assembly Judiciary Committee attempt to address concerns that the proposed statutory changes possessed similar constitutional flaws identified in the recent appellate decision. (The Judiciary Committee's analysis includes a thorough discussion of the legislative history and the relevant constitutional issues.) These amendments attempt to provide the court with discretion to weigh the parties' interest in having their personal financial information redacted with the public's interest in open access to court records. The five conditions that would have to be satisfied for the court to order redaction mirror conditions previously adopted by the Judicial Council under the California Rule of Court 243.1 for the sealing of court records.

Subsequent amendments (a) require the courts to redact a party's specific personal and financial information upon request of the party; (b) authorize the courts to collect a fee to recover their costs to perform this function; and (c) require the Judicial Council to do a report on gender fairness in the family courts, which is to include a statistical analysis of the information redacted pursuant to this bill.

2) Author's Arguments in Support: The author believes that, while open records principles should generally govern judicial records and court proceedings, a carefully-tailored exception is warranted for records and information in divorce cases that arguably affect only the parties to the dissolution or legal separation. The author cites numerous anecdotes not only of stolen identities but also of intrusive and allegedly unjust media publicity about divorcing couples with substantial assets. In most cases, the author states, the public clearly has no need to know what assets a divorcing couple has accumulated, where those assets are located, and how those assets are to be divided.

3) Opposition includes the California Newspaper Publishers Association and Californians Aware, a non-profit organization dedicated to protecting public access, argue against restricting access to court records and believes this bill would also be found unconstitutional.

The Judicial Council believes the bill would "have a negative effect on public trust and confidence in the courts." In part, the Council is concerned that "... any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case."

Analysis Prepared by: Chuck Nicol / APPR. / (916) 319-2081

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Analysis Prepared by: Chuck Nicol / APPR. / (916) 319-2081

AMENDED IN ASSEMBLY APRIL 25, 2006

AMENDED IN ASSEMBLY APRIL 19, 2006

AMENDED IN ASSEMBLY APRIL 17, 2006

AMENDED IN ASSEMBLY MARCH 9, 2006

AMENDED IN ASSEMBLY FEBRUARY 16, 2006

AMENDED IN SENATE AUGUST 30, 2005

AMENDED IN SENATE AUGUST 17, 2005

AMENDED IN SENATE AUGUST 15, 2005

AMENDED IN SENATE JULY 1, 2005

SENATE BILL No. 1015

Introduced by Senator Murray

February 22, 2005

An act to amend Section 2024.6 of, *and to add Section 2024.7 to,* the Family Code, *and to amend Section 68085.1 of the Government Code,* relating to dissolution of marriage, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1015, as amended, Murray. Dissolution of marriage: financial declarations.

(1) Existing law permits a party to request that documents listing or identifying the parties' assets and liabilities be sealed in specified family law proceedings, including dissolution of marriage.

This bill would revise those provisions to include documents listing or identifying the parties' income or expenses, permit specified

portions of those records to be redacted, subject to a finding by the court, and make related changes. This bill would additionally require the court, upon request of a party, to redact the social security number, residence address, and certain financial information of a party, as specified. This bill would require the Judicial Council to adopt rules governing procedures for redacting and restoring those records. *This bill would require the Judicial Council, if funds are appropriated, to conduct a study regarding gender fairness in the family courts and report the results of the study to the Legislature, as specified.* This bill would make legislative findings and declarations relating to dissolution of marriage and financial information.

(2) Existing law requires that certain fees and fines collected by superior courts be deposited into a bank account established by the Administrative Office of the Courts for distribution, as specified, with the balance deposited in the Trial Court Trust Fund in the State Treasury.

This bill would permit the Judicial Council to charge and collect a reasonable fee to recover the actual costs of redaction and file maintenance. This bill would require those fees to be deposited in the Trial Court Trust Fund.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $^2/_3$. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) The fundamental right of privacy protects against unwarranted intrusion into private financial affairs, including those affairs disclosed in a dissolution of marriage, nullity of marriage, or legal separation proceeding.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets, liabilities, income, or expenses, and information, such as social security numbers and

bank account numbers, that can be used to identify and locate the party's assets, liabilities, income or expenses.

(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including, but not limited to, the burgeoning crime of identity theft.

(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic databases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties. Existing state law is inadequate to protect these widespread privacy concerns.

(e) Local court rules regarding the disclosure of sensitive financial information vary from county to county. This act is intended to provide uniformity with respect thereto.

(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records.

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) Notwithstanding any other provision of law and except as described in subdivision (d), upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court shall order redacted the specified portion of a pleading filed with the court that lists the parties' financial assets, liabilities, income, or expenses, or provides the location of, including a residential address, or identifying information about, those assets, liabilities, income, or expenses, if the court expressly finds facts that establish all of the following:

(1) There exists an overriding interest that overcomes the public's right of access to public records.

(2) The overriding interest supports redaction of the pleading or portion of a pleading.

(3) A substantial probability exists that the overriding interest will be prejudiced if the pleading is not redacted.

(4) The proposed redaction is narrowly tailored.

(5) No less restrictive means exist to achieve the overriding interest.

(b) In making the determination described in subdivision (a), the court shall balance a particularized showing of the public interest in open access to judicial proceedings against the asserted privacy rights of spouses, children, and other interested parties.

(c) Except as described in subdivision (d) and subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy. The request under this section shall be made by noticed motion. Nothing redacted pursuant to this section may be restored except upon petition to the court and a showing of good cause.

(d) Upon the request of a party, the court shall order redacted from a pleading all of the following information regarding a party to the proceeding:

(1) A social security number.

(2) The address of a residence *unless that address is provided as the address for service of process of a party*.

(3) The name on, and account number and balance of, a bank account, brokerage account, or an account at any other financial institution.

(4) Annual salary or income.

(5) Net worth.

(e) *(1)* Commencing not later than July 1, 2007, the Judicial Council form used to declare assets and liabilities and income and expenses of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets, liabilities, income, or expenses listed therein. If the party making the request pursuant to subdivision (a) uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists or identifies financial information and is therefore subject to this section. By the same date, the Judicial Council shall also adopt rules setting forth the procedures to be used for redacting and restoring pleadings pursuant to this section.

(2) The Judicial Council may also adopt a rule to authorize the court to charge a reasonable fee to recover the actual cost of redaction described in subdivision (d). Those fees may include, but are not limited to, administrative costs and expenses incurred by the court for the time court personnel spend on redaction and file maintenance. Any fees collected pursuant to this paragraph shall be deposited in the Trial Court Trust Fund as described in Section 68085.1 of the Government Code.

(f) For purposes of this section, "pleading" means a document filed with the court that sets forth or declares the assets, liabilities, income, or expenses of one or both of the parties, including, but not limited to, a marital settlement agreement exhibit, schedule, transcript, or any document incidental to a declaration or marital settlement agreement that lists or identifies financial information.

(g) The party requesting redaction of a pleading pursuant to subdivision (a) shall serve a copy of the unredacted pleading, a proposed redacted pleading and the request for redaction on the other party or parties to the proceeding and file the proof of service with the request for redaction with the court.

(h) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a pleading redacted pursuant to this section in any manner that is not otherwise prohibited by law.

(i) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings.

(j) All information redacted pursuant to this section shall be made available to and used by the Judicial Council only for statistical purposes as described in Section 2024.7.

SEC. 3. Section 2024.7 is added to the Family Code, to read:

2024.7. The Judicial Council shall, if funds are appropriated for that purpose, conduct a study regarding gender fairness in the family courts, which shall include an analysis of the information redacted pursuant to Section 2024.6. The Judicial Council shall report the results of the study to the Legislature 18 months after receiving that appropriation, and every 10 years thereafter.

SEC. 4. Section 68085.1 of the Government Code is amended to read:

68085.1. (a) This section applies to all fees and fines that are collected on or after January 1, 2006, under all of the following:

(1) Sections 177.5, 209, 403.060, 491.150, 631.3, 683.150, 704.750, 708.160, 724.100, 1134, 1161.2, and 1218 of, subdivision (g) of Section 411.20 and subdivisions (c) and (g) of Section 411.21 of, and Chapter 5.5 (commencing with Section 116.110) of Title 1 of Part 1 of, the Code of Civil Procedure.

(2) *Paragraph (2) of subdivision (e) of Section 2024.6 of the Family Code.*

(3) Section 31622 of the Food and Agricultural Code.

~~(3)~~

(4) Sections 68086 and 68086.1, subdivision (d) of Section 68511.3, Sections 68926.1 and 69953.5, and Chapter 5.8 (commencing with Section 70600).

~~(4)~~

(5) Section 103470 of the Health and Safety Code.

~~(5)~~

(6) Subdivisions (b) and (c) of Section 166 and Section 1214.1 of the Penal Code.

~~(6)~~

(7) Sections 1835, 1851.5, 2343, 7660, and 13201 of the Probate Code.

~~(7)~~

(8) Sections 14607.6, 16373, and 40230 of the Vehicle Code.

~~(8)~~

(9) Section 71386 of this code and Section 1513.1 of the Probate Code, if the reimbursement is for expenses incurred by the court.

(b) On and after January 1, 2006, each superior court shall deposit all fees and fines listed in subdivision (a), as soon as practicable after collection and on a regular basis, into a bank account established for this purpose by the Administrative Office of the Courts. Upon direction of the Administrative Office of the Courts, the county shall deposit civil assessments under Section 1214.1 of the Penal Code and any other money it collects under the sections listed in subdivision (a) as soon as practicable after collection and on a regular basis into the bank account established for this purpose and specified by the Administrative Office of the Courts. The deposits shall be made as required by rules adopted by, and financial policies and procedures authorized by, the Judicial Council under subdivision (a) of Section 77206. Within 15 days after the end of the month in which the fees and fines are collected, each court, and each county that collects any fines or fees under subdivision (a), shall provide the Administrative Office of the Courts with a report of the fees by categories as specified by the Administrative Office of the Courts. The fees and fines listed in subdivision (a) shall be distributed as provided in this section.

(c) (1) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the Administrative Office of the Courts shall make the following distributions:

(A) To the small claims advisory services, as described in subdivision (f) of Section 116.230 of the Code of Civil Procedure.

(B) To dispute resolution programs, as described in subdivision (b) of Section 68085.3 and subdivision (b) of Section 68085.4.

(C) To the county law library funds, as described in Sections 116.230 and 116.760 of the Code of Civil Procedure, subdivision (b) of Section 68085.3, subdivision (b) of Section 68085.4, and Section 70621 of this code, and Section 14607.6 of the Vehicle Code.

(D) To the courthouse construction funds in the Counties of Riverside, San Bernardino, and San Francisco, as described in Sections 70622, 70624, and 70625.

(2) If any distribution under this subdivision is delinquent, the Administrative Office of the Courts shall add a penalty to the distribution as specified in subdivision (i).

(d) Within 45 calendar days after the end of the month in which the fees and fines listed in subdivision (a) are collected, the amounts remaining after the distributions in subdivision (c) shall be transmitted to the State Treasury for deposit in the Trial Court Trust Fund and other funds as required by law. This remittance shall be accompanied by a remittance advice identifying the collection month and the appropriate account in the Trial Court Trust Fund or other fund to which it is to be deposited. Upon the receipt of any delinquent payment required under this subdivision, the Controller shall calculate a penalty as provided under subdivision (i).

(e) From the money transmitted to the State Treasury under subdivision (d), the Controller shall make deposits as follows:

(1) Into the State Court Facilities Construction Fund, the Judges' Retirement Fund, and the Equal Access Fund, as described in subdivision (c) of Section 68085.3 and subdivision (c) of Section 68085.4.

(2) Into the Health Statistics Special Fund, as described in subdivision (b) of Section 70670 of this code and Section 103730 of the Health and Safety Code.

(3) Into the Family Law Trust Fund, as described in Section 70674.

(4) The remainder of the money shall be deposited into the Trial Court Trust Fund.

(f) The amounts collected by each superior court under Section 116.232, subdivision (g) of Section 411.20, and subdivision (g) of Section 411.21 of the Code of Civil Procedure, subdivision (d) of Section 68511.3 and Sections 68926.1, 69953.5, 70627, 70631, 70640, 70661, 70678, and 71386 of this code, and Sections 1513.1, 1835, 1851.5, and 2343 of the Probate Code, shall be added to the monthly apportionment for that court under subdivision (a) of Section 68085.

(g) If any of the fees provided in subdivision (a) are partially waived by court order or otherwise reduced, and the fee is to be

divided between the Trial Court Trust Fund and any other fund or account, the amount of the reduction shall be deducted from the amount to be distributed to each fund in the same proportion as the amount of each distribution bears to the total amount of the fee. If the fee is paid by installment payments, the amount distributed to each fund or account from each installment shall bear the same proportion to the installment payment as the full distribution to that fund or account does to the full fee.

(h) Except as provided in Sections 470.5 and 6322.1 of the Business and Professions Code, and Sections 70622, 70624, and 70625 of this code, no agency may take action to change the amounts allocated to any of the funds described in subdivision (c), (d), or (e).

(i) The amount of the penalty on any delinquent payment under subdivision (c) or (d) shall be calculated by multiplying the amount of the delinquent payment at a daily rate equivalent to 1½ percent per month for the number of days the payment is delinquent. The penalty shall be paid from the Trial Court Trust Fund.

(j) If a delinquent payment under subdivision (c) or (d) results from a delinquency by a superior court under subdivision (b), the court shall reimburse the Trial Court Trust Fund for the amount of the penalty. Notwithstanding Section 77009, any penalty on a delinquent payment that a court is required to reimburse pursuant to this section shall be paid from the court operations fund for that court. The penalty shall be paid by the court to the Trial Court Trust Fund no later than 45 days after the end of the month in which the penalty was calculated. If the penalty is not paid within the specified time, the Administrative Office of the Courts may reduce the amount of a subsequent monthly allocation to the court by the amount of the penalty on the delinquent payment.

~~SEC. 3.~~

SEC. 5. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Because of the imminent threat of identity theft posed by current law and to protect the right of privacy guaranteed by the

federal and state constitutions, with respect to dissolution proceedings, it is necessary that this act take effect immediately.

O

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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Director, Office of Governmental Affairs

April 24, 2006

Hon. Judy Chu, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: SB 1015 (Murray), as proposed to be amended - Oppose
Hearing: Assembly Appropriations Committee – April 26, 2006

Dear Assembly Member Chu:

While Senator Murray has accepted amendments that would mitigate the work load issues for the court raised by SB 1015, the Judicial Council continues to oppose SB 1015 because it would require the court to redact from marital dissolution files information that the court has used in making its determinations in a case. The April 19, 2006 amendments to SB 1015, make redaction of certain information routine, and deny the court the discretion to determine whether the redaction is necessary to protect the interests of the party requesting it. These amendments provide that the court shall, upon request of a party, redact specified information regarding a party to a dissolution proceeding.

In our previous letter regarding SB 1015 we highlighted the difference between information in a court file that the court needs to make its determinations, and that information which is not relevant to the court. We indicated that we are prepared to adopt a rule of court and/or develop educational materials to assist litigants in keeping the latter information out of their court file entirely. Current law already allows for the redaction of social security numbers, and many parties already truncate their bank account numbers and residential property descriptions so that they can avoid disclosure that might lead to identity theft. To the extent that the Legislature is concerned about keeping that information out of the file, we believe that we can instruct the parties on how to achieve that end without making it the responsibility of the court.

SB 1015 would, however, also require the court to redact financial information that the court does need in order to make property distribution and support determinations in the case, including the balances in any bank or brokerage account, the annual salary or income, and the net worth of a party. This requirement is troubling because it places the court in the position of shielding from public view that basis of its decisions. As we stated in our previous letter of opposition to SB 1015, requiring the courts to keep hidden information that was the basis for the court's decision weakens public trust and confidence in the courts, and creates the appearance that the court has something to conceal. Moreover, the language in the bill is vague, especially the language concerning "net worth."

In addition, the language added to SB 1015 has the potential to create a significant new workload for the courts in family law matters. Annually there are approximately 150,000 marital dissolution cases filed. With two parties in each case, the number of requests for redaction that courts could be faced with is substantial. Thus court staff may be required to review and redact tens of thousands of court files, and then be certain to maintain two court files in each of these cases. One file that would be available to the public, and one file that would be the working file for the court, because the redacted information would need to be accessible to the judicial officer hearing the case. We greatly appreciate the willingness of Senator Murray to adopt amendments that would allow the court to impose a fee to recover the actual costs of providing these services, and believe that the revenues generated by such a fee will mitigate the workload impact of SB 1015 for the courts if it is enacted.

However, because these amendments do not address our fundamental policy objections to the bill we urge that you vote "no" on SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Appropriations Committee
Hon. Kevin Murray, Member of the Senate
Mr. Chuck Nicol, Principal Consultant, Assembly Appropriations Committee
Ms. Julianne Huerta, Consultant, Assembly Republican Office of Policy
Mr. Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Director of Legislation, Office of Planning and Research

Regular bccs:

bcc: Mike Belote [California Advocates, mbelote@caladvocates.com or fax: 441-5859]

bcc: Kate Benoit [Director, California Judges Assoc., kbenoit@caljudges.org or fax: 10-588-5088]

bcc: Larry Doyle [State Bar Lobbyist, Larry.Doyle@calbar.ca.gov or fax: 442-6916 or 916/405-3538]

bcc: Fredericka McGee [Counsel to Speaker Fabian Nuñez, fredericka.mcgee@asm.ca.gov or fax: 319-2146 (Note: bcc ONLY on Assembly Bills)

bcc: Mark Willman [Staff Attorney, mwillman@lasuperiorcourt.org or fax: 213-687-8986]

Date of Hearing: April 19, 2006

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Judy Chu, Chair

SB 1015 (Murray) – As Amended: April 17, 2006

Policy Committee: Judiciary Vote: 7-0

Urgency: Yes State Mandated Local Program: No Reimbursable:

SUMMARY

This bill modifies the existing statute designed to shield financial information in marital dissolution cases, in order to address a finding of unconstitutionality made by the appellate court in a recent decision. Specifically, this bill:

1) Provides that, upon request, through a noticed motion by either party in a divorce proceeding, the court shall order redacted that portion of a filed pleading containing specified financial information about the parties, if the court finds all of the following:

   a) An overriding interest that overcomes the public's right of access to public records.
   b) The overriding interest supports redaction.
   c) A substantial probability that the overriding interest will be prejudiced without redaction.
   d) The proposed redaction is narrowly tailored.
   e) No less restrictive means exist to achieve the overriding interest.

2) Requires the court, in making the above determination, to balance the public interest for access to judicial proceedings with the privacy rights of spouses, children, and other interested parties.

3) Provides that any pleading redacted pursuant to this measure may not be restored except upon petition to the court and a showing of good cause.

4) Requires the Judicial Council, by July 1, 2007, to adopt rules setting forth the procedures for redacting and restoring pleadings pursuant to the above.

FISCAL EFFECT

In 2004, about 150,000 petitions for marital dissolution were filed with the courts statewide. The number of motions that would be made seeking redaction of financial information is unknown, but would probably involve, at most, a very small percentage of total petitions. This would result in additional court workload that more likely could marginally delay other court proceedings rather than directly increase overall court costs.

The courts would likely receive additional revenue associated with this new workload. The new Rule of Court to be adopted by the Judicial Council will likely include a provision allowing for a fee to be charged to the parties in cases where a substantial amount of material being submitted

for redaction requires the appointment of a court referee. A similar fee is currently authorized under Court Rule 243.1, involving the sealing of court records.

COMMENTS

1) Background and Purpose. In 2004, the Legislature, without dissent, passed AB 782/Chapter 45 (Kehoe)—an urgency measure establishing a new mechanism for divorcing or separating parties that required family courts to seal entire pleadings that contained any of their financial information. The stated purpose of that bill was to protect divorcing couples from being forced to expose their private financial information to public view solely because they were getting divorced. On January 20, 2006, however, the Second District Court of Appeals, based in Los Angeles, held that the key provision of AB 782—Family Code Section 2024.6, was an unconstitutional violation of the First Amendment's right of public access to court proceedings.

   SB 1015 seeks to address the court's declared constitutional infirmities in Family Code Section 2024.6 by, among other things, modifying Family Code Section 2024.6 to require targeted redaction of financial information rather than the broad sealing of entire court documents.

   The most recent amendments, as adopted by the Assembly Judiciary Committee, attempt to address concerns that the proposed statutory changes possessed similar constitutional flaws identified in the recent appellate decision. (The committee's analysis includes a thorough discussion of the legislative history and the relevant constitutional issues.) These amendments attempt to provide the court with discretion to weigh the parties' interest in having their personal financial information redacted with the public's interest in open access to court records. The five conditions that would have to be satisfied for the court to order redaction mirror conditions previously adopted by the Judicial Council under the California Rule of Court 243.1 for the sealing of court records.

2) Author's Arguments in Support: The author believes that, while open records principles should generally govern judicial records and court proceedings, a carefully-tailored exception is warranted for records and information in divorce cases that arguably affect only the parties to the dissolution or legal separation. The author cites numerous anecdotes not only of stolen identities but also of intrusive and allegedly unjust media publicity about divorcing couples with substantial assets. In most cases, the author states, the public clearly has no need to know what assets a divorcing couple has accumulated, where those assets are located, and how those assets are to be divided.

3) Opposition includes the California Newspaper Publishers Association and Californians Aware, a non-profit organization dedicated to protecting public access, which argue that the bill, as heard by the Judiciary Committee, would also be found unconstitutional. (It is unclear to what extent the most recent amendments address this concern.)

   The Judicial Council, with regard to the previous version of the bill, believes it would "have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments." In part, the Council is concerned that "... any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to

hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case."

Analysis Prepared by: Chuck Nicol / APPR. / (916) 319-2081

P/TR

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March 28, 2006

The Honorable Dave Jones
Chair, Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

RE: **SB 1015 (Murray) (as amended 3/9/2006)**
Dissolution of marriage: financial declarations.
Hearing: **April 4, 2006**
Position: **OPPOSE**

Dear Assemblyman Jones:

I am writing you on behalf of the California Judges Association (CJA) in opposition to SB 1015 as amended March 9, 2006. This bill is currently scheduled for hearing before the Assembly Judiciary Committee on April 4, 2006.

SB 1015 would amend Family Code section 2024.6 to require the court, upon the request by a party to a marital dissolution proceeding, to order redacted any portion of the pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy."

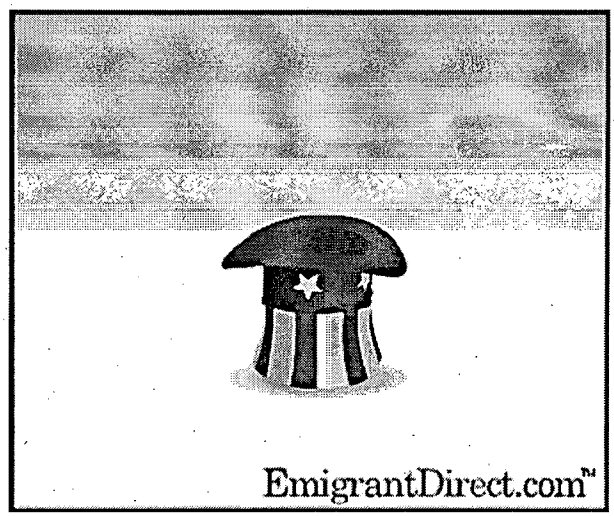
SB 1015 would place a tremendous burden on the court to redact personal information from pleadings. This increased workload would negatively impact the court and its ability to serve parties within the court system. Accordingly, CJA respectfully requests your "NO" vote on SB 1015.

Sincerely,

Kate Benoit

Kate (Benoit) Kalstein
Legislative Counsel

c: The Honorable Kevin Murray
Members, Assembly Judiciary Committee
Drew Liebert, Assembly Judiciary Committee Chief Counsel
Mark Redmond, Assembly Republican Caucus Consultant
Mike Belote, Esq., California Advocates, Inc.
Administrative Office of the Courts, Office of Governmental Affairs



SACRAMENTO
Divorce secrecy vote is imminent
Opponents claim bill is designed to help billionaire

- Greg Lucas, Chronicle Sacramento Bureau
Tuesday, April 4, 2006

Sacramento -- Lawmakers are poised to vote on a bill that would allow financial information in divorce proceedings to be kept secret, legislation that opponents say is tailored to help Ron Burkle, a Los Angeles billionaire and political contributor who has fought to keep information about his divorce under wraps.

Burkle and the bill's author say the measure has nothing to do with the high-profile split but is intended to help prevent identity theft and protect sensitive financial information.

Opponents -- who include First Amendment advocates, judges and Burkle's ex-wife -- say the bill is unconstitutional and mirrors what Burkle seeks in court: to keep his assets secret.

"He hasn't talked to me about it. I haven't talked to him about it. He hasn't given me any money. Everyone wants to think this is some sinister thing, but I think it's good policy," said the bill's author Sen. Kevin Murray, D-Los Angeles. "If you're seeking someone's personal private details, you should argue your need to know outweighs their privacy."

The fight over the bill centers around how much the public needs to know. Murray argues that getting a divorce should not involve full disclosure of financial information, which could lead to identity theft.

Opponents say that courts are public forums and that closing access to records is the equivalent of slamming the courthouse door shut.

Murray's bill, which is supported by the Family Law Section of the State Bar Association, requires judges to redact financial assets, liabilities and income or expenses in a divorce if one party requests it.

The bill, which is pending in the Assembly Judiciary Committee, also allows privately paid judges, such as the one hearing the Burkle case, to seal documents -- a right they do not have now.

"Supposedly the bill is not for Mr. Burkle, but it's an awfully big coincidence this bill has exactly what Burkle is trying to achieve in court," said Susan Seager, a lawyer who

challenged the sealing of Burkle's divorce pleadings after an earlier bill similar to Murray's SB 1015 became law in 2004.

That law was declared unconstitutional in February by an appellate court. Burkle has appealed, and his divorce filings remain under seal.

Frank Quintera, a spokesman for Burkle, said the information Burkle wants to keep private is known to media outlets, so Murray's bill is no help.

"Mr. Burkle is neither the author nor the sponsor of the bill. This legislation doesn't help him," Quintera said.

Burkle has not given to Murray's political campaigns nor made any political contributions since January 2005, but he has previously been a generous contributor to mainly Democrat candidates and causes.

His investment firm, Yucaipa Cos., has offered to buy all 12 of the newspapers -- including the San Jose Mercury News and Contra Costa Times -- being sold by McClatchy Co. after its purchase of Knight Ridder.

Burkle and his wife of 28 years, Janet, divorced in 1997. Three years ago, she sued, challenging the size of the alimony payments she receives.

Burkle quickly sought to seal parts of the court documents, arguing in part that details about his wealth might lead to identity theft or make his son a target for kidnapping. The privately paid judge handling the case redacted account numbers, addresses and some family photographs but left Burkle's asset information public in April 2004.

Within three weeks of that ruling, then Senate President Pro Tem John Burton, a friend of Burkle's, amended a bill to allow Burkle to keep his assets secret. The bill was hustled through the Legislature in less than a month and signed by Gov. Arnold Schwarzenegger on June 7.

Citing the new law, which took effect immediately, Burkle asked the court to seal information about his assets in the divorce case.

Seager, representing the Los Angeles Times and Associated Press, challenged the move, and a superior court judge struck down the new law as unconstitutional.

An appellate court in February backed up the lower court ruling, but Burkle has petitioned the state Supreme Court for a hearing.

Janet Burkle's lawyer, Hillel Chodos, has asked Murray to withdraw his bill.

"It may advance Ronald's litigation strategies and tactics and help him to overturn or circumvent an adverse decision by the court of appeal in his marital litigation, but it is not in the public interest," wrote Chodos.

Both the Judicial Council of California and the California Judges Association object to the measure.

The judges say having to redact personal information would be a "tremendous burden" on courts.

Like the California Newspaper Publishers Association, the judicial council argues that court proceedings and documents should be open to the public.

"In order to maximize public trust and confidence in the courts it is critical to preserve a policy of presumptive openness of court proceedings and records," Tracy Kenny, the judicial council's lobbyist, wrote to Assemblyman Dave Jones, D-Sacramento, chair of the Assembly Judiciary Committee.

"There may be cases where privacy concerns outweigh the public's right to know what the courts are doing but those situations should be the exception and not the rule," Kenny said.

Even the judiciary committee's analysis of the bill says that without changes, the measure is unconstitutional.

Murray rejects that interpretation and says his bill has been tailored to meet the appellate court ruling that struck down the 2004 bill.

E-mail Greg Lucas at glucas@sfchronicle.com.

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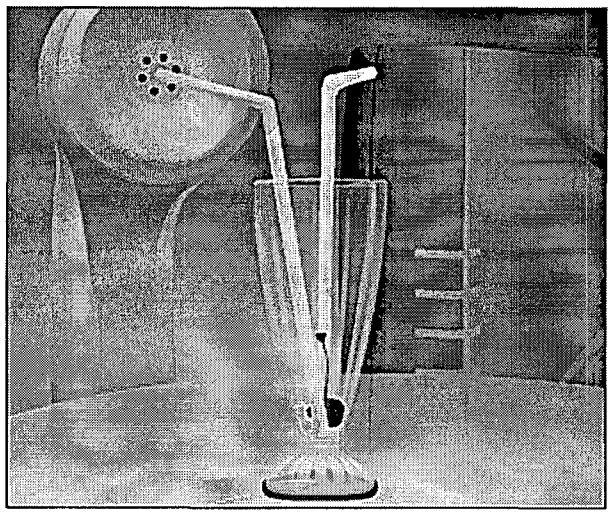

SACRAMENTO

Assembly panel approves divorce secrecy bill

Provision to allow sealing financial records is dropped

- Greg Lucas, Chronicle Sacramento Bureau
Wednesday, April 5, 2006

Sacramento -- An Assembly committee approved a bill Tuesday that could restrict public access to divorce records but stripped out a provision that would have given one spouse the power to keep financial information under court seal.

Opponents of the bill -- which include judges, First Amendment advocates and newspaper groups -- say the bill is designed to help Los Angeles billionaire Ron Burkle in his divorce. Burkle has been a generous contributor to political campaigns.

Burkle and the bill's author, Sen. Kevin Murray, D-Los Angeles, deny the measure has anything to do with the divorce. Murray said he is pushing the bill to help prevent identity theft and protect people's privacy.

"This bill has been talked about a lot," Murray told the Assembly Judiciary Committee. "But it's a very simple issue of protecting the privacy of people involved in a divorce. Because you happen to get a divorce does not mean all your personal information should be thrown out there for the world to hear."

Murray's original measure would have required judges to redact financial information from court files available to the public if one party in a divorce case requested it.

The committee approved the bill only after Murray agreed to drop that provision and change it to have judges consider requests for the sealing of financial information, weighing privacy against the public's interest in maintaining open court records. As it is now, the law gives judges that discretion, but critics say that if Murray's bill is signed into law more judges would tilt their decisions in favor of privacy rights rather than First Amendment concerns.

"We have open courts to make public confidence in the truth-finding function of the courts," said Tom Newton, a lobbyist for the California Newspaper Publishers Association in opposition to the bill.

"As soon as you start, in a blanket fashion, shutting down public access to an entire category of records -- all financial records -- you're going to undo that public confidence in the courts," Newton told the committee.

Lawmakers in 2004 passed a bill similar to Murray's, and Burkle used it to buttress his legal efforts to keep information about his assets private. An appeals court struck down the law,

saying it was too restrictive of the public's right to view court records.

Burkle and his wife, Janet, divorced in 1997. She has reopened the matter seeking bigger support payments and using displays of her ex-husband's assets to prove her case.

"This bill does strike a proper balance between the First Amendment interests at stake and the privacy interest," testified Stephen Rohde, a Los Angeles constitutional law attorney in favor of the bill. "California has a long tradition of recognizing and protecting privacy."

The committee ultimately approved Murray's measure on a unanimous 7-0 vote with two Bay Area Democrats -- Noreen Evans of Santa Rosa and Sally Lieber of Mountain View -- present but not voting.

Evans objected to a line in Murray's bill, SB1015, that says unnecessary disclosure of financial assets and liabilities "overrides the public's right to court records." Evans said that if Murray changed the phrase to "may override," she could support his bill.

"Unfortunately, I think that obviates the whole purpose of the bill," Murray replied.

The bill, which would take effect immediately if signed by the governor, must be approved by the full Assembly and the Senate.

E-mail Greg Lucas at glucas@sfchronicle.com.

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Director, Office of Governmental Affairs

DRAFT

March 21, 2006

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

Subject: SB 1015 (Murray), as amended March 9, 2006 – Oppose.
Hearing: Assembly Judiciary Committee – April 4, 2006

Dear Assembly Member Jones:

I regret to inform you that the Judicial Council is opposed to SB 1015, which would amend Family Code section 2024.6 to require the court, upon request by a party to a marital dissolution proceeding, to order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy." In addition, the bill would authorize privately compensated temporary judges to make orders for redaction pursuant to this section. The council is opposed because the bill would have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments.

SB 1015 appears to have two primary goals, protecting parties from identity theft, and affording parties the right to seek a high degree of financial privacy in marital dissolution proceedings. The council believes that the first goal can be achieved without compromising the openness of court proceedings or records. Currently litigants are advised on their forms to redact any social security numbers from documents filed with the court. ~~If that protection is not sufficient~~, SB 1015 could be amended to direct the council to adopt a rule of court advising parties of the

allowable means to keep other information out of the files by, for example, truncating bank account numbers and describing residential property in a manner that does not disclose the entire address. This information, which identifies the specific location of an asset, need not be anywhere in the court file because the court will not be considering it in making its determinations. By contrast, the income, expense, and other financial asset information that SB 1015 ~~seeks~~ appears to protect is often at issue in a contested dissolution matter, and does need to be available to the court as it hears and considers the case. Requiring the court to redact the information that was the basis of its determinations regarding support and distribution of property puts the court in the awkward position of shielding from public view the very facts that underlie its rulings.

One of the Judicial Council's key strategic goals is to enhance public understanding of and confidence in the judicial branch. The courts ~~serve the public and~~ are entrusted with the responsibility to provide justice to all litigants seeking the intervention of the courts. In order to maximize public trust and confidence in the courts it is crucial to preserve a policy of presumptive openness of court proceedings and records. There may be cases where privacy concerns outweigh the public's right to know what the courts are doing, but those situations should be the exception and not the rule. ~~Many of the issues considered by the court in marital dissolution matters are of a sensitive nature, but these proceedings are open to the public, and the court is exercising significant discretion in making its determinations in each case. That discretion ensures that each litigant can receive individual justice, but~~ the council is concerned that any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case.

The council is also concerned about the significant workload increase that would result from the implementation of SB 1015. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary ~~as described above~~. Because that determination is a legal judgment, ~~against a new standard that is broad and somewhat~~ vague, a judicial officer, rather than clerical staff, would be required to perform that function.

We have sought information from the courts regarding the number of motions filed seeking the sealing of pleadings under the current section 2024.6 provision, and have learned that some courts are receiving many of these requests each month, while others receive a small number. Given that there were approximately 150,000 petitions for marital dissolution filed in 2004, the potential workload statewide is quite substantial. Add this workload to a court system that is already overburdened, and desperately in need of additional judges, and the result of enactment of this legislation could be serious repercussions for those trying to access the court system. We are particularly concerned that these new duties would not be accompanied by the authority to recoup the costs of providing this new and mandatory service to litigants, and recommend that

the committee amend SB 1015 to allow the courts to recover these costs if it determines that the bill should move forward.

Finally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these dissolution cases. This provision raises serious concerns for the council because it is inconsistent with the current practice that ensures that the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, the council opposes any attempt to provide this authority to privately compensated temporary judges.

For these reasons the Judicial Council opposes SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Kevin Murray, Member of the Senate
Mr. Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Ms. Karen Pank, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Assistant Director of Legislation, Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

Judicial Council of California

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March 27, 2006

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

Subject: SB 1015 (Murray), as amended March 9, 2006 - Oppose
Hearing: Assembly Judiciary Committee – April 4, 2006

Dear Assembly Member Jones:

I regret to inform you that the Judicial Council is opposed to SB 1015, which would amend Family Code section 2024.6 to require the court, upon request by a party to a marital dissolution proceeding, to order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy." In addition, the bill would authorize privately compensated temporary judges to make orders for redaction pursuant to this section. The council is opposed because the bill would have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments.

SB 1015 appears to have two primary goals, protecting parties from identity theft, and affording parties the right to seek a high degree of financial privacy in marital dissolution proceedings. The council believes that the first goal can be achieved without compromising the openness of court proceedings or records. Currently litigants are advised on their forms to redact any social security numbers from documents filed with the court. SB 1015 could be amended to direct the council to adopt a rule of court advising parties of the allowable means to keep other information

out of the files by, for example, truncating bank account numbers and describing residential property in a manner that does not disclose the entire address. This information, which identifies the specific location of an asset, need not be anywhere in the court file because the court will not be considering it in making its determinations. By contrast, the income, expense, and other financial asset information that SB 1015 appears to protect is often at issue in a contested dissolution matter, and does need to be available to the court as it hears and considers the case. Requiring the court to redact the information that was the basis of its determinations regarding support and distribution of property puts the court in the awkward position of shielding from public view the very facts that underlie its rulings.

One of the Judicial Council's key strategic goals is to enhance public understanding of and confidence in the judicial branch. The courts are entrusted with the responsibility to provide justice to all litigants seeking the intervention of the courts. In order to maximize public trust and confidence in the courts it is crucial to preserve a policy of presumptive openness of court proceedings and records. There may be cases where privacy concerns outweigh the public's right to know what the courts are doing, but those situations should be the exception and not the rule. Currently litigants can seek to seal portions of their court files under California Rule of Court 243.1 when there is an overriding interest that outweighs the public interest, and other facts are found to establish that sealing is appropriate.

The Judicial Council recognizes that many of the issues considered by the court in marital dissolution matters are of a sensitive nature, but these proceedings are open to the public, and the court is exercising significant discretion in making its determinations in each case. That discretion ensures that each litigant can receive individual justice, but the council is concerned that any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case.

The council is also concerned about the significant workload increase that would result from the implementation of SB 1015. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary to "protect the parties overriding right to privacy." Because that determination is a legal judgment, and is arguably vague, a judicial officer, rather than clerical staff, would be required to perform that function.

We have sought information from the courts regarding the number of motions filed seeking the sealing of pleadings under the current section 2024.6 provision, and have learned that some courts are receiving many of these requests each month, while others receive a small number. Given that there were approximately 150,000 petitions for marital dissolution filed in 2004, the potential workload statewide is quite substantial. Add this workload to a court system that is already overburdened, and desperately in need of additional judges, and the result of enactment

of this legislation could be serious repercussions for those trying to access the court system. We are particularly concerned that these new duties would not be accompanied by the authority to recoup the costs of providing this new and mandatory service to litigants, and recommend that the committee amend SB 1015 to allow the courts to recover these costs if it determines that the bill should move forward.

Finally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these dissolution cases. This provision raises serious concerns for the council because it is inconsistent with the current practice that ensures that the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, the council opposes any attempt to provide this authority to privately compensated temporary judges.

For these reasons the Judicial Council opposes SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Kevin Murray, Member of the Senate
Mr. Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mr. Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Director of Legislation, Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

Date of Hearing: April 4, 2006

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 1015 (Murray) - As Amended: March 9, 2006

SUBJECT : FAMILY LAW: PRIVACY REQUESTS IN DIVORCE CASES

KEY ISSUES :

1) should the parties' financial information GENERALLY BE KEPT SECRET in DIvorce proceedings, UPON REQUEST BY EITHER PARTY?

2) Is this PROPOSAL, WHICH REQUIRES THE COURT TO REDACT FINANCIAL INFORMATION WITHOUT AN opportunity FOR THE COURT to BALANCE the public right of access to court documents against the individual interests of the party seeking privacy, sufficiently narrowly tailored to COMPLY WITH THE FIRST AMENDMENT?

3) how might the bill be amended to better comport with the constitutional dictates enumerated in the recent appellate court case?

SYNOPSIS

This bill seeks to address complex constitutional concerns raised recently in the case of Burkle v. Burkle . In that case, the appellate court held that family court records containing personal and financial information could only be sealed from public view if a four-part "public access" test set forth by the California Supreme Court in NBC v. Superior Court could be satisfied. Applying this test, the court found that Family Code Section 2024.6, which the Legislature enacted in 2004 to protect the privacy of divorcing couples, painted with too broad a privacy brush, and therefore is facially unconstitutional under the First Amendment. The appellate court stated that, by requiring a family court, upon request, to seal the entirety of court pleadings which listed any financial information about the requesting parties, Family Code Section 2024.6 violated two of the NBC constitutionality requirements. Specifically, the court held that: 1) the broad sealing required in the current version of the statute is not sufficiently narrowly tailored to serve the stated "overriding interest" of avoiding identify theft and other crimes; and 2) there is a "less restrictive means"

available for achieving those objectives, namely, the targeted redaction of specific financial or other information that could reasonably be shown, on a case-by-case basis, to increase the risk of identify theft or other crimes.

This bill seeks to modify Family Code Section 2024.6 principally in two ways. First, the measure sets forth (unlike its predecessor legislation) specific legislative findings to support the contention that parties to a marital dissolution have an overriding interest in being able broadly to protect their private financial lives from press and public view. Second, the bill seeks to retain the existing presumption in favor of allowing a party in a divorce proceeding to shield all of his or her financial information, but instead of requiring entire pleadings to be shielded, the measure calls for the mandatory redaction, or marking out, of only those parts of court documents that list any financial information about the petitioning party.

In support of the bill, the author states that while open records principles should generally govern court records, the simple fact that people get divorced in our society should not mean they lose their right to financial privacy. Also in support, the Family Law Section of the State Bar writes that the bill properly balances the public's right to know against the privacy needs of family law litigants. The California Alliance for Families and Children of Roseville also supports the bill.

Notwithstanding the bill's proposed statutory changes, however, this analysis concludes that, absent the amendments recommended in the analysis, it appears likely a court would find the proposed measure continues to possess the constitutional flaws identified in the recent appellate decision. The analysis therefore recommends for the author's and the committee's consideration that the measure be amended to, most importantly, replace the bill's current presumption in favor of privacy for all financial information with a balancing test that retains the court's discretionary ability to determine, on a case-by-case, fact specific basis, whether the party who is requesting the redacting of his or her financial information has adequately shown a substantial probability of prejudice to the requesting party's privacy interest of higher value that outweighs the public's right of access to the court records. The analysis also recommends three additional amendments, including amendments to require a noticed hearing when a privacy request

is made, to refine the definition of "pleadings" to ensure court

judgments and other documents issued by the court may not be shielded, and an amendment to delete the bill's current authorization for "private judges" to order documents shielded from public view.

As they did with the original legislation enacting Family Code Section 2024.6, a plethora of media organizations strongly oppose this bill, stating, among other things, that the measure continues to paint with far too broad a secrecy brush, and that the bill, like its predecessor, will again be found to be a facial violation of the First Amendment. The National Organization for Women also opposes the bill, as do the Coalition of Family Equity, the Commission on the Status of Women, and California Women Lawyers. Both the Judicial Council and the California Judges Association also oppose the bill, as do several First Amendment-oriented organizations.

SUMMARY : Seeks to modify the existing statute designed to shield financial information in marital dissolution cases to address a finding of unconstitutionality made by the appellate court in the recent decision of Burkle v. Burkle . Specifically, this bill:

1) States legislative findings including that existing law does not adequately protect the right of privacy in divorce proceedings, and that the Legislature intends to more fully protect that right; that in the context of divorce proceedings, the unnecessary public disclosure of financial assets, liabilities, income or expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records; and that the redaction of documents containing such information is the least restrictive means of protecting the financial privacy of the parties while recognizing the public's right of access to court records.

2) Provides that, upon request by either party in a divorce proceeding, the court shall order redacted any portion of a pleading containing the specified financial information about the parties, and requires that, subject to the direction of the court, no more of any pleading than is necessary to protect the parties' overriding right to privacy may be redacted. Requires that pleadings include any document that sets forth assets, liabilities, income or expenses, a marital

settlement agreement or any document attached to such an agreement that lists financial information.

3) Provides that a request under this proposed measure may be made by ex parte application, and that any pleading redacted

under the proposal may not be restored except upon petition to the court and good cause shown.

4) Authorizes a privately-compensated temporary judge to order pleadings redacted.

5) Requires that the party making the request to redact a pleading serve a copy of the pleading containing the financial information subject to the request on the other party and file a proof of service with the request to redact.

6) Does not preclude a law enforcement or government regulatory agency, otherwise authorized, to access the unredacted pleadings.

EXISTING LAW :

1) Provides that Congress shall make no law abridging the freedom of speech, or of the press. (U.S. Constitution, First Amendment.)

2) Explicitly protects the right to privacy for all Californians under the state Constitution. (California Constitution, Article I, Section 1.)

3) Provides that court proceedings shall be public, except as specifically provided in Family Code Section 214 or other provisions of law. (Code of Civil Procedure Section 124.)

4) Provides that records may only be sealed by establishing an overriding interest that overcomes the right of public access, among other factors. These court rules also provide that no record may be sealed solely by the stipulation of the parties. (Cal. Rules of Court Rule 243.1.)

5) Provides that when a case is heard by a privately-compensated, temporary judge, a motion to seal records must be decided by the presiding judge or a judge designated by the presiding judge. (Cal. Rules of Court Rule 244.)

6) Provides that the court may, when it considers it necessary in the interests of justice, direct the trial of any issue of fact joined in a family law proceeding to be private, and may exclude all persons except the officers of the court, the parties and their witnesses and counsel. (Family Code Section 214.)

7) Requires the court, upon request by a party in a dissolution or legal separation, to seal any pleading that list the

parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities. Upon petition, allows the court to unseal pleadings if "good cause" is shown. (Family Code Section 2024.6.) Holds Family Code Section 2024.6 unconstitutional under the First Amendment. (Burkle v. Burkle (January 20, 2006) 135 Cal.App.4th 1045.)

FISCAL EFFECT : As currently in print this bill is keyed fiscal.

COMMENTS: This bill raises thorny and controversial issues regarding our state constitution's special privacy protection on the one hand, and our concomitant federal and state constitutional commitments to maximize open access to court proceedings on the other. Just two years ago, in 2004, the Legislature passed by strong bi-partisan votes, and the Governor signed, urgency legislation which established a new mechanism for divorcing or separating parties to require family courts to seal entire pleadings that contained any of their financial information. (AB 782 (Kehoe), Ch. 45, Stats. of 2004.) The stated purpose of that earlier bill was to protect divorcing couples from being forced to expose their private financial information to public view solely because they were getting divorced. On January 20, 2006, however, the Second District Court of Appeals, based in Los Angeles, held that the key provision of AB 782, Family Code Section 2024.6, was an unconstitutional violation of the First Amendment's right of public access to court proceedings.

This bill seeks to address the court's declared constitutional infirmities in Family Code Section 2024.6 by, among other things, adding legislative findings, including that the unnecessary public disclosure of financial information in a dissolution proceeding outweighs the public's right to access court documents and proceedings, and by modifying Family Code Section 2024.6 to require targeted redaction of financial

information rather than the broad sealing of entire court documents. Notwithstanding the proposed statutory changes, however, the analysis concludes below that, absent the amendments recommended, it appears likely a court would find that this proposal continues to possess similar constitutional flaws identified in the recent appellate decision.

Author's Arguments in Support : According to the author, while open records principles should generally govern judicial records and court proceedings, the time has come to make a carefully-tailored exception for records and information in divorce cases that arguably affect only the parties to the dissolution or legal separation. The author cites numerous

anecdotes not only of stolen identities but also of intrusive and allegedly unjust media publicity about divorcing couples with substantial assets. In most cases, the author states, the public clearly has no need to know what assets a divorcing couple has accumulated, where those assets are located, and how those assets are to be divided.

The Long-Standing First Amendment Right of Public Access : Though the constitutional right of access to civil proceedings is not as well-developed as the right to attend criminal proceedings, federal courts that have addressed the question generally have held that the First Amendment provides a right of access to federal civil proceedings, and that the First Amendment carries with it "some freedom to listen." According to one federal court, "[T]he [same] policy reasons for granting public access to criminal proceedings apply to civil cases. These policies relate to the public's right to monitor the functioning of courts, thereby insuring quality, honesty and respect for our legal system." (In re Continental Illinois Securities Litigation (1984) 732 F.2d 1302.)

The Press-Enterprise Cases : The U.S. Supreme Court, in a series of cases brought by the Press-Enterprise newspaper, has articulated a test to determine whether the First Amendment right of access applies to proceedings outside of a criminal trial. The two-part test asks "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." (Press-Enterprise Co. v. Superior Court (1986) 478 U.S. 1.) Generally the courts have concluded that the First Amendment right of access therefore applies to civil proceedings as well

as to criminal proceedings. They have also concluded that the First Amendment right of access equally applies to court documents as well as to court proceedings.

California's Dual Tradition of Access and Privacy : It is also well-established policy in California to allow maximum public access to judicial proceedings and records. (Estate of Hearst (1977) 67 Cal. App. 3d 777.) Cases have held that "judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons." (Pantos v. City and County of San Francisco (1984); Champion v. Superior Court (1988).) However California also has a long tradition of recognizing and protecting privacy. Unlike many states, as noted above, our state constitution specifically and specially recognizes the right to privacy. In addition, our courts, including our Supreme Court, have specifically extended our

right of privacy to financial privacy. (Valley Bank of Nevada v. Sup. Ct. (1975) 15 Cal.3d 652, 656.)

Some Precedent for Court Closure in Certain Family and Other Types of Cases : While California has historically sought to allow maximum public access to judicial proceedings and records, it is also important to note there have been some careful legislatively-created statutory exceptions to this tradition. These include dependency actions (Welfare & Institutions Code Sections 300.2, 346, 350, 827), paternity actions (Family Code Section 7643), adoptions (Family Code section 8611), mediation of custody and visitation rights (Family Code section 3177), and conciliations (Family Code section 1818). Other proceedings may be closed at the discretion of the court, including, for example, custody hearings (Family Code section 3041). In these family-related instances, the Legislature has determined that it is necessary to close these proceedings in order to protect the participants, especially children, from harm that could result from public intrusion into very private matters. In addition, mental health hearings under the Lanterman-Petris-Short Act to establish a conservatorship or to require an involuntary commitment may be closed, unless a public hearing is requested by a party to the proceeding. (Welfare & Institutions Code section 5118.) Finally, state courts also have statutory authority to take broad steps to protect trade secrets. (Civil Code section 3426.5.)

NBC v. Superior Court : As noted, the seminal state Supreme

Court case on public access to civil proceedings which currently appears to control the constitutional analysis of this legislation is NBC Subsidiary (KNBC-TV) Inc. v. Sup. Ct. (1999) 20 Cal.4th 1178, written by Chief Justice Ronald George. In that case, Sondra Locke sued Clint Eastwood for deceit, intentional interference with prospective economic advantage and breach of fiduciary duty, based on an alleged promise by Eastwood to Locke to assist in the development of various movie projects. Out of express concern to ensure a fair trial, especially given the intense press interest in the case, the trial court ordered that all proceedings which occurred outside the presence of the jury be closed to the public and to the press. On appeal, however, the appellate court found the trial court's closure order to violate the First Amendment. The appellate court directed the trial court to vacate the secrecy order, and the California Supreme Court then affirmed the appellate court's "open access" order, holding that First Amendment scrutiny is triggered by the closure of civil proceedings.

Under the NBC test adopted by our Supreme Court, which is

largely consistent with the tests adopted by the federal courts, civil proceedings and records in California cases, whether civil or criminal, are presumed to be open to the public and the press. In order to close a trial or a hearing, or in order to seal court records, there are two basic requirements that must be met: (1) The court must make sure that the public is given notice of the possible closure or sealing, and the court must hold a hearing on the issue (see possible amendment #2, discussed below, regarding the bill's current authorization for an ex parte hearing); and (2) the court must make a number of findings in order to justify a decision denying public access to court proceedings or documents. The Supreme Court then set forth a four-prong test, also discussed fully below, that would, as with the earlier challenge of Family Code Section 2024.6, presumably determine the constitutionality of this measure as well.

The Recent Burkle Appellate Decision : In June 2003, Janet Burkle filed for dissolution of her marriage to Ronald Burkle. Mr. Burkle thereafter moved to seal financial information in various pleadings. In April 2004, a trial court ordered redaction of financial information in various documents "based solely on the potential impact the financial information may have on [the son's] safety." The redacted information consisted

of residence addresses and names and account numbers of bank and brokerage accounts, but not account balance information. The trial court refused to seal the spouses' postmarital agreement in its entirety, but similarly redacted financial information within the agreement. After AB 782 passed as an urgency measure in May 2004, Mr. Burkle filed an ex parte petition to seal several dozen pleadings in his case. The Associated Press and the Los Angeles Times (the press) then successfully sought to intervene to oppose Mr. Burkle's ex parte application. They argued, among other things, that the press and public had a presumptive right of access to records and proceedings in divorce cases, and that Family Code Section 2024.6 was unconstitutional because it required trial courts to seal records without engaging in the document-by-document analysis and other inquiries required by the First Amendment.

On February 28, 2005, instead of sealing the pleadings as requested, the trial court found that Family Code Section 2024.6 violated the First Amendment, and gave Mr. Burkle sixty days to appeal the decision, which he did. In a decision filed two months ago, on January 20, 2006, the Second District Court of Appeals agreed with the trial court that Family Code Section 2024.6 was an unconstitutional violation of the First Amendment. Mr. Burkle then sought review by the California Supreme Court on February 27, 2006, and the decision by the State Supreme

Court, either granting or denying review of the court of appeal decision, is pending.

In its holding, the Court of Appeal in the Burkle case first determined that the well settled principle that civil court proceedings are presumptively open to the public, as set forth in NBC v. Superior Court (supra) applies "with equal force in divorce cases as in any other ordinary civil case." (Burkle at 10.) In reaching that conclusion, the court noted, based on the U.S. Supreme Court analysis in Globe Newspapers Co. v. Superior Court (1982) 757 U.S. 596, that divorce proceedings have historically been open to the public, and, additionally, there is institutional value to having such proceedings generally open to the public. The court noted that public access to civil proceedings including divorce cases enhances public confidence in the judicial system, provides the public with the ability to scrutinize the proceedings, places a check on ju and enhances truth finding.

As a result of the presumption of openness to divorce

proceedings, the Burkle court determined that court records could only be sealed if the four-part test set forth by the California Supreme Court in NBC (noted above) could be satisfied. Specifically, that test holds that mandatory sealing of court records is permissible only if: (1) there is an overriding interest to support the sealing; (2) there is a substantial probability of prejudice to that interest absent sealing; (3) the sealing required is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means available to achieve the overriding interest. The court then concluded that the first prong of the test could be satisfied in the challenge to Family Code Section 2024.6 by the overriding interest of protecting privacy, particularly of avoiding identify theft or other crimes relating to the misuse of personal financial information. The court appeared less comfortable with the argument that the statute satisfied the second prong of NBC - that sealing the records would prevent identity theft and other abuse - but following established constitutional principles it deferred to the Legislature's judgment on that point.

However the Burkle court found that Family Code Section 2024.6 failed both the third and fourth prongs of the Supreme Court's NBC constitutionality test. The mandatory sealing of all pleadings that contain financial information, the court found, goes far beyond preventing identity theft and other potential crimes:

> The reach of the statute extends far beyond the

> overriding interest in protecting divorcing litigants from identify theft, kidnapping, stalking, theft or other financial crimes . . . . It is plainly not narrowly tailored to seal only information which arguably presents a risk of identity theft or other misuse, such as credit card numbers, account numbers, social security numbers and the like. (Burkle at 13-14.)

Moreover, determined the court, the ex parte application for sealing allowed by Section 2024.6 (which, like the current bill, permitted a party to seek a court order on shortened notice and with limited or no opportunity for the other side to oppose) failed to allow for the "particularized determinations in individual cases" necessary to ensure that the statute satisfies constitutional requirements. (Burkle at 14, quoting Globe .)

Most importantly for purposes of this legislation, the Burkle court noted that Family Code Section 2024.6 failed to allow for any judicial discretion when making these privacy determinations, but instead mandated that the court, upon petition by either party, to seal the entire documents that contained any of the information. Finally, the court held that the fourth prong of the test failed because there was a far less restrictive means of protecting the release of the information rather than wholesale sealing of entire pleadings. The court stated that the redaction (or marking out) of the specific financial information to be protected could protect the privacy of the information while still permitting access to the remainder of the document.

Current Law Already Appears to Allow for the Redaction Of Social Security Numbers, Bank Account Numbers And Address Information :

In evaluating the need for this measure, some have inquired about the status of current law regarding the ability for divorcing parties to protect the confidentiality of their social security numbers and other highly sensitive identifying information. It is therefore important to note that it appears clear that absent this legislation and, indeed, absent Family Code Section 2024.6, current law already allows for the redaction of social security numbers from any pleading or other document filed with the court in a dissolution, nullity of marriage or separation proceeding, except a document created for purposes of collecting child or spousal support. (Family Code Section 2024.5.) And other sensitive identifying personal information, such as bank account numbers and residential addresses, appear to already be subject to possible redaction upon request by a party under Rule of Court 243.1 noted above.

In Its Current Form, It Appears Unlikely This Bill Would Be

Found To Satisfy the Constitutional Requirements Set Forth In The Burkle Case: The author argues that this bill is narrowly tailored to survive constitutional attack. He argues that the bill narrowly, and appropriately, protects the financial privacy of divorcing litigants, and that the redaction required in the proposal is limited to no more than is necessary for that purpose.

In any constitutional analysis of a legislative act, it is well established that the Legislature is vested with the power to determine whether a matter serves a public purpose. Legislative findings are to be given great weight by the courts, and are to

be upheld unless found to be arbitrary and unreasonable. Indeed, courts must presume a legislative act is constitutional, resolving any doubts in favor of the act's constitutionality, unless there is clear and unquestionable conflict between the legislative act and the state or federal constitution. (Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1252.) Given this, a court must give great weight to this bill's findings regarding the privacy of financial information in dissolution proceedings, and must presume that the bill is constitutional.

Following the Burkle case, it is clear that protection of at least some of an individual's sensitive financial information is and has been found to be an overriding state interest, thus satisfying the first prong of the test. The state surely has an overriding interest in protecting individuals, including divorcing parties, from identity theft, kidnapping, harassment and other abuse that could occur with the release of certain sensitive financial information. However the key question here is precisely what sensitive financial information will a court find could, if compromised, reasonably be found to increase the risk of identity theft and other crimes or civil malfeasance. This certainly would appear to be the case with social security numbers, bank account numbers and residential addresses, where release of the information could doubtless facilitate the commission of financial crimes. It is not as certain, however, that a court would accept a legislative declaration that public access to such general financial information as the types and amounts of assets and liabilities, and the basic income, of divorcing parties, could similarly lead to significant harm. As the bill's news organization opponents state, the bill "makes no distinction between the sealing of a social security or bank account number on the one hand and the sealing of the identity of a basic community asset, such as a 1984 Oldsmobile Cutless Supreme on the other. It's hard to imagine significant issues of identity theft or even grand theft would arise from disclosure of this asset information. Yet, under [the bill], a court would be barred from refusing to seal a record that listed

the old Olds." To the extent this legislation requires family courts to treat all financial information about the parties identically for purposes of secrecy (requiring redaction), it therefore appears possible, though not at all certain, that the measure might be found to be constitutionality deficient even as to the "overriding interest" prong.

Regarding the second prong of the NBC test, the measure, as

noted, requires the court, upon request of either party, to redact any portion of a pleading with specified financial information. Contrary to the appellate court's admonition in Burkle , under this bill there appears to be no ability for the court to make an individualized determination of the probability of prejudice to the party's particular privacy interest, and whether that individual privacy interest overrides the public's "right to know" in the particular case. Instead, based on the legislative finding that unnecessary public disclosure of financial information raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right to know, the measure requires the court to order all such information redacted. This determination is automatic, upon request of a party, and as noted above, such request may even currently in the bill be made through ex parte application. The redacted financial information may only later be restored upon a petition to the court, with the burden of showing "good cause" for making the unknown information public placed on the party seeking openness. Given that under the current version of the bill a court apparently may not evaluate the substantial probability of prejudice to the overriding interest, but must automatically order the redaction, it seems likely that this bill, unless amended, would be found to violate the second prong of the NBC constitutionality test outlined in Burkle . In addition, it could also be found that the bill's placement of the burden of proof on the party seeking open access is also a potential violation of the First Amendment.

Turning to the third prong of the NBC test, the bill must be narrowly tailored to serve the overriding interest in protecting the financial privacy of divorcing couples. Again, given the bill's requirement that the court must (with no discretion) redact financial information simply upon request from one of the parties, the bill similarly does not appear to likely satisfy the third prong of the NBC constitutionality test. While the bill may protect the financial information of divorcing couples, without a case-by-case determination, it is unclear if that privacy interest overrides the public's right to access court records in a particular case, an important requirement set forth in the Burkle case. In addition, since this bill appears to apply not only to pleadings filed by the parties, but to all

documents in the case, including, potentially, the court's own judgment, the measure could potentially be found to be overbroad.

Finally, the last prong of the NBC constitutionality test requires that there be no less restrictive alternatives than redaction to meet the overriding interest sought. Assuming that a court will accept, as the Burkle court did, that there is an overriding interest in keeping all financial information in divorce cases private, it would appear likely that the court would indeed conclude that the redaction method in the bill is the least restrictive alternative available to protecting that information.

Case Law-Suggested Amendments for the Author's, and the Committee's, Consideration : Based upon the above application of the NBC public access requirements, it appears that to substantially improve the chances that this bill would survive future constitutional challenge, the bill should be amended as follows:

Suggested Amendment #1: A Balancing Test Providing for Judicial Discretion

Fundamentally, based on the legal analysis of the bill above under the NBC First Amendment test, the Committee may wish to discuss with the author his openness to amend the measure to require that, before a court may order redaction, it must make an individualized determination that the party requesting redaction has made a showing of substantial probability of prejudice to the party's privacy interest that outweighs the public's right of access to the information. As the Burkle case requires, such a court determination cannot be automatic, but instead must be made only when the party requesting redaction has made the required showing. Therefore, should the Committee wish to pass this bill, it may wish to discuss with the author adding the following "balancing test" amendment to Section 2024.6(a) :

On page 3, line 15:

Section 2024.6(a) Notwithstanding any other provision of law, upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, and upon a showing of substantial probability of prejudice to the requesting party's privacy interest that overrides the public's right of access to the court's records, the court shall order redacted any portion of a pleading that lists the

parties' financial assets, liabilities, income or expenses. Subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy.

Suggested Amendment #2: A Noticed Hearing Rather Than An Ex Parte Approach

As noted above, under the NBC test adopted by our Supreme Court, in order to close a trial or a hearing, or in order to seal court records, there are two basic requirements that must be met: (1) the court must ensure that the public is given notice of the possible closure or sealing, and the court must hold a hearing on the issue; and (2) the court must make a number of findings in order to justify a decision denying public access to court proceedings or documents. The bill's current authorization for a party to proceed ex parte would appear to permit the party to seek a court order on shortened notice, and with limited, and possibly even no opportunity, for the other side to reasonably oppose the request to close the proceedings or redact the documents. According to the Supreme Court in NBC, if a motion to close court proceedings is made in open court during a hearing, the trial judge must announce in open court that he or she intends to close the proceeding. (20 Cal.4th at 1217.) If such a motion is made in writing, the motion must be included on the public docket of the case prior to being decided. (Id.) Thus, though the notice requirement mentioned by the Court in NBC is apparently not a rigorous one, it appears clear that the bill's current authorization for closure via an ex parte motion would likely be found to be impermissible.

In order to eliminate this potential constitutional infirmity, the Committee therefore may wish to discuss with the author his openness to delete the bill's current authorization for an ex parte hearing on page 3, lines 24-25 and replace this provision with the following:

The request for redaction under this section shall be made by noticed motion.

Suggested Amendment #3: Clarification of Pleadings Definition

In addition to the amendments noted above, to further ensure that the bill is narrowly tailored to serve the overriding

interest of protecting the divorcing couple, the Committee may also wish to limit the definition of pleadings to only those documents filed with the court . This would ensure that court judgments and other official court documents filed not by the parties but by the court itself appropriately remain accessible to the public. To accomplish this in the bill, the following amendment could be made:

On page 4, line 3:

> (c) For purposes of this section, "pleading" means a document filed with the court that sets forth or declares the assets, liabilities, income or expenses of one or both of the parties, ~~including, but not limited to~~ a marital settlement agreement that lists and identifies the parties' assets, liabilities, income or expenses , ~~exhibits, schedules, transcripts,~~ or any document incidental or attached to any declaration or marital settlement agreement that lists or identifies financial information.

Suggested Amendment Regarding The Authority Of Temporary Judges And Other Privately Compensated Judges To Redact And Seal Court Records : As noted above, this bill applies not only to proceedings conducted by regular public judges, but also to matters involving a variety of non-public judges who are compensated by the parties. The use of privately-compensated nonpublic judges may arise in two ways: either by stipulation of the parties to have the matter (or some discrete part of the case) heard and decided by a temporary judge or referee pursuant to Court Rule 244 and 24.1, or by court appointment of a referee pursuant to Code of Civil Procedure section 639. These privately-compensated temporary judges and referees are lawyers who are temporarily given virtually all of the powers of a public judge - although not the power to seal records, as explained below. They are likewise subject to most, but not all, of the rules of judicial ethics. (See Code of Judicial Ethics Canon 6D (temporary judges and referees are not subject to Canons 2C, 3C(5), 3E(3), Canon 4 and Canon 5.)

When privately-compensated judges and referees are used, the proceeding is typically conducted in a private office away from the court. Even where proceedings are conducted away from the courthouse, however, pleading and other court records in these cases are supposed to be filed with and maintained by the court, and to be treated as public records just as they would be if the

matter were heard by a public judge. (Rule of Court 243.) Nevertheless, controversy has sometimes arisen regarding docketing of court records and compliance with public access requirements in cases handled by privately compensated temporary judges. (See, e.g., Divorces from Private Judges Raise Issue, Daily Journal, February 28, 2006.)

Perhaps because these proceedings are often conducted in private - and because privately-paid judges may have, or may be perceived to have, inherent financial incentives to satisfy parties for the purpose of obtaining future appointments, unlike public judges who are free to weigh the competing public and private interests without a pecuniary stake in the outcome - Rules 244 and 244.2 prevent privately-compensated judges and referees from sealing records. Thus currently a request to seal records in these cases must be heard by the presiding judge or a judge designated by the presiding judge.

It also appears worth noting that divorcing parties choosing to opt out of the public court system and use a private arbitrator or referee to resolve their conflict have significantly greater privacy protections. These parties, upon agreement, can keep most financial matters out of the court system and out of the public's view. Parties can even agree upfront to forgo their access to the public court system in a prenuptial agreement. This has already led to the charge that California has two tiers of justice - the private system for wealthier individuals, and the public system for everyone else. The credibility of the court system depends, in part, on its perception of fairness for all Californians. It would therefore appear to be an undesirable result to give additional incentives for famous or wealthier individuals to avoid the public court system, and, therefore, the state has a strong interest in not discouraging use of the public court system.

Suggested Amendment #4: "Private Judging" Amendment

Because this measure changes the current rules regarding sealing of court records for "private judging" only for marriage cases, and because the proposed change appears at odds with maximizing public access to the courts, the Committee may also wish to discuss with the author his openness to amend the bill's "private judging" changes by deleting proposed subdivision (d) of section 2024.6 on page 4, lines 11-14.

ARGUMENTS IN SUPPORT: Writing in support of the measure, the

bill's sponsor, Fred Silberberg of Silberberg & Ross, L.L.P., states, among other things, that:

> California has had a long standing policy allowing public access to divorce files, as well as allowing public access to ongoing proceedings in Family Law Court. Oddly enough, this right of access applies in proceedings for dissolution of marriage or legal separation. It does not apply in parentage proceedings ? Therefore, children of parties who are born out of wedlock are afforded rights of privacy which children who are born in wedlock are not. Moreover, California's policy of open access to dissolution and legal separation files is contrary to the policy of certain other states, including New York, which afford complete protection to family law litigants? This bill allows the court to restrict access only to the portions of the documents containing the financial information (such as account numbers, and addresses), while allowing access to the remainder of the documents where appropriate? [and] it does address the protection of sensitive information that could, if otherwise left subject to disclosure, lead to increase instances of identity theft, as well as risking the protection of children by disclosing their residential addresses?

The California Alliance for Families and Children of Roseville also writes in support judicial respect for family privacy does not lose its force upon the dissolution of marriage. The concept of family privacy embodies not simply a policy of minimum state intervention but also a presumption of autonomy?. During a proceeding the public, including the media, get all the information it needs to know, e.g. who the parties are, and there are financial and custody issues involved?"

As noted above, the Family Law Section of the State Bar (known as Flexcom) also is in support of this measure, writing, in part, that the bill "properly balances the public's right to know against the privacy needs of family law litigants to be reasonably and rationally protected in their persons and estates." The Bar section also recommends that the bill be amended to make it clear that its "confidentiality" protections

□

apply to any proceeding dissolving a domestic partnership relationship recognized under the California Domestic Partner Rights and Responsibilities Act of 2003 (AB 205, effective January 1, 2005).

Though not commenting on this particular legislation, it is also worth noting that a leading judicial expert in California has recently opined that in his view, personal information in dissolution proceedings should generally be treated as confidential. Judge Leonard Edwards, a highly respected superior court judge in Santa Clara County and a past president of the National Council of Juvenile and Family Court Judges, recently wrote a detailed and thoughtful article on confidentiality in family and juvenile courts, stating that while in general family court records should be open and accessible:

> In marital dissolution cases, the public interest is questionable. What public interest is served by learning how two married persons divide their property, settle alimony (spousal support) issues or share time with their children? Have people given up their right to have some aspects of their lives remain private simply by filing a legal action to dissolve their marriage? These should be private matters between the parties. . . . [C]ourt records regarding the filing of a marital dissolution and the entry of a final decree should be a part of the public record, accessible to the public, but the details of the property settlement and the alimony need not be public. (Judge Leonard Edwards, Confidentiality and the Juvenile and Family Courts, Juvenile and Family Court Journal (Winter 2004).)

ARGUMENTS IN OPPOSITION : The California Newspaper Publishers Association (CNPA), on behalf of many news organizations statewide, opposes the bill, arguing that it will, like its predecessor, be found unconstitutional on its face. CNPA also opposes the part of the measure allowing privately compensated, temporary judges to redact private financial information, arguing that the bill favors the wealthy who desire secrecy: "For those litigants who can afford to hire a "temporary" judge at $375-an-hour to hear their divorce, [the] bill allows those litigants to demand that their privately paid temporary judge seal their divorce court papers. Because there is little oversight of these temporary judges who are privately paid, we

believe that this would lead to unchecked secrecy for wealthy divorcing couples."

An attorney representing Ms. Burkle wrote the Committee stating, among other things, that the bill violates both the separation of powers doctrine, because it purports to limit the powers of the courts, and equal protection principles, by applying only to parties to a dissolution, and not to all litigants.

Californians Aware, a non-profit organization group dedicated to protecting public access, states in opposition that the latest amendments in the bill "do nothing to save the bill from the fatal First Amendment defects identified in _Burkle_ ? The approach to the suppression of information by 'redaction' rather than 'sealing' presents a distinction without a material difference." And the California First Amendment Coalition states that the bill violates First Amendment rights because "[r]edactions of specified information would be just the beginning. That information would remain at issue in hearings in divorce cases. Maintaining the confidentiality of redacted information will, therefore, require not only the alteration of records, but also the closing of proceedings that historically have been fully open to the public."

The California NOW chapter also opposes the bill, stating, among other things, that "[o]pen and honest disclosure [required in divorce cases] can only be effective if there are real deterrents against it. The incentive to omit, mislead or fabricate increases where there is less likelihood that the truth or accuracy of information will be scrutinized?" The Coalition for Family Equity also states in opposition that the measure "promotes new levels of secrecy in divorce proceedings above and beyond what is reasonably necessary for protection of the participants." And California Women Lawyers writes in part that "redacting transcripts would make appeals extremely difficult, and would be too confusing and cumbersome to trial and appellate court staff. Family law judges are already overburdened -- to have judges sifting through transcripts for redaction would cause chaos."

The University of San Diego's Children's Advocacy Institute also opposes the bill, stating in part that "We are against taxpayer-financed but secret government proceedings, including secret court proceedings. Whether it is a legislative committee meeting, a local planning commission hearing on a permit, or a

civil judicial proceeding, sunshine is the best way to ensure that our citizens are treated fairly and impartially by a government that has vast powers over them?"

The Judicial Council is also opposed to this legislation. It states that the bill "would have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments." It also states:

> SB 1015 could be amended to direct the council to adopt a rule of court advising parties of the allowable means to keep other information out of the

files by, for example, truncating bank account numbers and describing residential property in a manner that does not disclose the entire address. This information, which identifies the specific location of an asset, need not be anywhere in the court file because the court will not be considering it in making its determinations. By contrast, the income, expense, and other financial asset information that SB 1015 appears to protect is often at issue in a contested dissolution matter, and does need to be available to the court as it hears and considers the case. Requiring the court to redact the information that was the basis of its determinations regarding support and distribution of property puts the court in the awkward position of shielding from public view the very facts that underlie its rulings?

The California Judges Association also opposes the bill for similar reasons cited by the Judicial Council.

REGISTERED SUPPORT / OPPOSITION :

Support

California Alliance for Families and Children of Roseville
Family Law Section of the State Bar (Flexcom)
Fred Silberberg of Silberberg & Ross, L.L.P.

Opposition

Californians Aware
California Commission on the Status of Women

California First Amendment Coalition
California Judges Association
California National Organization for Women
California Newspaper Publishers Association
California Women Lawyers
Children's Advocacy Institute of the University of San Diego
Coalition for Family Equity
Judicial Council of California

Analysis Prepared by : Drew Liebert and Leora Gershenzon / JUD. / (916) 319-2334

Judicial Council of California

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Chair of the Judicial Council

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Administrative Director of the Courts

RONALD G. OVERHOLT
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KATHLEEN T. HOWARD
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March 27, 2006

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3126
Sacramento, California 95814

Subject: SB 1015 (Murray), as amended March 9, 2006 - Oppose
Hearing: Assembly Judiciary Committee – April 4, 2006

Dear Assembly Member Jones:

I regret to inform you that the Judicial Council is opposed to SB 1015, which would amend Family Code section 2024.6 to require the court, upon request by a party to a marital dissolution proceeding, to order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, or identifying information regarding those items. In making this order, the court is required to ensure that no more of the pleading is redacted "than is necessary to protect the parties' overriding right to privacy." In addition, the bill would authorize privately compensated temporary judges to make orders for redaction pursuant to this section. The council is opposed because the bill would have a negative effect on public trust and confidence in the courts, and would impose a significant new workload on judicial officers in family court assignments.

SB 1015 appears to have two primary goals, protecting parties from identity theft, and affording parties the right to seek a high degree of financial privacy in marital dissolution proceedings. The council believes that the first goal can be achieved without compromising the openness of court proceedings or records. Currently litigants are advised on their forms to redact any social security numbers from documents filed with the court. SB 1015 could be amended to direct the council to adopt a rule of court advising parties of the allowable means to keep other information

out of the files by, for example, truncating bank account numbers and describing residential property in a manner that does not disclose the entire address. This information, which identifies the specific location of an asset, need not be anywhere in the court file because the court will not be considering it in making its determinations. By contrast, the income, expense, and other financial asset information that SB 1015 appears to protect is often at issue in a contested dissolution matter, and does need to be available to the court as it hears and considers the case. Requiring the court to redact the information that was the basis of its determinations regarding support and distribution of property puts the court in the awkward position of shielding from public view the very facts that underlie its rulings.

One of the Judicial Council's key strategic goals is to enhance public understanding of and confidence in the judicial branch. The courts are entrusted with the responsibility to provide justice to all litigants seeking the intervention of the courts. In order to maximize public trust and confidence in the courts it is crucial to preserve a policy of presumptive openness of court proceedings and records. There may be cases where privacy concerns outweigh the public's right to know what the courts are doing, but those situations should be the exception and not the rule. Currently litigants can seek to seal portions of their court files under California Rule of Court 243.1 when there is an overriding interest that outweighs the public interest, and other facts are found to establish that sealing is appropriate.

The Judicial Council recognizes that many of the issues considered by the court in marital dissolution matters are of a sensitive nature, but these proceedings are open to the public, and the court is exercising significant discretion in making its determinations in each case. That discretion ensures that each litigant can receive individual justice, but the council is concerned that any attempt to redact from the public file information that was crucial to the outcome of a case will create the appearance that the court itself may have something to hide from the public. Such an appearance undermines the public's faith that the court is making unbiased and appropriate decisions in each case.

The council is also concerned about the significant workload increase that would result from the implementation of SB 1015. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary to "protect the parties overriding right to privacy." Because that determination is a legal judgment, and is arguably vague, a judicial officer, rather than clerical staff, would be required to perform that function.

We have sought information from the courts regarding the number of motions filed seeking the sealing of pleadings under the current section 2024.6 provision, and have learned that some courts are receiving many of these requests each month, while others receive a small number. Given that there were approximately 150,000 petitions for marital dissolution filed in 2004, the potential workload statewide is quite substantial. Add this workload to a court system that is already overburdened, and desperately in need of additional judges, and the result of enactment

of this legislation could be serious repercussions for those trying to access the court system. We are particularly concerned that these new duties would not be accompanied by the authority to recoup the costs of providing this new and mandatory service to litigants, and recommend that the committee amend SB 1015 to allow the courts to recover these costs if it determines that the bill should move forward.

Finally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these dissolution cases. This provision raises serious concerns for the council because it is inconsistent with the current practice that ensures that the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, the council opposes any attempt to provide this authority to privately compensated temporary judges.

For these reasons the Judicial Council opposes SB 1015.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Kevin Murray, Member of the Senate
Mr. Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mr. Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Ms. Sue Blake, Director of Legislation, Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

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The council is also concerned about the significant workload increase that would result from the implementation of SB 1015. Although SB 1015 would require the party seeking the order to prepare a redacted version, it would also require the court to oversee that process and ensure that the redactions are not more than necessary to "protect the parties overriding right to privacy." Because that determination is a legal judgment, and is arguably vague, a judicial officer, rather than clerical staff, would be required to perform that function.

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of this legislation could be serious repercussions for those trying to access the court system. We are particularly concerned that these new duties would not be accompanied by the authority to recoup the costs of providing this new and mandatory service to litigants, and recommend that the committee amend SB 1015 to allow the courts to recover these costs if it determines that the bill should move forward.

Finally, SB 1015 seeks to authorize privately compensated temporary judges to make orders to redact pleadings in these dissolution cases. This provision raises serious concerns for the council because it is inconsistent with the current practice that ensures that the court retains some oversight over the record of the proceedings before the temporary judge, while still affording the parties an opportunity to seek the protection of their court records. California Rule of Court 244 sets forth the provisions that apply when parties seek, by stipulation, to use a privately compensated attorney as a temporary judge for the purposes of litigation. The rule specifically provides that a motion to seal records in a case overseen by a privately compensated temporary judge must be heard by the presiding judge of the court that authorized the stipulation or his or her designee. Given the analogous nature of sealing and redaction, the council opposes any attempt to provide this authority to privately compensated temporary judges.

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AMENDED IN ASSEMBLY MARCH 9, 2006

AMENDED IN ASSEMBLY FEBRUARY 16, 2006

AMENDED IN SENATE AUGUST 30, 2005

AMENDED IN SENATE AUGUST 17, 2005

AMENDED IN SENATE AUGUST 15, 2005

AMENDED IN SENATE JULY 1, 2005

SENATE BILL No. 1015

Introduced by Senator Murray

February 22, 2005

An act to amend Section 2024.6 of the Family Code, relating to dissolution of marriage.

LEGISLATIVE COUNSEL'S DIGEST

SB 1015, as amended, Murray. Dissolution of marriage: financial declarations.

Existing law permits a party to request that documents listing or identifying the parties' assets and liabilities be sealed in specified family law proceedings, including dissolution of marriage.

This bill would ~~extend~~ *revise* those provisions to include documents listing or identifying the parties' income or expenses, permit those records to be ~~sealed or~~ redacted, and make related changes. The bill would require the Judicial Council to adopt rules governing procedures for ~~sealing, unsealing,~~ redacting, and restoring those records.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) The fundamental right of privacy protects against unwarranted intrusion into private financial affairs, including those affairs disclosed in a dissolution of marriage, nullity of marriage, or legal separation proceeding.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets, liabilities, income or expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income or expenses.

(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft.

(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic data bases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties. Existing state law is inadequate to protect these widespread privacy concerns.

(e) Local court rules regarding the disclosure of sensitive financial information vary from county to county. This act is intended to provide uniformity with respect thereto.

(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of

privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records.

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) ~~Upon~~ *Notwithstanding any other provision of law, upon* request by a party to a ~~petition~~ *proceeding* for dissolution of marriage, nullity of marriage, or legal separation, the court shall order *redacted any portion of* a pleading that lists the parties' financial assets ~~and~~, liabilities ~~and~~, *income or expenses, or* provides the location *of, including a residential address,* or identifying information about, those assets ~~and~~, liabilities ~~sealed~~, *income, or expenses. Subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy.* The request may be made by ex parte application. Nothing ~~sealed~~ *redacted* pursuant to this section may be ~~unsealed~~ *restored* except upon petition to the court and *a showing of* good cause ~~shown~~.

(b) Commencing not later than July 1, ~~2005~~ *2007*, the Judicial Council form used to declare assets and liabilities *and income and expenses* of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets ~~and~~, liabilities, *income, or expenses* listed therein. If the party making the request *pursuant to subdivision (a)* uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists ~~and~~ *or* identifies financial information and is therefore subject to this section. *By the same date, the Judicial Council shall also adopt*

rules setting forth the procedures to be used for redacting and restoring pleadings pursuant to this section.

(c) For purposes of this section, "pleading" means a document that sets forth or declares the ~~parties'~~ assets ~~and~~, liabilities, income ~~and~~ *or* expenses~~, a~~ *of one or both of the parties, including, but not limited to, a* marital settlement agreement ~~that lists and identifies the parties' assets and liabilities~~, *exhibit, schedule, transcript,* or any document ~~filed with the court~~ incidental to ~~the~~ *a* declaration or *marital settlement* agreement that lists ~~and~~ *or* identifies financial information.

(d) *For purposes of this section and notwithstanding any other provision of law, a privately compensated temporary judge may order pleadings redacted pursuant to the provisions of this section.*

(e) The party ~~making the request to seal~~ *requesting redaction of* a pleading pursuant to subdivision (a) shall serve a copy of the *unredacted* pleading, *a proposed redacted pleading and the request for redaction* on the other party *or parties* to the proceeding and file ~~a~~ *the* proof of service with the request ~~to seal the pleading~~ *for redaction with the court.*

~~(e)~~

(f) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a ~~sealed~~ pleading *redacted pursuant to this section* in any manner that is not otherwise prohibited by law.

(g) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings.

~~SECTION 1. The Legislature finds and declares as follows:~~

~~(a) The people have a right of privacy in their financial affairs, as well as in matters relating to marriage.~~

~~(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets and liabilities and income and expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income and expenses.~~

~~(c) The sensitive financial information which the law compels a party to a proceeding for dissolution or nullity of marriage or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft, yet is rarely if ever a matter of legitimate public interest.~~

~~(d) The Legislature also finds that protecting the sensitive financial information subject to this section will further the prompt and efficient resolution or settlement of proceedings for the dissolution or nullity of marriage or legal separation by preventing or discouraging the disclosure or threatened disclosure of that information for improper purposes or to secure collateral or unfair advantages.~~

~~(e) Existing law concerning the sealing of court records was not enacted or otherwise promulgated with consideration of the extensive financial disclosures required of parties to a proceeding for dissolution or nullity of marriage, or legal separation. Much of existing law concerning the sealing of court records was also enacted or otherwise promulgated prior to the current epidemic of identity theft and the current widespread use of electronic databases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Existing law was enacted prior to the widespread concern over and federal legislation designed to protect and guard against, the misuse of personal information and child abduction.~~

~~(f) For these reasons, the Legislature finds that existing law concerning the sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution or nullity of marriage are entitled. It is the intent of the Legislature to protect more fully that right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, it enacts this act.~~

~~SEC. 2. Section 2024.6 of the Family Code is amended to read:~~

~~2024.6. (a) Notwithstanding any other provision of law, upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court shall order sealed or redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses, or provides the~~

~~location of, including a residential address, or identifying information about, those assets, liabilities, income, or expenses. Subject to the direction of the court, no more of any pleading shall be sealed or redacted than is necessary to prevent identification or location of the financial information subject to this section. The request may be made by ex parte application. Nothing sealed or redacted pursuant to this section may be unsealed or restored except upon petition to the court and a showing of good cause.~~

~~(b) Commencing not later than ____, the Judicial Council form used to declare assets or liabilities of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets, liabilities, income, or expenses listed therein. If the party making the request set forth in subdivision (a) uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists or identifies financial information and is therefore subject to this section. By the same date, the Judicial Council shall also adopt rules setting forth the procedures to be used for sealing, unsealing, redacting, and restoring pleadings pursuant to this section.~~

~~(c) For purposes of this section, "pleading" means a document that sets forth or declares the assets, liabilities, income or expenses of one or both of the parties, including, but not limited to marital settlement agreements, exhibits, schedules, transcripts, or any document incidental to any declaration or marital settlement agreement that lists or identifies financial information.~~

~~(d) For purposes of this section and notwithstanding any other provision of law, "court" includes a privately compensated judge.~~

~~(e) The party making the request pursuant to subdivision (a) shall serve a copy of the pleading containing financial information subject to this section on the other party or parties to the proceeding and file a proof of service with the request.~~

~~(f) Nothing in this section precludes a party to a proceeding described in this section from using any document or information~~

~~contained in a pleading sealed or redacted pursuant to this section in any manner that is not otherwise prohibited by law.~~

O

Judicial Council

- administratively ⇒ oppose - Rosenfield
- fee - per page
- J.B. - our own administrative concerns
- listed provisions

SB 1015 = ~~soc. sec.~~ acct #s
- residential address
- owns on the parties

70% self-represented

- privately ~~hb~~ Judges - who knows - integrity of the documents - lock on control

one hour

AB 1787 (Cohn)

TRO - set a TRO + extend it
- EPO served - confused -

support - judicial authority in judicial affairs
- clarify open section review

AB 2843 - no position

March 27th

Interpreter - Support - set yours first

huge need

Los Angeles Times
latimes.com

http://www.latimes.com/news/opinion/editorials/la-ed-burkle20mar20,0,6396439.story?coll=la-news-comment-editorials
From the Los Angeles Times

EDITORIAL

Divorced from reality

March 20, 2006

ONE FOUNDATION OF DEMOCRACY is that court proceedings have to be public. To close them is to invite funny business — payoffs, sweetheart deals, favor trading — that would undermine the fairness that our justice system strives for. Any argument for limited secrecy in court will stumble on this basic principle.

It is a principle our elected officials should keep in mind as they debate a bill that would seal court records in a divorce case. The bill, up for consideration in Sacramento this week, would personally benefit billionaire Ron Burkle, who has waged a dogged campaign to close court proceedings in divorce cases; his lavish political contributions have paved the way for its quick passage. Burkle is a California success story — a guy who worked his way from bag boy to supermarket magnate. He may even have a point when he argues that there is no public benefit to releasing a person's financial records in a divorce case.

But it is never good policy to write legislation for one person, as is the case here. And though many litigants may not like it, the judicial system as a whole benefits from more openness, not less. Nevada is the only state where court records can be sealed at the request of either party in a divorce case. Similarly, this bill would require that all documents with financial information be sealed if either party in a divorce case requests it, which removes a judge's discretion. Further, it would allow privately paid arbiters, who operate outside the court system to negotiate terms of a settlement, to seal court records.

The Times, the California Newspaper Assn. and other organizations that defend open courts are lobbying against this bill. A similar bill, rushed through the Legislature in 2004, has since been ruled unconstitutional by two lower courts, and Burkle is appealing to the state Supreme Court. Meantime, state Sen. Kevin Murray (D-Culver City) has amended an unrelated bill to authorize the blacking out of financial records in a divorce case. Murray argues that defendants might be vulnerable to identity theft. That's a hollow point. Judges in divorce cases routinely agree to keep identifying information out of court records.

Burkle's ex-wife argues that shielding financial records enables him to hide millions in order to limit alimony payments. (She backed out of a 1997 divorce settlement, arguing that the agreed-upon $410,000 a month in alimony was not enough.) That's for a judge to decide. What should be clear to legislators is that closing our court system violates the principle of openness and justice that benefits us all.

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Damaging proposition

Bill to seal divorce court records raises big concerns

TheReporter.Com

Divorce may be ugly, but a divorce-court related bill is even uglier, and could severely damage the public's right to access its courts.

The story starts with Assembly Bill 782, originally proposed as a trial court issue by Assemblywoman Christine Kehoe in 2004. But in a gut-and-amend move by Sen. John Burton on April 1, 2004, AB 782 became an effort to protect one man's privacy following a divorce.

Although AB 782 never mentioned billionaire and big-time political donor Ron Burkle, it was clear that his divorce from his wife Janet was behind Sen. Burton's plan. It was right around the same time that a judge rejected Mr. Burkle's attempt to broadly seal documents.

Two months later, the bill was signed into law by the governor and allowed either party involved in a divorce to have the court seal any document that lists their financial assets and liabilities. A few months later, Mr. Burkle used the law to request the sealing of 28 documents, including his wife's declaration about his income and expenses.

In January 2006, the law was revoked by the California Court of Appeal for the Second District, which declared it unconstitutional.

Now Senate Bill 1015 seeks to overturn that ruling.

Next week, the Assembly Judiciary Committee is expected to consider SB 1015. We hope members of the committee understand that a vote for SB 1015 is a vote against every Californian's right to an open and transparent court.

Under the First Amendment, courts must be allowed to decide sealing requests on a case-by-case basis. The mandatory sealing called for in SB 1015 would change this.

We agree with the appeals court, that the First Amendment right that guarantees access to ordinary civil cases should apply to divorce proceedings.

We question whether the bill would have done much to prevent identity theft and financial crimes, as it purposed to do.

Justice Paul Boland wrote, "The statute closes to public view not only the identifying information that would facilitate identity theft or other financial crimes - Social Security numbers, account numbers, locations - but all information pertaining to any asset, including its existence, its value, the provisions of any agreement relating to the asset and any contentions that may be made about the resolution of disputes over an asset. In short, much of the information contained in documents as to which sealing is mandated may be completely unrelated to the asserted statutory goal of preventing identity theft and financial crimes."

As we near the end of National Sunshine Week, when newsrooms across the country focus on public access issues, we urge the committee to reject SB 1015 wholeheartedly and outright.

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THE SAN DIEGO UNION-TRIBUNE

UNION-TRIBUNE EDITORIAL

Rhetoric vs. reality

Politicians extol openness, but talk is cheap

March 17, 2006

Sunshine Week is a time when politicians like to expound on their devotion to open government. But the reality of California's openness record is far removed from their rhetoric. From school districts to the Legislature, a contempt for the public's right to know is common. Here are a few of the all-too-many examples:

The San Diego school board voted last summer behind closed doors to select its new superintendent, then refused to announce its choice until it found the timing convenient. This followed a secret selection process of the exact sort described as illegal in the ballot argument for Proposition 59, enacted in a 2004 landslide.

Sen. Kevin Murray, D-Culver City, is pushing a bill crafted to help billionaire Democratic donor Ron Burkle keep his divorce records secret. So much for open court proceedings, a staple of democracy.

California Aware, a nonprofit group that promotes government openness, recently had a volunteer go to 31 state agencies and request information of various sorts from each. All 31 agencies presented illegal obstacles to gaining the information.

Plainly, a culture of secrecy endures in government. One reason it persists is that many politicians and bureaucrats privately dismiss openness laws as Pollyannaish measures that get in the way of efficient management.

Hardly. A big reason so many back-room deals go awry is that they haven't faced routine scrutiny and had their flaws exposed.

Still, even if elected officials don't buy that logic, there's a powerful reason to work in an open and aboveboard fashion: It's the law.

If only this carried more weight with every public employee – from DMV clerks to state senators.

»Next Story»

Tuesday, March 21, 2006

Divorce court records should not be hidden

Openness helps assure that justice is done

Government operations need to be open to public scrutiny to make sure they haven't become infected with corruption. That's why we strongly urge the Assembly Judiciary Committee to reject SB1015, by state Sen. Kevin Murray, D-Los Angeles, at hearings beginning today. The bill passed the Senate last year.

The bill concerns what financial records can be disclosed for public inspection in divorce or legal separation cases. In the Assembly summary's language, the bill says that a family court "shall order redacted" from public review "the parties' financial assets, liabilities, income or expenses" and addresses of residences. Actually, these days, the value of residences easily can be discovered by using such Web sites as Zillow.com.

The reason given by backers of the bill is to protect the privacy of the parties in the divorce or separation process.

We certainly support citizens' rights to privacy. But divorce cases are different from regular privacy situations - such as otherwise keeping secret one's financial or other data - because the two parties are using the public courts system to resolve their family problems.

"We have to have court doors open to make sure they [the courts]are not involved in corrupt actions," Tom Newton, general counsel of the California Newspaper Publishers Association, told us. "As soon as you put asset information behind the cloak of secrecy, then no one will be able to determine that justice is being done." The CNPA has been urging the Legislature to drop SB1015.

State Sen. Debra Bowen, D-Redondo Beach, is one of the Legislature's major privacy advocates. She said, as quoted in the March 19 Auburn Journal, that "information such as bank and credit card account numbers that are like gold to an identity thief need to be kept confidential" in divorce proceedings. But she added that simply listing someone's net worth is a different matter. "Divorce records have traditionally been open to the public, so any move to put a veil over some of the information in the proceedings should have to meet a pretty high bar," she said.

"The Legislature enacted a similar, although somewhat broader law in 2004, but a state appeals court" struck down the law as a violation of the First Amendment right to freedom of the press, reported the March 19 San Jose Mercury News. One of the parties in that case, Los Angeles billionaire Ron Burkle, has appealed the ruling to the

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state Supreme Court.

At a minimum, the Assembly Judiciary Committee should postpone consideration of SB1015 until the higher court rules on the Burkle case. Indeed, the Assembly analysis of the bill, part of which we quoted above, goes on to note of SB1015 that it "appears likely a court would find the proposed measure continues to possess the constitutional flaws identified in the recent appellate decision."

We understand that this is a contentious issue involving the often messy situations of separation and divorce. Long term, a possible solution might be, as we have urged in other controversies, to move marriage and other family matters to private courts that would avoid the involvement of the government.

In the meantime, so long as public courts are used for divorce or anything else, they must be open to public scrutiny.

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Print This Article

Newspapers may have an angel Billionaire Burkle emerges as possible buyer, union says

- Carolyn Said, Chronicle Staff Writer
Thursday, March 16, 2006

He's a billionaire supermarket magnate who started at age 13 bagging groceries at the Stater Bros. food market his dad managed. He backed P. Diddy's clothing company, feuded with Michael Ovitz, advised Michael Jackson on selling the Beatles catalog and ponied up for Al Gore's cable TV network. He's a longtime Friend of Bill (Clinton) and big-time Democratic donor and fundraiser who also gave generously to Republican Govs. Pete Wilson and Arnold Schwarzenegger.

Now Ron Burkle, 53, has emerged as a suitor for the dozen newspapers McClatchy Co. is unloading in the wake of its $4.5 billion purchase of Knight Ridder Inc.

The union representing workers at many of the papers tapped Burkle, head of closely held investment firm Yucaipa Cos. of Los Angeles, as a deep-pocketed investor to bid on the papers. By some estimates, the dozen papers on the block, which include the San Jose Mercury News, Contra Costa Times, Philadelphia Inquirer and St. Paul Pioneer Press, could sell for $1.5 billion to $2 billion.

If Burkle's bid were accepted, the papers would be run by a new company called ValuePlus Media that would offer employees a chance to buy ownership stakes. Workers who chose to invest in the company would roll over part of their 401(k) funds to acquire ValuePlus shares, an arrangement called an employee stock ownership plan, taking on the benefits and risks of equity ownership. If enough participated, the new company would enjoy significant tax savings.

Yucaipa -- named after Burkle's California hometown -- manages more than $3 billion for pension funds, corporations and high-net-worth individuals, including $450 million for the California Public Employees' Retirement System. "Yucaipa has done well for us in the past few years," a CalPERS spokesman said. CalPERS' three Yucaipa funds have annual returns of 7 percent, 23 percent and 29.6 percent.

Clinton, a senior adviser to Yucaipa, wrote in his memoir, "My Life," that Burkle "became one of my best friends."

While Burkle made his fortune through leveraged buyouts of food-distribution companies and supermarket chains like Fred Meyer, Jurgensen's and Ralph's, his portfolio has broadened to encompass Aloha Airlines, auto-logistics company TDS Logistics,

cold-storage company Americold and Piccadilly Restaurants. Golden State Foods, which he owned for 10 years, is one of McDonald's largest international suppliers. Yucaipa is the primary stakeholder in more than 30 companies.

Besides Gore's Current TV, Yucaipa's media investments include a majority stake in Source Interlink, the largest distributor of magazines, CDs and DVDs to retail stores and newsstands, according to Yucaipa spokesman Frank Quintero.

Burkle sits on the boards of companies in diverse industries, from Internet (Yahoo) to big oil (Occidental Petroleum) to bricks and mortar (KB Home, one of the nation's biggest homebuilders) to high-octane charity (the J. Paul Getty Trust).

Fortune pegged Burkle's net worth at $2.3 billion, making him slightly wealthier than Gordon Getty.

Why would he invest in newspapers, when Wall Street is busy writing the obituary of an industry made obsolete by the Internet?

Chris Mackin, president of Ownership Associates Inc., a consulting firm for employee-owned companies retained as an adviser by the Newspaper Guild-CWA, said Burkle is a savvy investor who thinks newspapers still have plenty of potential.

In meetings discussing a possible purchase of the Knight Ridder papers, Burkle "made a comment that newspapers aren't going to go away," Mackin said. "He's confident there's a future in this industry that's obviously about being smart and knowing how to combine your online strategy with your print strategy."

Mackin said he has no indication that Burkle wants to buy newspapers as "a mouthpiece for his political views. Ron's a businessman and he's looking at this as an investment."

Burkle's spokesman, Quintero, said: "Ron is very well aware of the (media) marketplace. He's on the board of Yahoo, so he definitely gets the technology piece."

Burkle's potential purchase of the newspapers is not contingent on employees taking an ownership stake, according to the guild, which said it asked him to bid because Yucaipa is the largest "worker-friendly" private equity firm.

"With the size of (Yucaipa's) assets, they have the wherewithal to do this deal even without the employees being involved," said Linda Foley, president of the Newspaper Guild in Washington. "They would put the money in up front and then the employees will be given the opportunity to invest side by side with Yucaipa."

Quintero said Burkle's philosophy involves working with unions, which he considers a way to get better insight into companies' operations.

Guild leaders said that's what drew them to him. They say they are hopeful that McClatchy Chief Executive Officer Gary Pruitt, who has been quoted saying money would not be the only consideration in selling the 12 papers, will see the advantage of selling to Yucaipa.

"We hope McClatchy considers everything, not just cost, although we'll be competitive

there too," said Bernie Lunzer, secretary-treasurer of the journalists union. "I believe McClatchy has a responsibility to the journalism community. I don't expect them to turn around and sell to chainsaw artists."

McClatchy is open to selling the papers as a block or piecemeal. Community leaders in Philadelphia and St. Paul, Minn., have started forming investment groups to make their own bids.

The union, which represents employees at eight of the for-sale papers, said it hopes Yucaipa will be able to buy the entire 12, because of the advantages of having a larger chain. The guild has already held meetings and conference calls with employees at the unionized papers to explain how voluntary employee ownership would work.

"This isn't like investing in a steel mill that would otherwise go out of business," Foley said. "That's not going to happen here. Is there risk? Yes, there's risk in any investment, but this would be voluntary. People will take it on with their eyes wide open."

According to a Morgan Stanley analysis, Knight Ridder's regional papers (including both ones for sale and ones McClatchy is keeping) had profit margins of 26.4 percent. Some of its larger papers, including ones now for sale, had much lower margins. The Mercury News' was 8 percent and the Philadelphia Inquirer and Philadelphia Daily News combined had 9 percent margins.

While employee-ownership plans sometimes are predicated on employees making concessions about wages or benefits, the union said that is not how ValuePlus Media would be structured.

ValuePlus Media and whatever papers it buys would be run by seasoned newspaper professionals, Mackin said. "We've got very senior people who are veterans of the Knight Ridder universe who have run these papers before on a very profitable basis who have expressed interest in participating in this," he said, declining to disclose any names. The guild said Tony Ridder, former CEO of Knight Ridder, is not among those veterans. The guild said it has discussed with Yucaipa having union and employee representation on the new company's board of directors.

Employees at the for-sale papers, who learned on Monday that their fate would remain up in the air for several more months, are still mulling over what a Yucaipa bid and employee ownership would mean.

"We're still in the education process," said Becky Bartindale, an education reporter at the Mercury News and president of the San Jose Guild. "I think there are people who are interested (in employee ownership) but we don't have enough information yet to sign on the dotted line."

Reporters are famously a cynical lot, and some are fairly skeptical about the potential deal.

"A lot of folks I've heard from are not too keen on forking over their retirement nest egg to a bunch of their colleagues," said one Mercury News reporter, who asked not to be named because of the uncertain status of the newspaper. "When it comes to your

retirement money, you want to give it to grumpy, stingy old men and not do-goody journalists."

But others said they see employee ownership as positive.

Griff Palmer, database editor at the Mercury News and secretary-treasurer of the San Jose Guild, said he would feel comfortable investing one-quarter of his 401(k) in the new company.

"I would feel that I was helping to contribute toward the continued viability of the company," he said. "I think that the more financially engaged the employees are, the better relationship we have with the board of directors. It creates less of an 'us' and 'them' environment."

E-mail Carolyn Said at csaid@sfchronicle.com.

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http://www.latimes.com/news/columnists/la-fi-golden16mar16,1,3757610.column?coll=la-news-columns
From the Los Angeles Times

MICHAEL HILTZIK / GOLDEN STATE

Private Justice Can Be Yours if You're Rich

Michael Hiltzik
Golden State

March 16, 2006

You don't need me to tell you how grand it is to be rich in California. You don't have to care about the condition of public education, because your kids go to private school. You don't have to worry about higher park fees, because you can lock up access to your private beach and hire thugs to run off any riffraff who get near the water. You don't have to do your own gardening, because there are plenty of illegals around to trim your perennials.

And you don't have to subject yourself to litigating your private disputes in open court, because you can buy yourself a judge to run interference for you — under cover of the state Constitution, no less.

If your private judge violates state judicial rules and bends the public court system to your personal ends, what's the downside? Your judge is outside the reach of the state's disciplinary system for misbehaving jurists. If your case happens to involve matters of manifest public importance and interest, too bad about the public. After all, the system belongs to you.

Many states allow retired judges to fulfill limited judicial roles — as referees in evidentiary disputes or as fill-in judges to relieve docket gridlock, for example. But California, apparently uniquely, is much more liberal. Its Constitution allows attorneys and ex-judges to conduct actual trials in the guise of temporary jurists. Once selected by litigants, they're sworn in as Superior Court judges and endowed with almost all the powers and authority of any active judge.

They then proceed to abuse their power. Documents and hearings in the cases before them are supposed to be public, but often the papers don't end up in public files, trial schedules are kept secret, and even those that leak out are held in private offices behind layers of building security. The sealing of a court document is an important decision that involves a core principle of the public judicial system; these judges do it all the time, secretly, simply by sticking sensitive papers in their briefcases and dodging requests for access.

So justice ends up belonging, like a private preserve, to the rich and powerful — indeed, anyone who can pay a judge $400 to $500 an hour. It's unsurprising that the public knows little about this system because the judicial establishment isn't even sure how widespread it is; court clerks don't keep a tally of how many cases are tried by privately paid temporary judges.

But the number is obviously huge. One Northern California private divorce judge told me she handles more than 20 cases at a time. Brad Pitt and Jennifer Aniston hired a private judge to preside over their divorce, as did Charlie Sheen and Denise Richards and investment billionaire Ronald Burkle and his ex-wife, Janet. Michael Jackson hired a private judge to hear his custody fight over his children with ex-wife Debbie Rowe. What all had in common was the need to secure formal, legally enforceable judgments and a distaste for the wear and tear of going to court to get them.

Instead of reining in this system, the Legislature is preparing to expand it. A bill to give temporary judges the authority to seal many documents in divorce cases is currently moving through Sacramento, despite evidence that temporary judges have overstepped their nonexistent authority in the past.

The corrosive influence of this two-tier system is hardly a secret. In 1992, when a plan to expand the authority of temporary judges came under consideration, Los Angeles Superior Court Judge Robert H. O'Brien complained in a letter to state court administrators that "the appearance of a dual system — one for the wealthy, one for the poor (or even not so wealthy)" was a "real evil." He dismissed the most frequently heard justification — that the public dockets were jammed — as a "feeble rationalization" for the creation of a moneymaking scheme for retired trial judges. (Court documents indicate that retired Superior Court Judge Stephen Lachs, whose current rate is $475 an hour, collected $73,000 in just over a year on the Burkle matter alone.)

One corrupting feature of the process is the immunity of privately paid judges from disciplinary action. The state Commission on Judicial Performance, which has the power to remove ordinary judges from the bench, has no jurisdiction over temporary judges, even when they misbehave. Even a county's presiding judge is powerless to force temporary judges to comply with local procedural rules.

And their treatment of the rules can be extremely casual. Consider the runaround — there's no other word for it — on which Judge Lachs has led the public in the Michael Jackson custody case, over which he presided until December, when Jackson accused him of bias and asked him to step down. Jackson may be the focus of somewhat overheated tabloid attention, but the judicial system's response to a serious charge against someone so prominent — Rowe has accused him of abducting their two children to Bahrain — is plainly a matter of legitimate public concern.

Under Lachs, however, documents required by local court rules to be filed with the Los Angeles court clerk never wound up in the files, but remained in his possession. Hearings were scheduled but not divulged. At a hearing in December, Lachs ejected a reporter for TMZ.com, an entertainment news website, on grounds that sensitive custody issues were to be discussed; in the event, the only topic covered behind closed doors was the motion by Jackson's attorneys to oust Lachs from the case. (Lachs never responded to my requests for comment.)

Why should we care about this? Not only because the very idea of two-tier justice should enrage every citizen, but also because as conditions get better for the privileged, they become worse for everyone else. As long as the wealthy and powerful can buy their own civil justice, they won't care if the rest of the system goes to hell, and the road to its collapse will become ever steeper.

Golden State appears every Monday and Thursday. You can reach Michael Hiltzik at golden.state@latimes.com and view his weblog at latimes.com/goldenstateblog.

Joe Wirt

From: Kamenandco@aol.com

Sent: Thursday, March 16, 2006 11:25 AM

To: Joe Wirt

Subject: Re: please send us a copy of recent paper

joe,
many thanks. it's been a pleasure working with you all these years and i thank you.
best,
kev

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Access advocates oppose California divorce privacy bill

By JOHN HILL
Sacramento Bee
17-MAR-06

SACRAMENTO, Calif. -- First amendment advocates are gearing up to fight a new version of a bill that would limit access to divorce records, a move they say would erode the public's ability to monitor judges and caters to one influential constituent: billionaire supermarket baron Ron Burkle.

Backers of the bill, SB 1015 by Sen. Kevin Murray, D-Culver City, say it is needed to guard against identity theft and to preserve the privacy of parties in contested divorces.

"Why should it be invaded?" just because someone ends up in divorce court, asked Fred Silberberg, a Los Angeles lawyer and certified family law specialist who drafted the bill.

Opponents call it a warmed-over version of a 2003 bill that allowed parties in divorces to request the sealing of court pleadings listing their assets.

At the time, the bill was seen by many as a favor to Burkle, a major campaign contributor to both parties. After the law passed, Burkle cited it in his own divorce case in 2004 in asking the court to seal 28 pleadings. That led the Los Angeles Times and the Associated Press to contest the law.

In January, a state appeals court found it unconstitutional. The case is on appeal to the California Supreme Court.

"The First Amendment provides a right of access to court records in divorce proceedings, just as in other ordinary civil cases," Associate Justice Paul Boland wrote.

Guarding against identity theft might warrant that kind of restriction, Boland wrote. But the 2003 law was too broad an incursion on the First Amendment.

SB 1015 fixes that problem, Silberberg said, by just targeting financial information within pleadings, rather than requiring the court to seal the entire document.

Opponents say that the differences are meaningless.

Divorce cases only address two issues: child custody and dividing up assets, said Tom Newton, general counsel for the California Newspaper Publishers Association.

Allowing financial information to be kept secret, he said, amounts to closing off much of the substance of a case from public scrutiny.

"We don't think this is narrow at all," Newton said of Murray's bill. "It takes the entire case and puts it behind a smokescreen."

The reason the public needs to have access, Newton and others say, is to assess whether courts are handling divorce cases fairly.

"It doesn't matter if it's a divorce case or a murder case," he said. "Does the public have a way to know that justice is being done in every case?"

The California National Organization for Women opposes the bill because it wants the public to be able to see that divorce judges aren't biased against women, who are often at a financial disadvantage in court, said legislative director Jodi Hicks.

"Without full disclosure of the settlement, what other recourse do you have?" Hicks asked.

Critics say the bill strips judges of discretion to decide case-by-case whether information should be blacked out.

And they say the law is unnecessary. Parties in divorce cases can already ask that sensitive financial information such as Social Security numbers and account numbers be withheld.

"The only plausible purpose of this legislation is to keep information about one billionaire's finances out of the public eye," said Terry Francke, general counsel for Californians Aware, a non-profit that promotes open government.

Silberberg said judges would still have to look through court records and decide how to apply the law. And while many

judges may already black out sensitive financial information, courts around the state have a variety of local rules, he said, not all of which protect financial privacy.

A small but growing number of states, he said, are limiting access to divorce records or proceedings. New York has been keeping divorce information confidential for 200 years.

Contrary to charges that the bill is designed to benefit Burkle, Silberberg said he knew nothing about the supermarket magnate's connection to the earlier law until the court of appeal decision in January. He said he made some calls to Sacramento to find a potential author of the bill, and settled on Murray because of earlier legislation the Culver City Democrat did to address identity theft.

Silberberg said he's worked only with Murray's staff, and has had no contact with Burkle.

Murray and Burkle did not return phone calls seeking comment.

"We're neither the sponsor nor the author of the bill," said Burkle spokesman Frank Quintero.

The bill will be heard Tuesday by the Assembly Judiciary Committee. The chairman of the committee, Dave Jones, D-Sacramento, did not respond to calls seeking comment. His office said that he generally doesn't discuss legislation prior to committee hearings. A committee analysis of the bill concluded that it would have to be changed substantially to pass constitutional muster.

(Distributed by Scripps-McClatchy Western Service, http://www.shns.com.)

CONTRA COSTA TIMES

Posted on Tue, Feb. 28, 2006

Amended bill would seal finances in divorce cases

By Steve Lawrence
ASSOCIATED PRESS

SACRAMENTO - A Democratic lawmaker has introduced a bill to allow a divorcing spouse to keep financial records private less than a month after a court struck down a similar law that opponents contend was passed to help a wealthy campaign donor.

Earlier this month, Sen. Kevin Murray, D-Culver City, took over a Senate bill dealing with homeland security that was awaiting action in the Assembly and turned it into a measure dealing with financial records in divorce cases.

It would require a court to seal certain financial records at the request of one of the spouses in a case involving divorce, marriage nullification or legal separation.

Murray's amendments, added to the bill on Feb. 16, followed a Jan. 20 decision by the state 2nd District Court of Appeal in a case involving billionaire Ron Burkle, who was trying to keep financial records in his divorce case sealed.

In that ruling, a three-judge panel found that a 2004 law cited by Burkle in his attempt to seal the financial records was "unconstitutional on its face."

"The First Amendment provides a right of access to court records in divorce proceedings," the court said in a decision written by Associate Justice Paul Boland.

"While the privacy interests protected by (the 2004 law) may override the First Amendment right of access in an appropriate case, the statute is not narrowly tailored to serve overriding privacy interests."

Murray's bill is narrower than the 2004 law. But it still would require a divorce court, at the request of one of the spouses, to seal or redact information about the couple's assets, liabilities, income, expenses or residential addresses.

Murray's office did not return a phone call Monday seeking comment. He told the San Diego Union-Tribune that the legislation, which is awaiting a hearing in the Assembly Judiciary Committee, is needed to protect privacy rights and avoid identity theft.

"There's too much financial information disclosed in a divorce that makes either party vulnerable to attack," he said.

He said neither Burkle, who has contributed to several Democrats and two campaign committees controlled by Gov. Arnold Schwarzenegger, nor his aides asked him to introduce the bill.

"Is he interested in it? Sure," Murray told the newspaper. "Clearly, his name is on the court case. Clearly, it's not lost on anybody that he's involved somewhere."

A spokesman for Burkle, Frank Quintera, also said Burkle didn't ask for Murray's legislation or the 2004 law.

"Mr. Burkle is neither the author or the sponsor of the (Murray) bill, and as far as I know has no comment on the bill," he told the Associated Press.

Fred Silberberg, a veteran Los Angeles family law attorney, said he suggested the bill to Murray following the appeals court decision.

"I don't believe the public has the right to know everything that goes on in a divorce proceeding," he said, adding that he hadn't heard of Burkle until the appeals court issued its decision.

He said the court found First Amendment problems with the 2004 law because it required a judge to seal an entire document if it contained financial information.

The Murray bill would only require a court to redact "that portion of the information that relates directly to the financial issues, such as an account number or the address of property," he said. "The old statute was the entire document."

But Tom Newton, general counsel for the California Newspaper Publishers Association, which joined the Associated Press and Los Angeles Times in challenging the 2004 law, said Murray's bill would still undermine the concept that court proceedings should be public.

"This throws the whole thing out by allowing one party to make it a private proceeding," he told the Union-Tribune.

Assembly committee considers bill limiting access to divorce records

- By STEVE LAWRENCE, Associated Press Writer
Monday, March 20, 2006

(03-20) 00:01 PST SACRAMENTO, (AP) --

An Assembly committee is scheduled to consider a bill on Tuesday that would require a judge overseeing a divorce to redact the couple's financial information from court records, if one of the spouses requests it.

Supporters tout the measure, which would also apply to legal separation and marriage nullification proceedings, as a way to protect personal privacy. Opponents see it as a threat to open courts and an outgrowth of the old issue of money influencing politics.

Critics contend it was introduced on behalf of Los Angeles billionaire Ron Burkle, a major campaign contributor who tried to keep financial records in his divorce proceedings sealed.

Both the bill's sponsor, Sen. Kevin Murray, and a spokesman for Burkle denied the supermarket mogul's divorce prompted the bill.

Murray, D-Culver City, said he generated the bill — actually he amended his legislation into a homeland security measure that had already passed the Senate — to shield affluent couples against identity theft and unjust publicity.

"There is too much financial information disclosed in a divorce that makes either party vulnerable to attack," he told the San Diego Union-Tribune recently.

The Legislature enacted a similar, although somewhat broader law in 2004, but a state appeals court, ruling in a case brought by Burkle to seal the records in his divorce, struck it down in January as a violation of the First Amendment.

Burkle, whose estimated personal wealth of more than $2 billion makes him one of the world's richest men, has appealed the decision to the California Supreme Court.

Opponents said the 2004 law was pushed through the Legislature to help Burkle, who has given money to Democrats and two committees controlled by Gov. Arnold Schwarzenegger.

The California Newspaper Publishers Association and groups that promote women's rights and public access to government records argue that Murray's new bill similarly goes beyond shielding personal financial information to infringe on the public's right to

access government records.

"It's the principle at stake here as to whether or not the courtroom doors are going to be open or shut," said Tom Newton, the CNPA's general counsel. "If you allow them to chip away at ... court proceedings and records, pretty soon you won't have open courts anymore."

Murray said Burkle did not ask him to sponsor the measure, although he conceded Burkle was interested in it. A spokesman for Burkle, Frank Quintera, also said that Burkle hadn't requested the legislation.

Fred Silberberg, a veteran Los Angeles family law attorney who said he didn't know Burkle, said he suggested the bill to Murray following the appeals court decision.

Murray didn't return telephone calls from The Associated Press seeking comment.

Peter Scheer, executive director of the California First Amendment Coalition, said that requiring the sealing of financial records could harm the interests of the couple's children, business partners, creditors and tax agencies.

"For couples who have assets, divorce is rarely just about the spouses' respective rights and obligation," he said in a letter to Murray.

The bill is supported by the Bar Association of California's family law section, which says it would "balance the public's right to know against the privacy needs of family law litigants to be reasonably and rationally protected."

An analysis of the bill by the staff of the Assembly Judiciary Committee concluded that it would also likely be found unconstitutional and recommended several amendments to keep it from being struck down by the courts.

One proposed change would require a judge, before redacting financial information, to find there was a "substantial probability" that the harm to privacy rights would outweigh the public's right of access.

Newton said the amendments wouldn't remove his group's opposition.

"We think there is already a ready mechanism in divorce cases to seal that information, but if they want to clarify that, we would be all ears," he said.

Also this week, the Senate Labor and Industrial Relations Committee is scheduled to hold a hearing on cutbacks in benefits for disabled workers stemming from workers' compensation legislation that Schwarzenegger pushed through in 2004.

The state Commission on Health and Safety and Workers' Compensation found last month that regulations adopted to implement the bill reduced the average cash award to permanently disabled workers by 50 percent.

On the Net:

and

www.assembly.ca.gov

www.senate.ca.gov

URL: http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/03/19/state/n131718S89.DTL

Today is Monday, March 20, 2006
Originally published Monday, March 20, 2006
Updated Monday, March 20, 2006

Measure fuels debate over divorce record privacy

State Sen. Kevin Murray from Culver City says his bill protects privacy. Opponents say it would impose secrecy on a public proceeding.

By Bill Ainsworth
Copley News Service

SACRAMENTO -- Billionaire Ron Burkle has tenaciously tried to keep records in his bitter divorce case secret, invoking a law that some claimed was designed specifically for his situation.

But two courts have declared that law unconstitutional.

Now a Culver City lawmaker is quietly trying to rush a bill through the Legislature that would restore key parts of the law and could help Burkle win his fight to keep his records out of public view.

State Sen. Kevin Murray said his bill, Senate Bill 1015, protects privacy.

"There's too much financial information disclosed in a divorce that makes either party vulnerable to attack," he said.

Opponents say the bill would impose secrecy on a public proceeding.

"There's a right of access to court proceedings. This throws the whole thing out by allowing one party to make it a private proceeding," said Tom Newton, general counsel for the California Newspaper Publishers Association.

Critics also claim legislators are acting on behalf of a wealthy donor. Burkle, a supermarket magnate, is a big contributor to Democrats and Republican Gov. Arnold Schwarzenegger. The original law was passed quickly as Burkle's divorce case was heating up.

Hillel Chodos, a lawyer who represents Burkle's wife, Janet, in their divorce case, said he believes that Burkle or his aides are behind the new legislation. But he said he has no direct evidence of a Burkle link.

"I'm indignant," Chodos said. "His basic idea is that if you have enough money, it doesn't matter what the courts say." A spokesman for Burkle did not return calls seeking comment.

Murray's bill, which will be heard Tuesday in the Assembly Judiciary Committee, would -- at the request of one party -- require a judge to seal the part of a court record that contains financial information.

Auburn Journal
A Gold Country Media Online Edition

Print Page

Monday, March 20, 2006 Last modified: *Sunday, March 19, 2006 8:53 AM PST*

Media challenges proposed divorce privacy bill

By: Jason Probst, Gold Country News Service

Privacy advocates are ginning up support to contest a bill that would seal financial records of divorce proceedings from public record.

SB1015, sponsored by Kevin Murray, D-Culver City, will be heard Tuesday in the Assembly Judiciary Committee. If passed there, it would go directly to the Assembly for a floor vote, then a vote of concurrence in the Senate, then Governor Arnold Schwarzenegger's desk.

Opponents of the bill cite a Jan. 20 decision in California's 2nd District Court of Appeal, in which a judge ruled unconstitutional a 2004 law that allowed billionaire Ron Burkle to seal partial records of his split with wife Janet Burkle - their divorce proceedings began in June 2003. The law was challenged in a lawsuit filed by the Associated Press, The L.A. Times and the California Newspaper Publishers Association.

According to media reports, Burkle is worth an estimated $2.3 billion, and has contributed millions to political candidates - the bulk of it to Democrats - though he has reportedly donated $200,000 to Gov. Schwarzenegger's various campaigns.

Tom Newton, general counsel for the California Newspaper Publishers Association, said SB1015 was "tailor-made to address the problems of Ron Burkle... who I think sincerely believes he is entitled in California to a private divorce."

SB1015 was originally a homeland security bill sponsored by Sen. Gloria Romero, but has since become a "gut and amend" bill, said Newton, who said that Assemblyman Murray replaced the original version with the current contents.

Newton and media advocates are hoping to raise public awareness to contest the bill at Tuesday's committee hearing.

"This is really the only opportunity for the public to stand up and say this is not a good idea," Newton said. "Open divorce records allow the public to determine for itself whether or not the courts are operating in a fair and just manner. If you close the door of a courtroom, or you seal the records of the court proceedings, or evidence associated with a trail, then you completely disable the public from performing its watchdog role. It's exactly the same if you shut the doors of the city council meeting or the doors of the state legislature. Once you start doing that then the public will lose confidence (in these institutions)."

In an email response to the Los Angeles Business Journal on the issue, Ron Burkle expressed a decidedly different feeling about whether financial details in divorce records should be available for public consumption.

"In a divorce, people's entire lives are cut open and exposed," Burkle wrote. "I don't believe that a reporter's curiosity outweighs an individual's right to privacy and the right to protect oneself from identity theft."

Local Republican legislators, including Sen. Dave Cox, and Sen. Sam Aanestad declined comment on the bill.

Assemblyman Tim Leslie, R-Tahoe City, said he backs SB1015.

"It seems reasonable to me. My feelings aren't all that strong, but I don't see why it's anyone's business what the circumstances are between a divorcing couple," Leslie said. "I don't know why people think they have the right to pore over their personal records."

Senator Debra Bowen, D-Redondo Beach, has reservations about the bill even though she's one of the most strident privacy advocates in the State Legislature.

Bowen has sponsored a number of privacy protection bills, ranging from fighting junk faxes to tightening data theft reporting requirements for companies that gather and sell sensitive personal information.

"Trying to achieve the right balance between a person's right to privacy and the public's right to know is one of the toughest challenges we face," Sen. Bowen said. "Divorce records have traditionally been open to the public, so any move to put a veil over some of the information in the proceedings should have to meet a pretty high bar. Clearly, information such as bank and credit card account numbers that are like gold to an identity thief need to be kept confidential, but I don't think balances and a person's net worth meets that same test."

Close Window

Date of Hearing: March 21, 2006

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 1015 (Murray) – As Amended: March 9, 2006

SUBJECT: FAMILY LAW: PRIVACY REQUESTS IN DIVORCE CASES

KEY ISSUES:

1) SHOULD THE PARTIES' FINANCIAL INFORMATION GENERALLY BE KEPT SECRET IN DIVORCE PROCEEDINGS, UPON REQUEST BY EITHER PARTY?

2) IS THIS PROPOSAL, WHICH REQUIRES THE COURT TO REDACT FINANCIAL INFORMATION WITHOUT AN OPPORTUNITY FOR THE COURT TO BALANCE THE PUBLIC RIGHT OF ACCESS TO COURT DOCUMENTS AGAINST THE INDIVIDUAL INTERESTS OF THE PARTY SEEKING PRIVACY, SUFFICIENTLY NARROWLY TAILORED TO COMPLY WITH THE FIRST AMENDMENT?

3) HOW MIGHT THE BILL BE AMENDED TO BETTER COMPORT WITH THE CONSTITUTIONAL DICTATES ENUMERATED IN THE RECENT APPELLATE COURT CASE?

SYNOPSIS

This bill seeks to address complex constitutional concerns raised recently in the case of Burkle v. Burkle. In that case, the appellate court held that family court records containing personal and financial information could only be sealed from public view if a four-part "public access" test set forth by the California Supreme Court in NBC v. Superior Court could be satisfied. Applying this test, the court found that Family Code Section 2024.6, which the Legislature enacted in 2004 to protect the privacy of divorcing couples, painted with too broad a privacy brush, and therefore is facially unconstitutional under the First Amendment. The appellate court stated that, by requiring a family court, upon request, to seal the entirety of court pleadings which listed any financial information about the requesting parties, Family Code Section 2024.6 violated two of the NBC constitutionality requirements. Specifically, the court held that: 1) the broad sealing required in the current version of the statute is not sufficiently narrowly tailored to serve the stated "overriding interest" of avoiding identify theft and other crimes; and 2) there is a "less restrictive means" available for achieving those objectives, namely, the targeted redaction of specific financial or other information that could reasonably be shown, on a case-by-case basis, to increase the risk of identify theft or others crimes.

This bill seeks to modify Family Code Section 2024.6 principally in two ways. First, the measure sets forth (unlike its predecessor legislation) specific legislative findings to support the contention that parties to a marital dissolution have an overriding interest in being able broadly to protect their private financial lives from press and public view. Second, the bill seeks to retain the existing presumption in favor of allowing a party in a divorce proceeding to shield all of his or her financial information, but instead of requiring entire pleadings to be shielded, the measure calls for the mandatory redaction, or marking out, of only those parts of court documents that list any financial information about the petitioning party.

In support of the bill, the author states that while open records principles should generally govern court records, the simple fact that people get divorced in our society should not mean they lose their right to financial privacy. Also in support, the Family Law Section of the State Bar writes that the bill properly balances the public's right to know against the privacy needs of family law litigants.

Notwithstanding the bill's proposed statutory changes, however, this analysis concludes that, absent the substantial amendments recommended in the analysis, it appears likely a court would find the proposed measure continues to possess the constitutional flaws identified in the recent appellate decision. The analysis therefore recommends for the author's and the committee's consideration that the measure be amended to, most importantly, replace the bill's current presumption in favor of privacy for all financial information with the Burkle court's required balancing test that retains the court's discretionary ability to determine, on a case-by-case, fact specific basis, whether the party who is requesting the shielding of his or her financial information has adequately shown "a substantial probability of prejudice to the requesting party's privacy interest of higher value that outweighs the public's right of access to the court records." The analysis also recommends additional amendments to address the bill's treatment of the "private judging" issue.

As they did with the original legislation enacting Family Code Section 2024.6, a plethora of media organizations strongly oppose this bill, stating, among other things, that the measure continues to paint with far too broad a secrecy brush, and that the bill, like its predecessor, will again quickly be found to be a facial violation of the First Amendment due to its broad sweeping and mandatory nature. The National Organization for Women also opposes the bill, as do the Coalition of Family Equity, and the Commission on the Status of Women. Several First Amendment-oriented organizations also oppose the legislation.

SUMMARY: Seeks to modify the existing statute designed to shield financial information in marital dissolution cases to address a finding of unconstitutionality made by the appellate court in the recent decision of *Burkle v. Burkle*. Specifically, this bill:

1) States legislative intent and findings including that existing law does not adequately protect the right of privacy in dissolution or nullity of marriage or legal separation proceedings, and that the Legislature intends to more fully protect that right; that in the context of divorce proceedings, the unnecessary public disclosure of financial assets, liabilities, income or expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records; and that the redaction of documents containing such information is the least restrictive means of protecting the financial privacy of the parties while recognizing the public's right of access to court records.

2) Provides that, notwithstanding any other provision of law, upon request by either party to a proceeding for dissolution or nullity of marriage or legal separation, the court shall order redacted any portion of a pleading containing the parties' financial assets, liabilities, income or expenses or provides the location of, including a residential address, or identifying information about those assets, liabilities, income or expenses. Requires that, subject to the direction of the court, no more of any pleading than is necessary to protect the parties' overriding right to privacy may be redacted. Requires that pleadings include any document

that sets forth assets, liabilities, income or expenses, a marital settlement agreement or any document attached to such an agreement that lists financial information. The request may be made by *ex parte* application, and any pleading sealed or redacted pursuant to this procedure may not be restored except upon petition to the court and good cause shown.

3) Authorizes a privately-compensated temporary judge to order pleadings redacted under #2, above.

4) Requires that the party making the request to redact a pleading serve a copy of the pleading containing the financial information subject to the request on the other party and file a proof of service with the request to redact.

5) Does not preclude a law enforcement or government regulatory agency, otherwise authorized, to access the unredacted pleadings.

EXISTING LAW:

1) Provides that Congress shall make no law abridging the freedom of speech, or of the press. (U.S. Constitution, First Amendment.)

2) Explicitly and specially protects the right to privacy of all Californians under the California Constitution. (California Constitution, Article I, Section 1.)

3) Provides that court proceedings shall be public, except as provided in Family Code Section 214 or other provisions of law. (Code of Civil Procedure Section 124.)

4) Provides that records may only be sealed by establishing an overriding interest that overcomes the right of public access, among other factors. These court rules also provide that no record may be sealed solely by the stipulation of the parties. (Cal. Rules of Court R. 243.1)

5) Provides that any electronic record in proceedings under the Family Code, including dissolution of marriage, should not be available to the public by remote Internet access. (Cal. Rules of Court R. 2073(c).)

6) Provides that when a case is heard by a privately compensated, temporary judge, a motion to seal records must be decided by the presiding judge or judge designated by the presiding judge. (Cal. Rules of Court R. 244.)

7) Provides that the court may, when it considers it necessary in the interests of justice, direct the trial of any issue of fact joined in a family law proceeding to be private, and may exclude all persons except the officers of the court, the parties and their witnesses and counsel. (Family Code Section 214.)

8) Requires the court, upon request by a party in a dissolution or legal separation, to seal any pleading that list the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities. Upon petition, allows the court to unseal pleadings if "good cause" is shown. (Family Code Section 2024.6.) Holds Family

Code Section 2024.6 unconstitutional under the First Amendment. (*Burkle v. Burkle* (January 20, 2006) 135 Cal.App.4th 1045.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill raises thorny and controversial issues regarding our state constitution's special privacy protection on the one hand, and our concomitant federal and state constitutional commitments to maximize open access to court proceedings on the other. Just two years ago, in 2004, the Legislature passed by strong bi-partisan votes, and the Governor signed, urgency legislation which established a new mechanism for divorcing or separating parties to require family courts to seal entire pleadings that contained any of their financial information. (SB 782 (Kehoe), Ch. 45, Stats. of 2004.) The stated purpose of that earlier bill was to protect divorcing couples from being forced to expose their private financial information to public view solely because they were getting divorced. On January 20, 2006, however, the Second District Court of Appeals, based in Los Angeles, held that the key provision of SB 782, Family Code Section 2024.6, was an unconstitutional violation of the First Amendment's right of public access to court proceedings. This bill seeks to address the court's declared constitutional infirmities in Family Code Section 2024.6 by, among other things, adding legislative findings including that unnecessary public disclosure of financial information in a dissolution proceeding outweighs the public's right to access court documents and proceedings, and by modifying Family Code Section 2024.6 to require targeted redaction of all financial information rather than broad sealing of entire court documents.

Notwithstanding the proposed statutory changes, however, this analysis concludes below that, absent the amendments recommended, it appears likely a court would find this proposal continues to possess similar constitutional flaws identified in the recent appellate decision.

Author's Arguments in Support: According to the author, while open records principles should generally govern judicial records and court proceedings, the time has come to make a carefully-tailored exception for records and information in divorce cases that affect only the parties to the dissolution or legal separation. The author cites numerous anecdotes not only of stolen identities but also of intrusive and allegedly unjust media publicity about divorcing couples with substantial assets. In most cases, the author states, the public clearly has no need to know what assets a divorcing couple have accumulated, where those assets are located, and how those assets are to be divided.

The Long-Standing First Amendment Right of Public Access: Though the constitutional right of access to civil proceedings is not as well-developed as the right to attend criminal proceedings, federal courts that have addressed the question generally have held that the First Amendment provides a right of access to federal civil proceedings, and that the First Amendment carries with it "some freedom to listen." According to one federal court, "[T]he [same] policy reasons for granting public access to criminal proceedings apply to civil cases. These policies relate to the public's right to monitor the functioning of courts, thereby insuring quality, honesty and respect for our legal system." (*In re Continental Illinois Securities Litigation* (1984) 732 F.2d 1302.)

The *Press-Enterprise* Cases: The U.S. Supreme Court, in a series of cases brought by the *Press-Enterprise* newspaper, has articulated a test to determine whether the First Amendment right of access applies to proceedings outside of the criminal trial. The two-part test asks "whether the place and process have historically been open to the press and general public," and "whether

public access plays a significant positive role in the functioning of the particular process in question." (*Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1.) Generally the courts have concluded that the First Amendment right of access therefore applies to civil proceedings as well as criminal proceedings. They have also concluded that the First Amendment right of access equally applies to court documents as well as court proceedings.

California's Dual Tradition of Access and Privacy: It is also well-established policy in California to allow maximum public access to judicial proceedings and records. (*Estate of Hearst* (1977) 67 Cal. App. 3d 777.) Cases have held that "judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons." (*Pantos v. City and County of San Francisco* (1984); *Champion v. Superior Court* (1988).) However California also has a long tradition of recognizing and protecting privacy. Unlike many states, as noted above our state constitution specifically and specially recognizes the right to privacy. In addition, our courts, including our Supreme Court, have specifically extended our right of privacy to financial privacy. (*Valley Bank of Nevada v. Sup. Ct.* (1975) 15 Cal.3d 652, 656.)

Some Precedent for Court Closure in Certain Family and Other Types of Cases: While California has historically sought to allow maximum public access to judicial proceedings and records, it is also important to note there have been some careful statutory exceptions to this tradition. These include dependency actions (Welfare & Institutions Code Sections 300.2, 346, 350, 827), paternity actions (Family Code Section 7643), adoptions (Family Code section 8611), mediation of custody and visitation rights (Family Code section 3177), and conciliations (Family Code section 1818). Other proceedings may be closed at the discretion of the court, e.g., custody hearings (Family Code section 3041). In these family-related instances, the Legislature has determined that it is necessary to close these proceedings in order to protect the participants from harm that could result from public intrusion into very private matters. In addition, mental health hearings under the Lanterman-Petris-Short Act to establish a conservatorship or force an involuntary commitment may be closed, unless a public hearing is requested by a party to the proceedings. (Welfare & Institutions Code section 5118.) Finally, our courts also have statutory authority to take broad steps to protect trade secrets. (Civil Code section 3426.5.)

The Controlling California Case of *NBC v. Superior Court*: As noted, the seminal state Supreme Court case on public access to civil proceedings which controls the constitutional analysis of this legislation is *NBC Subsidiary (KNBC-TV) Inc. v. Sup. Ct.* (1999) 20 Cal.4th 1178, written by Chief Justice Ronald George. In that case, Sondra Locke sued Clint Eastwood for deceit, intentional interference with prospective economic advantage and breach of fiduciary duty, based on an alleged promise by Eastwood to Locke to assist in the development of various movie projects. Out of express concern to ensure a fair trial given the intense press interest in the case, the trial court ordered that all proceedings which occurred outside the presence of the jury be closed to the public and to the press. On appeal, however, the appellate court found the trial court's closure order to violate the First Amendment. The appellate court directed the trial court to vacate the secrecy order, and the California Supreme Court then affirmed the appellate court's "open access" order and held that First Amendment scrutiny is triggered by the closure of civil proceedings.

Under the *NBC* test adopted by our Supreme Court, which is largely consistent with the tests adopted by the federal courts, civil proceedings and records in California cases, whether civil or criminal, are presumed to be open to the public and the press. In order to close a trial or a

hearing, or in order to seal court records, there are two basic requirements that must be met: (1) The court must make sure that the public is given notice of the possible closure or sealing, and must hold a hearing; and (2) the court must make a number of findings in order to justify a decision denying access. The notice requirement is not a rigorous one. If a motion to close court proceedings is made in open court during a hearing, the trial judge must announce in open court that he or she intends to close the proceeding. If a motion is made in writing, the motion must be included on the public docket of the case prior to being decided. The Supreme Court then set forth a four-prong test, discussed below, that would, as with the earlier challenge of Family Code Section 2024.6, determine the constitutionality of this measure.

The Recent *Burkle* Appellate Decision: In June of 2003, Janet Burkle filed for dissolution of her marriage to Ronald Burkle. Mr. Burkle thereafter moved to seal financial information in various pleadings. The court redacted certain financial information it concluded could risk injury to the parties, such as addresses and account numbers, but not other information, such as asset account balances. After the Legislature passed SB 782 as an urgency measure in May 2004, Mr. Burkle sought to seal several dozen pleadings in his case. On February 28, 2005, instead of sealing the pleadings as requested, the trial court found that Family Code Section 2024.6 violated the First Amendment, and gave Mr. Burkle sixty days to appeal the decision, which he did. In a decision filed two months ago, on January 20, 2006, the Second District Court of Appeals agreed with the trial court that Family Code Section 2024.6 was an unconstitutional violation of the First Amendment. Mr. Burkle then sought review by the California Supreme Court on February 27, 2006, and the decision by the State Supreme Court, either granting or denying review of the court of appeal decision, is pending.

In its holding, the Court of Appeal in the *Burkle* case first determined that the well settled principle that civil court proceedings are presumptively open to the public, as set forth in *NBC v. Superior Court* (supra) applies "with equal force in divorce cases as in any other ordinary civil case." (*Burkle* at 10.) In reaching that conclusion, the court noted, based on the U.S. Supreme Court analysis in *Globe Newspapers Co. v. Superior Court* (1982) 757 U.S. 596, that divorce proceedings have historically been open to the public, and, additionally, there is institutional value to having such proceedings generally open to the public. The court noted that public access to civil proceedings including divorce cases enhances public confidence in the judicial system, provides the public with the ability to scrutinize the proceedings, places a check on judicial power, and enhances truth finding.

As a result of the presumption of openness to divorce proceedings, the *Burkle* court determined that court records could only be sealed if the four-part test set forth by the California Supreme Court in *NBC* (noted above) could be satisfied. Specifically, that test holds that mandatory sealing of court records is permissible only if: (1) there is an overriding interest to support the sealing; (2) there is a substantial probability of prejudice to that interest absent sealing; (3) the sealing required is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means available to achieve the overriding interest. The court then concluded that the first prong of the test could be satisfied in the challenge to Family Code Section 2024.6 by the overriding interest of protecting privacy, particularly of avoiding identify theft or other crimes relating to the misuse of personal financial information. The court appeared less comfortable with the argument that the statute satisfied the second prong of *NBC* – that sealing the records would prevent identity theft and other abuse – but following established constitutional principles it deferred to the Legislature's judgment on that point.

However the *Burkle* court found that Family Code Section 2024.6 failed both the third and fourth prongs of the Supreme Court's *NBC* constitutionality test. The mandatory sealing of all pleadings that contain financial information, the court found, goes far beyond preventing identity theft and other potential crimes:

> The reach of the statute extends far beyond the overriding interest in protecting divorcing litigants from identify theft, kidnapping, stalking, theft or other financial crimes . . . . It is plainly not narrowly tailored to seal only information which arguably presents a risk of identity theft or other misuse, such as credit card numbers, account numbers, social security numbers and the like. (*Burkle* at 13-14.)

Moreover, determined the court, the *ex parte* application for sealing allowed by Section 2024.6 (which, like the current bill, permitted a party to seek a court order on shortened notice and with limited or no opportunity for the other side to oppose) failed to allow for the "particularized determinations in individual cases" necessary to ensure that the statute satisfies constitutional requirements. (*Burkle* at 14, quoting *Globe*.) Most importantly for purposes of this legislation, the *Burkle* court noted that Family Code Section 2024.6 failed to allow for any judicial discretion when making these privacy determinations, but instead mandated that the court, upon petition by either party, to seal the entire documents that contained any of the information. Finally, the court held that the fourth prong of the test failed because there was a far less restrictive means of protecting the release of the information rather than wholesale sealing of entire pleadings. The court stated that the redaction (or marking out) of the specific financial information to be protected could protect the privacy of the information while still permitting access to the remainder of the document.

Current Law Already Appears to Allow for the Redaction Of Social Security Numbers, Bank Account Numbers And Address Information: In evaluating the need for this measure, some have inquired about the status of current law regarding the ability for divorcing parties to protect the confidentiality of their social security numbers and other highly sensitive identifying information. It is therefore important to note that it appears clear that absent this legislation and, indeed, absent Family Code Section 2024.6, current law already allows for the redaction of social security numbers from any pleading or other document filed with the court in a dissolution, nullity of marriage or separation proceeding, except a document created for purposes of collecting child or spousal support. (Family Code Section 2024.5.) And other sensitive identifying personal information, such as bank account numbers and residential addresses, appear to already be subject to possible redaction upon request by a party, under Rule of Court 243.1 (noted above).

In Its Current Form, It Appears Unlikely This Bill Would Be Found To Satisfy the Constitutional Requirements Set Forth In The *Burkle* Case: The author argues that this bill is narrowly tailored to survive constitutional attack. He argues that the bill narrowly, and appropriately, protects the financial privacy of divorcing litigants, and that the redaction required in the proposal is limited to no more than is necessary for that purpose.

In any constitutional analysis of a legislative act, it is well established that the Legislature is vested with the power to determine whether a matter serves a public purpose. Legislative findings are to be given great weight by the courts, and are to be upheld unless found to be arbitrary and unreasonable. Indeed, courts must presume a legislative act is constitutional,

resolving any doubts in favor of the act's constitutionality, unless there is clear and unquestionable conflict between the legislative act and the state or federal constitution. (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal. 4th 1252.) Given this, a court must give great weight to this bill's findings regarding the privacy of financial information in dissolution proceedings, and must presume that the bill is constitutional.

Following the *Burkle* case, it is clear that protection of at least some of an individual's sensitive financial information is an overriding state interest, thus satisfying the first prong of the test. The state surely has an overriding interest in protecting individuals, including divorcing parties, from identity theft, kidnapping, harassment and other abuse that could occur with the release of certain sensitive financial information. However the key question here is precisely what sensitive financial information will a court find could, if compromised, reasonably be found to increase the risk of identity theft and other crimes. This certainly would appear to be the case with social security numbers, bank account numbers and residential addresses, where release of the information could doubtless facilitate the commission of financial crimes. It is not nearly as certain, however, that a court would accept a legislative declaration that public access to such general financial information as the types and amounts of assets and liabilities, and the basic income, of divorcing parties, could similarly lead to significant harm. As the bill's news organization opponents state, the bill "makes no distinction between the sealing of a social security or bank account number on the one hand and the sealing of the identity of a basic community asset, such as a 1984 Oldsmobile Cutless Supreme on the other. It's hard to imagine significant issues of identity theft or even grand theft would arise from disclosure of this asset information. Yet, under [the bill], a court would be barred from refusing to seal a record that listed the old Olds." To the extent this legislation requires family courts to treat all financial information about the parties identically for purposes of secrecy (requiring redaction), it therefore appears possible that the measure might be found to be constitutionality deficient even as to the "overriding interest" prong.

Regarding the second prong of the *NBC* test, the measure, as noted, requires the court, upon request of either party, to redact any portion of a pleading with specified financial information. Contrary to the appellate court's admonition in *Burkle*, under this bill there appears to be no ability of the court to make an individualized determination of the probability of prejudice to the party's privacy interest, and whether that individual privacy interest overrides the public's "right to know" in the particular case. Instead, based on the legislative finding that unnecessary public disclosure of financial information raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right to know, the measure requires the court to order all such information redacted. This determination is automatic, upon request of a party, and as noted above, such request may even be made through *ex parte* application. The information may only later be restored upon a petition to the court, with the burden of showing "good cause" for making the unknown information public placed on the party seeking openness rather than on the party seeking privacy. Given that under this bill a court apparently could not weigh the substantial probability of prejudice to the overriding interest, but must instead simply order the redaction, it seems likely that this bill would be found to violate the second prong of the *NBC* constitutionality test outlined in *Burkle*. In addition, it could also be found that the bill's placement of the burden of proof on the party seeking open access also is violative of the First Amendment.

Turning to the third prong of the *NBC* test, the bill must be narrowly tailored to serve the overriding interest in protecting the financial privacy of divorcing couples. Again, given the

bill's requirement that the court must redact financial information simply upon request from one of the parties, without the ability to make an individualized determination on the substantial probability of prejudice to the requesting party's privacy interest that outweighs the public's right of access, the bill similarly does not appear to satisfy the third prong of the *NBC* constitutionality test. While the bill may protect the financial information of divorcing couples, without a case-by-case determination, it is unclear if that privacy interest overrides the public's right to access court records in a particular case, a seminal requirement set forth in the *Burkle* case. In addition, since this bill appears to apply not only to pleadings filed by the parties, but to all documents in the case, including, potentially, the court's own judgment, the measure could be found to be overbroad.

Finally, the last prong of the *NBC* constitutionality test requires that there are no less restrictive alternatives than redacting the records in question. Assuming that a court will accept, as the *Burkle* court did, that there is an overriding interest in keeping all financial information in divorce cases private (see discussion above), it would appear likely that the court would conclude that the redaction method in the bill is the least restrictive alternative available to protecting that information.

Case Law Required Amendments for the Author's, and the Committee's, Consideration: Based upon the above application of the *NBC* public access requirements, it appears that to improve the chances that this bill would survive future constitutional challenge, the bill should be amended substantially as follows:

Suggested Amendment #1

Fundamentally, based on the legal analysis of the bill above under the *NBC* First Amendment test, the Committee may wish to discuss with the author his openness to amend the measure to require that, before a court may order redaction, it must make an individualized determination that the party requesting redaction has made a showing of substantial probability of prejudice to the party's privacy interest that outweighs the public's right of access to the information. As the *Burkle* case requires, such a court determination cannot be automatic, but instead must be made only when the party requesting redaction has made the required showing. Therefore, should the Committee wish to pass this bill, it may wish to discuss with the author adding the following "balancing test" amendment to Section 2024.6(a):

On page 3, line 15:

> Section 2024.6(a) Notwithstanding any other provision of law, upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, and upon a showing of substantial probability of prejudice to the requesting party's privacy interest that overrides the public's right of access to the court's records, the court shall order redacted any portion of a pleading that lists the parties' financial assets, liabilities, income or expenses. Subject to the discretion ~~direction~~ of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy.

Suggested Amendment #2

In addition, in order to ensure that the bill is narrowly tailored to serve the overriding interest of protecting the divorcing couple, the Committee may also wish to limit the definition of pleadings to only those documents filed with the court. This would ensure that court judgments and other court documents are accessible to the public.

On page 4, line 3:

> (c) For purposes of this section, "pleading" means a document filed with the court that sets forth or declares the assets, liabilities, income or expenses of one or both of the parties, ~~including, but not limited to~~ a marital settlement agreement that lists and identifies the parties' assets, liabilities, income or expenses, ~~exhibits, schedules, transcripts,~~ or any document incidental or attached to any declaration or marital settlement agreement that lists or identifies financial information.

Suggested Amendments for the Author's and the Committee's Consideration Regarding The Authority Of Temporary Judges And Other Privately Compensated Judges To Redact And Seal Court Records: As noted above, this bill applies not only to proceedings conducted by regular public judges, but also to matters involving a variety of non-public judges who are compensated by the parties. The use of privately-compensated nonpublic judges may arise in two ways: either by stipulation of the parties to have the matter (or some discrete part of the case) heard and decided by a temporary judge or referee pursuant to Court Rule 244 and 24.1, or by court appointment of a referee pursuant to Code of Civil Procedure section 639. These privately-compensated temporary judges and referees are lawyers who are temporarily given virtually all of the powers of a public judge – although not the power to seal records, as explained below. They are likewise subject to most, but not all, of the rules of judicial ethics. (See Code of Judicial Ethics Canon 6D (temporary judges and referees are not subject to Canons 2C, 3C(5), 3E(3), Canon 4 and Canon 5.)

When privately-compensated judges and referees are used, the proceeding is typically conducted in a private office away from the court. Even where proceedings are conducted away from the courthouse, however, pleading and other court records in these cases are supposed to be filed with and maintained by the court, and to be treated as public records just as they would be if the matter were heard by a public judge. (Rule of Court 243.) Nevertheless, controversy has sometimes arisen regarding docketing of court records and compliance with public access requirements in cases handled by privately compensated temporary judges. (See, e.g., Divorces from Private Judges Raise Issue, *Daily Journal*, February 28, 2006.)

Perhaps because these proceedings are often conducted in private – and because privately-paid judges may have, or may be perceived to have, inherent financial incentives to satisfy parties for the purpose of obtaining future appointments, unlike public judges who are free to weigh the competing public and private interests without a pecuniary stake in the outcome – Rules 244 and 244.2 prevent privately-compensated judges and referees from sealing records. Thus currently a request to seal records in these cases must be heard by the presiding judge or a judge designated by the presiding judge.

It also appears worth noting that divorcing parties choosing to opt out of the public court system and use a private arbitrator or referee to resolve their conflict have significantly greater privacy protections. These parties, upon agreement, can keep most financial matters out of the court system and out of the public's view. Parties can even agree upfront to forgo their access to the

public court system in a prenuptial agreement. This has already led to the charge that California has two tiers of justice – the private system for wealthier individuals, and the public system for everyone else. The credibility of the court system depends, in part, on its perception of fairness for all Californians. It would therefore appear to be an undesirable result to give additional incentives for famous or wealthier individuals to avoid the public court system, and, therefore, the state has a strong interest in not discouraging use of the public court system.

Suggested Amendment #3

Because this measure changes the current rules regarding sealing of court records for "private judging" only for marriage cases, and because the proposed change appears at odds with maximizing public access to the courts, the Committee may also wish to discuss with the author his openness to amend the bill's "private judging" changes by deleting proposed subdivision (d) of section 2024.6 on page 4, lines 11-14.

ARGUMENTS IN SUPPORT: As noted above, the Family Law Section of the State Bar (known as Flexcom) is in support of this measure, writing, in part, that the bill "properly balances the public's right to know against the privacy needs of family law litigants to be reasonably and rationally protected in their persons and estates." The Bar section also recommends that the bill be amended to make it clear that its "confidentiality" protections apply to any proceeding dissolving a domestic partnership relationship recognized under the California Domestic Partner Rights and Responsibilities Act of 2003 (AB 205, effective January 1, 2005).

Though not commenting on this particular legislation, it is also worth noting that a leading judicial expert in California has recently opined that in his view, personal information in dissolution proceedings should generally be treated as confidential. Judge Leonard Edwards, a highly respected superior court judge in Santa Clara County and a past president of the National Council of Juvenile and Family Court Judges, recently wrote a detailed and thoughtful article on confidentiality in family and juvenile courts, stating that while in general family court records should be open and accessible:

> In marital dissolution cases, the public interest is questionable. What public interest is served by learning how two married persons divide their property, settle alimony (spousal support) issues or share time with their children? Have people given up their right to have some aspects of their lives remain private simply by filing a legal action to dissolve their marriage? These should be private matters between the parties. . . . [C]ourt records regarding the filing of a marital dissolution and the entry of a final decree should be a part of the public record, accessible to the public, but the details of the property settlement and the alimony need not be public. (Judge Leonard Edwards, Confidentiality and the Juvenile and Family Courts, *Juvenile and Family Court Journal* (Winter 2004).)

ARGUMENTS IN OPPOSITION: The California Newspaper Publishers Association (CNPA), on behalf of many news organizations statewide, opposes the bill, arguing that it will, like its predecessor, be found unconstitutional on its face. CNPA also opposes the part of the measure allowing privately compensated, temporary judges to redact private financial information, arguing that the bill favors the wealthy who desire secrecy: "For those litigants who can afford to hire a "temporary" judge at $375-an-hour to hear their divorce, [the] bill allows those litigants to demand that their privately paid temporary judge seal their divorce court papers. Because

there is little oversight of these temporary judges who are privately paid, we believe that this would lead to unchecked secrecy for wealthy divorcing couples."

An attorney representing Ms. Burkle wrote the Committee stating, among other things, that the bill violates both the separation of powers doctrine, because it purports to limit the powers of the courts, and equal protection principles, by applying only to parties to a dissolution, and not to all litigants.

California Aware, a non-profit organization group dedicated to protecting public access, states in opposition that the latest amendments in the bill "do nothing to save the bill from the fatal First Amendment defects identified in *Burkle*... The approach to the suppression of information by 'redaction' rather than 'sealing' presents a distinction without a material difference."

The California First Amendment Coalition states that the bill violates First Amendment rights because "[r]edactions of specified information would be just the beginning. That information would remain at issue in hearings in divorce cases. Maintaining the confidentiality of redacted information will, therefore, require not only the alteration of records, but also the closing of proceedings that historically have been fully open to the public."

The California NOW chapter also opposes the bill, stating, among other things, that "[o]pen and honest disclosure [required in divorce cases] can only be effective if there are real deterrents against it. The incentive to omit, mislead or fabricate increases where there is less likelihood that the truth or accuracy of information will be scrutinized..." The Coalition for Family Equity also states in opposition that the measure "promotes new levels of secrecy in divorce proceedings above and beyond what is reasonably necessary for protection of the participants."

Judicial Council Concerns: The Judicial Council has not yet taken a position on this measure. However it wrote the Committee stating a host of concerns, including that the bill's redaction requirements will increase the workload of family courts and it would "consume significant amounts of judicial officer time."

REGISTERED SUPPORT / OPPOSITION:

Support

Family Law Section of the State Bar (Flexcom)
Fred Silberberg of Silberberg & Ross, L.L.P.

Opposition

California Aware
California Commission on the Status of Women
California First Amendment Coalition
California National Organization for Women
California Newspaper Publishers Association
Coalition for Family Equity

Analysis Prepared by: Drew Liebert and Leora Gershenzon / JUD. / (916) 319-2334

Politics

Bill would shield divorce details

The meas e, touted as a defense against identity theft, helps billi aire, foes say.

By John Hill Bee Capitol Bureau
Published 2 am PST Saturday, March 18, 2006
Story appea on Page A3 of The Bee

First Amendment advocates are gearing up to fight a new version of a bill that would limit access to divorce records, a move they say would erode the public's ability to monitor judges and caters to one influential constituent: billionaire supermarket baron Ron Burkle.

Backers of the bill, SB 1015 by Sen. Kevin Murray, D-Culver City, say it is needed to guard against identity theft and to preserve the privacy of parties in contested divorces.

"Why should it be invaded?" just because someone ends up in divorce court, asked Fred Silberberg, a Los Angeles lawyer and certified family law specialist who drafted the bill.

Opponents call it a warmed-over version of a 2003 bill that allowed parties in divorces to request the sealing of court pleadings listing their assets.

At the time, the bill was seen by many as a favor to Burkle, a major campaign contributor to both parties. After the law passed, Burkle cited it in his own divorce case in 2004 in asking the court to seal 28 pleadings. That led the Los Angeles Times and the Associated Press to contest the law.

In January, a state appeal court found it unconstitutional. The case is on appeal

to the California Supreme Court.

"The First Amendment provides a right of access to court records in divorce proceedings, just as in other ordinary civil cases," Associate Justice Paul Boland wrote.

Guarding against identity theft might warrant that kind of restriction, Boland wrote. But the 2003 law was too broad an incursion on the First Amendment.

SB 1015 fixes that problem, Silberberg said, by just targeting financial information within pleadings, rather than requiring the court to seal the entire document.

Opponents say that the differences are meaningless.

Divorce cases only address two issues: child custody and dividing up assets, said Tom Newton, general counsel for the California Newspaper Publishers Association.

Allowing financial information to be kept secret, he said, amounts to closing off much of the substance of a case from public scrutiny.

"We don't think this is narrow at all," Newton said of Murray's bill. "It takes the entire case and puts it behind a smoke screen."

The reason the public needs to have access, Newton and others say, is to assess whether courts are handling divorce cases fairly.

"It doesn't matter if it's a divorce case or a murder case," he said. "Does the public have a way to know that justice is being done in every case?"

The California National Organization for Women opposes the bill because it wants the public to be able to see that divorce judges aren't biased against women, who are often at a financial disadvantage in court, said legislative director Jodi Hicks.

"Without full disclosure of the settlement, what other recourse do you have?" Hicks asked.

Critics say the bill strips judges of discretion to decide case by case whether information should be blacked out.

And they say the law is unnecessary. Parties in divorce cases can already ask that sensitive financial information such as Social Security numbers and account numbers be withheld.

"The only plausible purpose of this legislation is to keep information about one

billionaire's finances out of the public eye," said Terry Francke, general counsel for Californians Aware, a nonprofit group that promotes open government.

View All Top

Silberberg said judges would still have to look through court records and decide how to apply the law. And while many judges may already black out sensitive financial information, courts around the state have a variety of local rules, he said, not all of which protect financial privacy.

A small but growing number of states, he said, are limiting access to divorce records or proceedings. New York has been keeping divorce information confidential for 200 years.

Contrary to charges that the bill is designed to benefit Burkle, Silberberg said he knew nothing about the supermarket magnate's connection to the earlier law until the court of appeal decision in January. He said he made some calls to Sacramento to find a potential author of the bill, and settled on Murray because of earlier legislation the Culver City Democrat did to address identity theft.

Silberberg said he's worked only with Murray's staff, and has had no contact with Burkle.

Murray and Burkle did not return phone calls seeking comment.

"We're neither the sponsor nor the author of the bill," said Burkle spokesman Frank Quintero.

The bill will be heard Tuesday by the Assembly Judiciary Committee. The chairman of the committee, Dave Jones, D-Sacramento, did not respond to calls seeking comment. His office said that he generally doesn't discuss legislation prior to committee hearings.

A committee analysis of the bill concluded that it would have to be changed substantially to pass constitutional muster. Committee consultants recommend leaving it to judges to decide case by case whether privacy interests trump the First Amendment.

ABOUT THE WRITER:

The Bee's John Hill can be reached at (916) 326-5543 or jhill@sacbee.com.

Assembly committee considers bill limiting access to divorce records

- By STEVE LAWRENCE, Associated Press Writer
Monday, March 20, 2006

(03-20) 00:01 PST SACRAMENTO, (AP) --

An Assembly committee is scheduled to consider a bill on Tuesday that would require a judge overseeing a divorce to redact the couple's financial information from court records, if one of the spouses requests it.

Supporters tout the measure, which would also apply to legal separation and marriage nullification proceedings, as a way to protect personal privacy. Opponents see it as a threat to open courts and an outgrowth of the old issue of money influencing politics.

Critics contend it was introduced on behalf of Los Angeles billionaire Ron Burkle, a major campaign contributor who tried to keep financial records in his divorce proceedings sealed.

Both the bill's sponsor, Sen. Kevin Murray, and a spokesman for Burkle denied the supermarket mogul's divorce prompted the bill.

Murray, D-Culver City, said he generated the bill — actually he amended his legislation into a homeland security measure that had already passed the Senate — to shield affluent couples against identity theft and unjust publicity.

"There is too much financial information disclosed in a divorce that makes either party vulnerable to attack," he told the San Diego Union-Tribune recently.

The Legislature enacted a similar, although somewhat broader law in 2004, but a state appeals court, ruling in a case brought by Burkle to seal the records in his divorce, struck it down in January as a violation of the First Amendment.

Burkle, whose estimated personal wealth of more than $2 billion makes him one of the world's richest men, has appealed the decision to the California Supreme Court.

Opponents said the 2004 law was pushed through the Legislature to help Burkle, who has given money to Democrats and two committees controlled by Gov. Arnold Schwarzenegger.

The California Newspaper Publishers Association and groups that promote women's rights and public access to government records argue that Murray's new bill similarly goes beyond shielding personal financial information to infringe on the public's right to access government records.

"It's the principle at stake here as to whether or not the courtroom doors are going to be open or shut," said Tom Newton, the CNPA's general counsel. "If you allow them to chip away at ... court proceedings and records, pretty soon you won't have open courts anymore."

Murray said Burkle did not ask him to sponsor the measure, although he conceded Burkle was interested in it. A spokesman for Burkle, Frank Quintera, also said that Burkle hadn't requested the legislation.

Fred Silberberg, a veteran Los Angeles family law attorney who said he didn't know Burkle, said he suggested the bill to Murray following the appeals court decision.

Murray didn't return telephone calls from The Associated Press seeking comment.

Peter Scheer, executive director of the California First Amendment Coalition, said that requiring the sealing of financial records could harm the interests of the couple's children, business partners, creditors and tax agencies.

"For couples who have assets, divorce is rarely just about the spouses' respective rights and obligation," he said in a letter to Murray.

The bill is supported by the Bar Association of California's family law section, which says it would "balance the public's right to know against the privacy needs of family law litigants to be reasonably and rationally protected."

An analysis of the bill by the staff of the Assembly Judiciary Committee concluded that it would also likely be found unconstitutional and recommended several amendments to keep it from being struck down by the courts.

One proposed change would require a judge, before redacting financial information, to find there was a "substantial probability" that the harm to privacy rights would outweigh the public's right of access.

Newton said the amendments wouldn't remove his group's opposition.

"We think there is already a ready mechanism in divorce cases to seal that information, but if they want to clarify that, we would be all ears," he said.

Also this week, the Senate Labor and Industrial Relations Committee is scheduled to hold a hearing on cutbacks in benefits for disabled workers stemming from workers' compensation legislation that Schwarzenegger pushed through in 2004.

The state Commission on Health and Safety and Workers' Compensation found last month that regulations adopted to implement the bill reduced the average cash award to permanently disabled workers by 50 percent.

On the Net:

and

www.assembly.ca.gov

www.senate.ca.gov

URL: http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/03/19/state/n131718S89.DTL

RULES APPLICABLE TO TEMPORARY JUDGES

12.22 RESERVED

(Rule 12.22 [~~3/1/96~~] PRESCRIBED FORM FOR STIPULATION AND ORDER FOR APPOINTMENT OF TEMPORARY JUDGE REPEALED 7/1/98.)

12.23 MATTERS TO BE AGREED UPON IN ORDER TO STIPULATE TO APPOINTMENT OF TEMPORARY JUDGE

Before submitting the stipulation to the court, the parties must agree upon a privately compensated temporary judge to try the case, obtain the agreement of said temporary judge to do so and fix a date by which all proceedings within the jurisdiction of this court shall be completed.

(Rule 12.23 effective 3/1/96.)

12.24 SUBMISSION OF STIPULATION

The stipulation and proposed order for appointment of a privately compensated temporary judge shall be submitted to the courtroom of the presiding judge in the Central District, or to the supervising judge of one of the other districts, depending upon where the case is properly pending under Local Rule 2.0.

(Rule 12.24 effective 3/1/96.)

12.25 REPRESENTATIONS BY THE STIPULATING PARTIES

By submitting the stipulation and proposed order to the court, the stipulating parties and their attorneys represent to the court: (1) that they are the only parties to the case; (2) that no new parties will be added.

(Rule 12.25 effective 3/1/96.)

12.26 APPLICATION OF TRIAL COURT DELAY REDUCTION RULES TO PROCEEDINGS BEFORE TEMPORARY JUDGES

Upon the signing of the proposed order by the presiding judge or supervising judge, the action shall be exempt from the trial court delay reduction rules of this Court, pursuant to Local Rule 7.2(b)(7). Until such order is signed, the case remains fully subject to said rules and to all other applicable rules of this Court, and all previously ordered deadlines, hearings, and other orders made in the case remain in full force and effect.

(Rule 12.26 [~~3/1/96~~] amended and effective 1/1/2003.)

12.27 DEADLINE FOR COMPLETION OF PROCEEDINGS BEFORE TEMPORARY JUDGE

The date upon which all proceedings within the jurisdiction of this court shall be completed, as agreed to by the parties and approved by the presiding judge or supervising judge, shall constitute an order of the court to complete all such proceedings by said date. Said order is directed to all parties, their attorneys, and to the temporary judge. Said date shall not be extended except by order of the presiding judge or supervising judge as the case may be, and violation of said order will be sanctionable under CRC, rule 227.

(Rule 12.27 effective 3/1/96.)

12.28 USE OF PUBLIC FACILITIES

The presiding judge may permit a temporary judge to use public facilities, when they are available, upon payment of a reasonable fee set by the presiding judge.

(Rule 12.28 effective 3/1/96.)

12.29 EXHIBITS

All exhibits shall be as available for public inspection as they would be if the case were being tried by the court. Upon final determination of the cause by the temporary judge, all exhibits shall be delivered to the Executive Officer/Clerk properly marked and with proper exhibit receipt form completed, unless a written stipulation for the return or disposal of such exhibits has been approved by the temporary judge and filed.

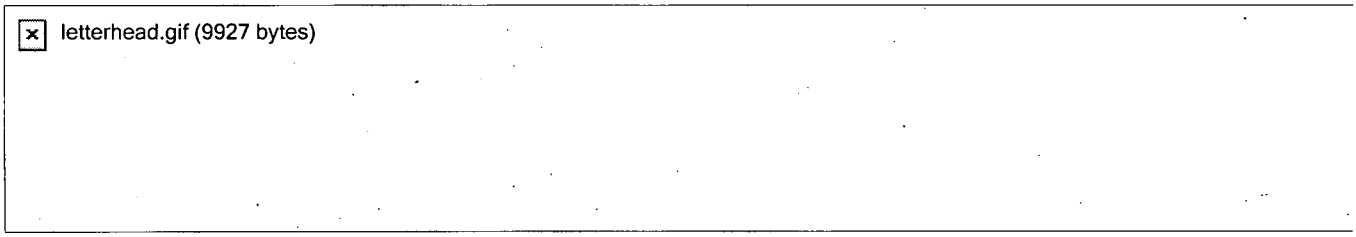
(Rule 12.29 effective 3/1/96.)

12.30 FILING OF ORIGINAL PAPERS AND ORDERS OF TEMPORARY JUDGE

All original papers are to be filed with the Executive Officer/Clerk within the same time and in the same manner as would be required if the case were being tried by the court. Signed orders of the temporary judge are to be presented for filing to the Assistant Division Chief in Room 109 of the County Courthouse if the case is pending in the Central District, and to the person designated by the supervising judge if the case is pending in another district. Minute orders will not be accepted unless they are signed by the temporary judge. If the minute order format is used, the order must set forth the name, address, telephone number, and CSR number of any privately retained court reporter or, if electronic reporting is used, the minute order shall so

state.

(Rule 12.30 effective 3/1/96.)



March 8, 2006

Honorable Kevin Murray
California State Senate
State Capitol, Room 5050
Sacramento, California 95814

RE: Oppose SB 1015 (Murray)

Dear Senator Murray:

I regret to inform you the California Newspaper Publishers Association has adopted an oppose position on your SB 1015, which attempts to overturn a recent California appellate court decision that emphatically upheld the right of the public to access the records of its court system. Although the bill deletes some of the provisions that were recently held unconstitutional by the Court of Appeal, the bill still contains a mandatory sealing provision that the Court of Appeal held to be in violation of the First Amendment and California's tradition of open divorce records. Under the First Amendment, courts must be allowed to decide sealing requests on a case-by-case basis. This mandatory sealing bill impermissibly strips courts of the authority to conduct the case-by-case analysis required by the First Amendment.

CNPA opposes SB 1015 and similar bills that would restrict access to California courts because it believes secret court proceedings and sealed court records prevent the public from determining that justice is being done in every case. Laws that allow for blanket secrecy for broad categories of information, such as is proposed in SB 1015, do not just harm the public. These laws harm the court itself as an institution, which to survive, must have the public's trust. As Chief Justice Burger wrote "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept that which they are prohibited from observing. Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980) (U.S. Supreme Court).

As you know, the Second Appellate District Court of Appeal recently and emphatically upheld the right of the public to access the records and proceedings of its court system, including ordinary divorce proceedings and records. SB 1015 attempts to reinstate a law found to be facially unconstitutional by the Court of Appeal in the case of Burkle v. Burkle. The Los Angeles Times, the Associated Press and CNPA intervened in the Burkle case. The court struck down Family Code Section 2024.6, which was enacted in 2004 over CNPA's objections. In striking the section that allows one party to a divorce to require the court to seal financial and asset information, the court said the law was "an undue burden on the First Amendment right of public access to court records."

SB 1015 attempts to amend the operative and unconstitutional part of Section 2024.6 as follows:

2024.6. (a) ~~Upon~~ *Notwithstanding any other provision of law, upon* request by a party to a ~~petition~~ *p*

parties' financial assets ~~and~~ ,liabilities ~~and~~ , *income or expenses, or* provides the location *of, includin court, no more of any pleading shall be sealed or redacted than is necessary to prevent identification or* may be made by ex parte application. Nothing sealed *or redacted* pursuant to this section may be unseal good cause ~~shown~~ .

These amendments will not make Sec. 2024.6 constitutional. If SB 1015 were to become law, CNPA strongly believes the first court that looked at it would again strike it down, resulting in another massive waste of precious legislative, judicial and litigant resources.

The box into which SB 1015 must fit

A long line of cases have established a presumptive First Amendment right of access to court proceedings and records, including proceedings and records associated with the dissolution of marriage: Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, Press-Enterprise Co. v. Sup. Ct., 464 U.S. 501, (1984) (*Press-Enterprise I*), Press-Enterprise Co. v. Sup. Ct., 478 U.S. 1 (1986) (*Press-Enterprise II*), Estate of Hearst, 67 Cal. App. 3d, 777, In re Marriage of Lechowick (1988), 65 Cal. App. 4th 1406, and NBC Subsidiary (KNBC-TV), Inc., v. Sup. Ct., 20 Cal. 4th 1178 (1999).

The last cited case, involving Clint Eastwood and Sandra Locke, is the first in California, if not the nation, to explicitly hold the presumptive First Amendment right of access to courts applies to civil as well as criminal proceedings. Following NBC, the California Judicial Counsel promulgated Rules of Court 12.5, 243.1, 243.2, 243.3, and 243.4. These rules provide a comprehensive scheme for courts to use to determine whether and how records shall be sealed.

Together, these cases and rules of court establish that the public has a presumptive right of access to all court proceedings and records of court proceedings. This right of access can be overcome only when a court determines *on the facts of a particular case* that an *overriding interest* to the right of public access exists and that this interest will be prejudiced unless the records are sealed. Any order closing a court proceeding or sealing a record must be *narrowly tailored* to meet the overriding interest and the court must find that there are no less restrictive means to achieve the interest. *Factual findings* in support of an order, and an order sealing records, must be *on the record.*

Under the current laws and procedures, divorcing litigants are permitted to ask a court to redact sensitive court information, such as bank account and social security numbers. In fact, in the Burkle case, the trial court did redact bank account information without this statute, based on procedures and laws currently in place. There is no need for this bill.

SB 1015 will not fit in the box

SB 1015 is unconstitutional on its face because it fails to respect the rules set forth by both the United States and California Supreme courts for overcoming the peoples' presumptive First Amendment right of access. SB 1015 requires the court to seal a broad range of court records at the request of one party, including the existence or description of virtually every asset possessed by a litigant -- not just sensitive bank account or social security numbers -- that is identified or described in a court "pleading," which itself is very broadly defined. SB 1015 destroys the court's constitutional duty to determine on the facts of a particular case whether an overriding interest exists sufficient to seal a particular record. SB 1015 destroys the court's discretion to determine that the sealing order is "narrowly tailored" to meet an overriding interest and go no further. SB 1015 destroys the court's discretion to seek out and apply less restrictive alternatives to the blanket sealing of the existence, description and value of every asset described in every pleading.

For example, SB 1015 makes no distinction between the sealing of a social security or bank account number on the one hand and the sealing of the identity of a basic community asset, such as a 1984 Oldsmobile Cutless Supreme on the other. It's hard to imagine significant issues of identity theft or even grand theft would arise from disclosure of this asset information. Yet, under SB 1015, a court would be barred from refusing to seal a record that listed the old Olds.

This bill requires courts, upon demand, to seal all financial information listed in divorce court records. This would render divorce court proceeding and records essentially secret. If the public is prevented from learning about the financial details -- including the division of the assets -- the public has no mechanism for determining the fairness of the proceeding.

New redaction language won't save SB 1015

SB 1015 contains this new language: *Subject to the direction of the court, no more of any pleading shall be sealed or redacted than is necessary to prevent identification or location of the financial information subject to this section.*

If we represented the courts we would be horrified by this sentence. Instead of placing the burden on litigants to prove up a higher interest in secrecy for only truly sensitive information, SB 1015 would force courts to, at the whim of a litigant, sift through potentially hundreds of pages of pleadings searching out "the parties' financial assets, liabilities, income or expenses . . . or the . . . location of those assets," and make the remainder of the pleadings publicly accessible. This exercise would have to be accomplished no matter whether public disclosure of any particular piece of information would actually harm an overriding interest. This provision turns the presumptive First Amendment right of access on its head and allows litigants to lord over the court and waste its time. Current law, as established in Burkle v. Burkle, places the burden squarely on the parties, not the courts, and requires litigants to use a rifle instead of a shotgun to seal only those records that should be sealed consistent with constitutional principles and court rules.

Legislative intent Section can't withstand serious scrutiny

In order to bolster the idea that the wholesale sealing of asset information filed with the courts is constitutional, SB 1015 would have the Legislature "find and declare" some very curious things. The bill would have the legislature declare the information sought to be sealed by SB 1015 "is rarely, if ever a matter of legitimate public interest." Other than child custody issues, which are not a subject of this bill, a proceeding that dissolves a marriage is primarily about the division of assets. SB 1015 would, at the request of one party, force the court to seal the "identification or location of assets." A divorce case without public access to the assets subject to division is like a murder case without public access to the identity of the victim or the murder weapon. "Convict this man," the District Attorney said, "He killed somebody with something." Without public access to the identity of assets, the public has no way to determine whether courts are fairly and efficiently administering justice.

The idea that sealing financial assets will help prevent child abduction is ridiculous on its face. The identification of stocks, bonds, fine art, "liabilities, income and expenses" are not remotely linked to the serious crime of child abduction. The only possible asset, in which a remote connection could be made, is a home. CNPA asserts the identity and location of a litigant's home set forth in a court record would not raise any security issue in 99.99 percent of cases. How many billionaires seek to dissolve their marriages each year in relation to Joe and Jane litigant? Moreover, no showing has been made that the current rules that allow sealing upon an appropriate showing of a higher interest are inadequate to guard against this remote harm -- a harm that would almost never arise in the real world.

SB 1015 would create more mischief than it would ever stop

The seminal champion of the right to privacy, U.S. Supreme Court Justice Louis D. Brandeis, once said, "sunshine is the best disinfectant." Allowing one party in a divorce proceeding to force the court to black out the partie's asset information would allow dishonest people to get away with fraud, perjury, tax evasion and the like. Those who have cheated on their taxes will approach the court without fear that taxing agencies will identify their sins by review of public court records. Likewise, those who have been defrauding their partners or business associates will be able to litigate their divorce aggressively with little to fear that their duplicity will be revealed. Creditors will no longer be able to identify the fraudulent transfer of assets in sham divorces. SB 1015 will allow litigants with superior financial power to take advantage of their weaker opponents without the oversight of family and friends and non-governmental organizations.

The curious provision allowing privately compensated judges to seal records

CNPA also opposes the bill because it favors the wealthy who desire secrecy. For those litigants who can afford to hire a "temporary" judge at $375-an-hour to hear their divorce, your bill allows those litigants to demand that their privately paid temporary judge seal their divorce court papers. Because there is little oversight of these temporary judges who are privately paid, we believe that this would lead to unchecked secrecy for wealthy divorcing couples. Under the current law -- California Rule of Court 244 -- temporary judges who are privately paid by the parties are prohibited from deciding sealing requests. Instead, sitting judges who are accountable to the public must decide sealing requests. We oppose your bill because it weakens this rule.

Conclusion

In November 2004, 83 percent of voters said they wanted their government to be more open to public scrutiny. Prop. 59 amended the state Constitution and emphatically declared "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." For all the reasons set forth here and because SB 1015 runs 180 degrees counter to the people's expressed desire for open and public government, we must respectfully oppose your bill.

Sincerely,

Thomas W. Newton
General Counsel

Honorable Senate President pro Tem Don Perata
Honorable Senate Republican Leader Dick Ackerman
Honorable Assembly Speaker Fabian Nuñez
Honorable Assembly Republican Leader George Plescia
Honorable Members of the Assembly Judiciary Committee
Honorable Members of the Senate Judiciary Committee
Will Fleet, CNPA President, Publisher, Glendale News-Press
Harold W. Fuson, Jr. CNPA Governmental Affairs Committee Chairman, VP and Chief Legal Officer, Copley Press, Inc.
Jack Bates, CNPA Executive Director

Karlene Goller, Vice President and Deputy General Counsel, Los Angeles Times
David Tomlin, Assistant General Counsel, The Associated Press
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Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mark Redmond, Republican Consultant, Assembly Judiciary Committee
Gene Wong, Chief Counsel, Senate Judiciary Committee
Assembly and Senate Floor Analysis

Davis Wright Tremaine LLP

First Amendment Law Letter

Battle to Maintain Public and Press Access to Divorce Courts

By Susan E. Seager
[Fall 2005]

Each year, more than one million people file for divorce in the United States. In most states, divorce court proceedings and records have long been open to the public and press. This tradition of openness has allowed the public and press to scrutinize the shifting rights of men, women, and domestic partners over their financial assets and child custody and to ensure that the laws are being fairly applied. Nancy C. Cott's recent book, *Public Vows: A History of Marriage and the Nation* (2000), conducted an exhaustive look at divorce court records, newspaper articles, and other materials to posit her theory that the government has used marriage laws to shape gender roles, reduce the government's welfare costs, prevent interracial unions, and limit the influx of some immigrant groups. More recently, *The New York Times Magazine* published *The Fathers' Crusade* by Susan Dominus, a May 8, 2005, article about the rise of the fathers' custody rights movement, which contends that divorce courts are biased against fathers in child custody decisions. Neither of these publications would have been possible without public access to divorce court records and the ability of the divorcing parties to freely discuss their cases.

But in the bellwether state of California, the Legislature has hastily enacted a new statute *mandating* the sealing of financial documents filed in divorce court—California Family Code § 2024.6—that would reverse more than a century of openness.

The first test of the new statute

The Los Angeles Times, California Newspaper Publishers Association, and The Associated Press have launched a legal challenge to the new California secrecy statute in the divorce case of *Burkle v. Burkle*, involving Ronald W. Burkle, a Beverly Hills supermarket magnate who is one of the world's richest men, reputedly the largest political donor to the Democratic Party, and a financial advisor to Michael Jackson.[1] The battle began just a few days before Christmas in 2004. That's when Mr. Burkle filed two *ex parte* applications asking two Los Angeles County Superior Court judges and the California Court of Appeal to seal hundreds of pages of his divorce court records, even though the records had been available to the public as public court records for more than a year. Over the objections of the media organizations and Mrs. Burkle, the trial courts and Court of Appeal issued temporary blanket sealing orders. Demonstrating the danger of such statutes, the Court of Appeal placed the entire *Burkle* divorce appellate record under seal, sealing more than 12 volumes of previously public court records. Those records remain sealed today.

Mr. Burkle relied on Section 2024.6, which requires a court, upon request, to automatically seal a divorce court record – *in its entirety* – if the record contains even a mere footnote that mentions a party's financial assets and the "location" of those assets. This new statute was signed into law as "urgency legislation" by Governor Arnold Schwarzenegger on June 7, 2004, ostensibly to protect divorcing couples from identity theft and kidnappings, although the legislation did not cite a single instance of identity theft or kidnapping that could be linked to public divorce court records. Perhaps not coincidentally, the statute contains the same legal arguments used by Mr. Burkle in his previous legal briefs in his divorce case, and was signed into law shortly after Mr. Burkle and his companies donated nearly $150,000 to the governor's political committees and the state Democratic Party.

The three media organizations opposed Mr. Burkle's sealing requests, contending that Section 2024.6 is unconstitutional because it requires courts to seal public court records without undertaking the line-by-line, document-by-document analysis required by the First Amendment. The United States Supreme Court has struck down similarly overbroad statutes as unconstitutional in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609-611 (1982), and other cases.

On Feb. 28, 2005, Los Angeles Superior Court Judge Roy L. Paul found that the statute is unconstitutional because it is "not narrowly tailored." *Burkle v. Burkle*, 2005 WL 497446 at *4-*5 (Cal. Sup. Ct. Feb. 28, 2005). Judge Paul explained that the statute is "not unconstitutional merely because it deprives the court of discretion as to what should be sealed, but because as enacted it seals the entirety of a pleading if any of the specified materials are included in it." *Id.* As written, the statute requires a court to seal "a 100 page pleading filled with legal argument of genuine public interest...if a party's home address appears even in a footnote," which invites "gamesmanship." *Id.*

Mr. Burkle has asked the Court of Appeal to reverse Judge Paul's order, arguing that the financial data provided in divorce court pleadings should be sealed to protect the litigant's privacy, which Mr. Burkle asserts is a compelling interest. Mr. Burkle also contends that the statute can be interpreted to allow limited redactions of financial information, and does not require blanket sealing orders. However, Mr. Burkle could not point to any specific language in the statute that would allow a limited redaction.

The statute is inconsistent with the Supreme Court's "experience and logic" test

In evaluating whether the First Amendment right of public access applies to particular court records or proceedings, the Court of Appeal will follow the United States Supreme Court's two-part "experience and logic" test. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("Press- Enterprise II"); *Globe Newspaper*, 457 U.S. at 9. First, the court must evaluate "whether the place and process have historically been open to the press and general public." Second, the court must determine "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8; see also Globe Newspaper, 457 U.S. at 605-06. The media organizations assert that both prerequisites are easily satisfied here.

California's divorce records traditionally have been open to the public

California's courts have long recognized that divorce proceedings and records are presumptively open to the public and press. More than 100 years ago, the California Supreme Court vacated a contempt order against a reporter for reporting about closed divorce proceedings, declaring that "[i]n this country it is a first principle that the people have the right to know what is done in their courts." *In re Shortridge*, 99 Cal. 526, 530-31 (1893). The Court explained that "the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to public trust." *Id.* at 530-31. California's Courts of Appeal consistently have adhered to this mandate. *See, e.g., Green v. Uccelli*, 207 Cal. App. 3d 1112, 1120 (1989); In re Marriage of *Lechowick*, 65 Cal. App. 4th 1406, 1414 (1998). *See also Estate of Hearst*, 67 Cal. App. 3d 777, 783-84 (1977) (recognizing common law right of access to probate court records over objection of the prominent Hearst family, which asserted fears of terrorism, kidnapping, and other violence).

A hundred years after *Shortridge* the California Supreme Court affirmed this long tradition of access, holding that the public and press had a presumptive constitutional right of access to the palimony trial of celebrity Clint Eastwood, and that this right of access did not disappear merely because the proceedings involved wealthy, powerful public figures. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1187, 1208 & n.25; 1211 n.27, 1218-19 (1999). To the contrary, the public's interest is arguably stronger to ensure that equal treatment is given in celebrity cases. The Court reiterated the important public policy reasons for mandating public access to all court proceedings. 20 Cal. 4th at 1208 n.25; 1210, 1211. Particularly instructive, however, the Court noted that an earlier decision by a California Court of Appeal had not gone far enough in recognizing the First Amendment right of public access to family court proceedings and records when it vacated a blanket order closing divorce court

proceedings and sealing records. The Supreme Court noted that in *In re Lechowick*, 65 Cal. App. 4th 1406, the Court of Appeal had relied solely on Family Code § 214, which allows limited closure of portions of family law proceedings, but should have "take[n] into account rules of procedure and substance set out in...cases construing the First Amendment" right of access to judicial proceedings. *NBC Subsidiary*, 20 Cal. 4th at 1195 n.11.

The media organizations contend that these authorities demonstrate that civil proceedings and records dealing with personal business disputes—including divorce proceedings—are historically open in California, clearly satisfying the "experience" test of *Press-Enterprise II* and *Globe Newspaper*. Thus, the first prong of the United States Supreme Court's two-pronged test under the First Amendment is satisfied.

Public access to divorce records provides vital information about an important part of our judicial system

The media organizations assert in *Burkle* that the second part of the Supreme Court test is satisfied because the right of access to divorce proceedings and records "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper*, 457 U.S. at 606. Of course, the Supreme Court has made clear that compelling reasons exist for access to public records in general. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*").

No exception exists for the powerful or wealthy. In *NBC Subsidiary*, the California Supreme Court strongly rejected the trial court's assertion that "there is nothing of concern to the public [in the Eastwood trial] 'beyond the fact that two famous people are involved in a private dispute.'" 20 Cal. 4th at 1210. "We believe that the public has an interest, in all civil cases, in observing and assessing the performance of its judicial system, and that interest strongly supports a general right of access in ordinary civil cases." *Id.* The Court cited with approval language from *Estate of Hearst*, a probate case involving the assets of the wealthy Hearst publishing family, observing that "the public has a legitimate interest in access to...court documents...If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *NBC Subsidiary*, 20 Cal. 4th at 1211 n.28, quoting *Estate of Hearst*, 67 Cal. App. 3d at 777.

The media organizations contend that these principles apply equally to divorce proceedings and records, where the value of public oversight cannot be seriously disputed. Moreover, public and press access to divorce proceedings and records "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of selfgovernment." *Id.* The need for public oversight is especially acute in the *Burkle* case, where one of the parties is politically and financially powerful, and has been accused by his wife of hiding financial assets and misrepresenting his marital status to avoid sharing tens of millions of dollars in community property.

Section 2024.6 is neither narrowly tailored nor justified by a compelling state interest

Once the First Amendment's presumptive right of access is found to apply, a statute mandating closure or sealing can only survive constitutional challenge if it is *both* narrowly tailored and justified by a compelling state interest. In *Globe Newspaper*, the Supreme Court struck down as unconstitutional a Massachusetts statute that required trial courts to automatically exclude the public and press from any criminal trial during the testimony of underage sex crime victims, holding that the state could not justify the blanket sealing mandated. 457 U.S. at 608, 610.

The media organizations contend that the blanket sealing mandated by Section 2024.6 is similarly unconstitutional. Section 2024.6(a) provides that "[u]pon request by a party to a petition for dissolution of marriage, nullity of marriage, or legal separation, the court shall order a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities sealed." The statute defines "pleading" very broadly: "a document that sets forth or declares the parties' assets and liabilities, income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental

to the declaration or agreement that lists and identifies financial information." *Id.* § 2024(c). The party requesting sealing can do so with an *ex parte* application. *Id.* § 2024.6(a).

As with the Massachusetts statute, Section 2024.6 prohibits courts from engaging in a document-bydocument analysis to determine whether secrecy is necessary or whether limited redactions would adequately protect the state interests. Instead, merely upon the demand of one party, the statute mandates the wholesale sealing of records that otherwise would be open to public scrutiny.

Moreover, the state's asserted interests are speculative and defy common sense. According to the legislative history of the statute cited by Mr. Burkle, the secrecy provision was rationalized by "concerns about identity theft, stalking, kidnapping of the divorcing couple's children, theft of artworks and other property, and other finance-related crimes..." But like the Massachusetts statute, no empirical data was presented by the author of Section 2024.6 or anyone else in the Legislature to support these speculative claims of harm arising from public court documents. Instead, the bill's author recited only anecdotal examples of "stolen identities" and of "undue media publicity about divorcing couples with substantial assets," without linking either to publicly-available divorce records. And the California Legislature did not address the fact that similar financial information is available in a wide variety of other court documents in ordinary civil litigation, nor did it consider using an alternative method to protect specific financial information, such as redacting bank account numbers and home addresses.

Based on these authorities and facts, the media organizations are asking the Court of Appeal to find that Section 2024.6 is not narrowly tailored and therefore unconstitutional. The matter is pending before the Court of Appeal, but the *Burkle* records remain sealed pending that Court's resolution of this important issue.

NOTES

1 Davis Wright Tremaine attorneys Kelli Sager, Alonzo Wickers and Susan Seager represent the media organizations in this case.

Other articles in the 2005 FALL Newsletter:

- California Code of Civil Procedure § 425.17(c): A New Restriction on Anti-SLAPP Motions by Bruce E.H. Johnson
- California Legislature Amends Anti-SLAPP Statute Again by Rochelle L. Wilcox

About the author:

Susan E. Seager is an associate in DWT's Los Angeles office. A former journalist, she provides media clients with pre-publication advice and litigates a variety of media issues, including claims for defamation, privacy, and right of publicity, copyright and trademark, and access to court and government records.

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From the Los Angeles Times

MICHAEL HILTZIK / GOLDEN STATE

Private Justice Can Be Yours if You're Rich

Michael Hiltzik
Golden State

March 16, 2006

You don't need me to tell you how grand it is to be rich in California. You don't have to care about the condition of public education, because your kids go to private school. You don't have to worry about higher park fees, because you can lock up access to your private beach and hire thugs to run off any riffraff who get near the water. You don't have to do your own gardening, because there are plenty of illegals around to trim your perennials.

And you don't have to subject yourself to litigating your private disputes in open court, because you can buy yourself a judge to run interference for you — under cover of the state Constitution, no less.

If your private judge violates state judicial rules and bends the public court system to your personal ends, what's the downside? Your judge is outside the reach of the state's disciplinary system for misbehaving jurists. If your case happens to involve matters of manifest public importance and interest, too bad about the public. After all, the system belongs to you.

Many states allow retired judges to fulfill limited judicial roles — as referees in evidentiary disputes or as fill-in judges to relieve docket gridlock, for example. But California, apparently uniquely, is much more liberal. Its Constitution allows attorneys and ex-judges to conduct actual trials in the guise of temporary jurists. Once selected by litigants, they're sworn in as Superior Court judges and endowed with almost all the powers and authority of any active judge.

They then proceed to abuse their power. Documents and hearings in the cases before them are supposed to be public, but often the papers don't end up in public files, trial schedules are kept secret, and even those that leak out are held in private offices behind layers of building security. The sealing of a court document is an important decision that involves a core principle of the public judicial system; these judges do it all the time, secretly, simply by sticking sensitive papers in their briefcases and dodging requests for access.

So justice ends up belonging, like a private preserve, to the rich and powerful — indeed, anyone who can pay a judge $400 to $500 an hour. It's unsurprising that the public knows little about this system because the judicial establishment isn't even sure how widespread it is; court clerks don't

keep a tally of how many cases are tried by privately paid temporary judges.

But the number is obviously huge. One Northern California private divorce judge told me she handles more than 20 cases at a time. Brad Pitt and Jennifer Aniston hired a private judge to preside over their divorce, as did Charlie Sheen and Denise Richards and investment billionaire Ronald Burkle and his ex-wife, Janet. Michael Jackson hired a private judge to hear his custody fight over his children with ex-wife Debbie Rowe. What all had in common was the need to secure formal, legally enforceable judgments and a distaste for the wear and tear of going to court to get them.

Instead of reining in this system, the Legislature is preparing to expand it. A bill to give temporary judges the authority to seal many documents in divorce cases is currently moving through Sacramento, despite evidence that temporary judges have overstepped their nonexistent authority in the past.

The corrosive influence of this two-tier system is hardly a secret. In 1992, when a plan to expand the authority of temporary judges came under consideration, Los Angeles Superior Court Judge Robert H. O'Brien complained in a letter to state court administrators that "the appearance of a dual system — one for the wealthy, one for the poor (or even not so wealthy)" was a "real evil." He dismissed the most frequently heard justification — that the public dockets were jammed — as a "feeble rationalization" for the creation of a moneymaking scheme for retired trial judges. (Court documents indicate that retired Superior Court Judge Stephen Lachs, whose current rate is $475 an hour, collected $73,000 in just over a year on the Burkle matter alone.)

One corrupting feature of the process is the immunity of privately paid judges from disciplinary action. The state Commission on Judicial Performance, which has the power to remove ordinary judges from the bench, has no jurisdiction over temporary judges, even when they misbehave. Even a county's presiding judge is powerless to force temporary judges to comply with local procedural rules.

And their treatment of the rules can be extremely casual. Consider the runaround — there's no other word for it — on which Judge Lachs has led the public in the Michael Jackson custody case, over which he presided until December, when Jackson accused him of bias and asked him to step down. Jackson may be the focus of somewhat overheated tabloid attention, but the judicial system's response to a serious charge against someone so prominent — Rowe has accused him of abducting their two children to Bahrain — is plainly a matter of legitimate public concern.

Under Lachs, however, documents required by local court rules to be filed with the Los Angeles court clerk never wound up in the files, but remained in his possession. Hearings were scheduled but not divulged. At a hearing in December, Lachs ejected a reporter for TMZ.com, an entertainment news website, on grounds that sensitive custody issues were to be discussed; in the event, the only topic covered behind closed doors was the motion by Jackson's attorneys to oust Lachs from the case. (Lachs never responded to my requests for comment.)

Why should we care about this? Not only because the very idea of two-tier justice should enrage every citizen, but also because as conditions get better for the privileged, they become worse for everyone else. As long as the wealthy and powerful can buy their own civil justice, they won't care if the rest of the system goes to hell, and the road to its collapse will become ever steeper.

Golden State appears every Monday and Thursday. You can reach Michael Hiltzik at golden.state@latimes.com and view his weblog at latimes.com/goldenstateblog.

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From: Kenny, Tracy [mailto:Tracy.Kenny@jud.ca.gov]
Sent: Tuesday, February 21, 2006 10:40 AM
To: pinetwork@listserve.com
Subject: [PINetwork] Sealing Financial Information in Family Law Files

I am looking for information on how often litigants are filing petitions to seal pleadings and other documents in their family law court files pursuant to Family Code section 2024.6. That section was added through urgency legislation (AB 782) in 2003, and the Court of Appeal for the 2nd District recently held that the statute was unconstitutionally overbroad in its reach. As a result, legislation has been introduced (see SB 1015 http://www.leginfo.ca.gov/pub/bill/sen/sb_1001-1050/sb_1015_bill_20060216_amended_asm.pdf) that would revise the section to require the court to ensure that it seals or redacts only that information that pertains to the parties financial assets and liabilities. In order to determine the workload burden on the courts that this change would effect, I am trying to find out how often parties are seeking to have their files sealed under the existing provisions.

If you have information about the usage of this provision in your court, or can even say whether it is frequent of infrequent, I would greatly appreciate receiving it.

Tracy Kenny
Legislative Advocate
Judicial Council of California - Administrative Office of the Courts
770 L Street, Suite 700
Sacramento, CA 95818
916-323-3121, Fax 916-323-4347
tracy.kenny@jud.ca.gov
www.courtinfo.ca.gov
"Serving the courts for the benefit of all Californians."

Kenny, Tracy

From: Reynolds, Pamela [ReynolP@saccourt.com]
Sent: Wednesday, February 22, 2006 12:55 PM
To: Kenny, Tracy
Subject: RE: [PINetwork] Sealing Financial Information in Family Law Files

On average, the Family Law Division of the Sacramento Superior Court receives 21 ex parte applications to seal financial records each month. If you have further questions please let us know.

Pam Reynolds, Administrative Assistant
Sacramento Superior Court
Executive Office
916-874-6488
916-874-8229 (fax)
reynolp@saccourt.com

From: pinetwork-bounces@listserve.com [mailto:pinetwork-bounces@listserve.com] **On Behalf Of** Kenny, Tracy
Sent: Tuesday, February 21, 2006 10:40 AM
To: pinetwork@listserve.com
Subject: [PINetwork] Sealing Financial Information in Family Law Files

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If you have information about the usage of this provision in your court, or can even say whether it is frequent of infrequent, I would greatly appreciate receiving it.

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Kenny, Tracy

From: Nancy Holsey [nholsey@lassencourt.ca.gov]
Sent: Wednesday, February 22, 2006 1:06 PM
To: Kenny, Tracy; pinetwork@listserve.com
Subject: RE: [PINetwork] Sealing Financial Information in Family Law Files

We have not had any requests yet.

Nancy Holsey
Judicial Assistant/Analyst
Lassen Superior Court
220 S Lassen St, Ste 6
Susanville, CA 96130
(530) 251-8102
nholsey@lassencourt.ca.gov

-----Original Message-----
From: pinetwork-bounces@listserve.com [mailto:pinetwork-bounces@listserve.com] **On Behalf Of** Kenny, Tracy
Sent: Tuesday, February 21, 2006 10:40 AM
To: pinetwork@listserve.com
Subject: [PINetwork] Sealing Financial Information in Family Law Files

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Kenny, Tracy

From: pinetwork-bounces@listserve.com on behalf of Stuchlik, Susan, Superior Court [sstuchlik@alameda.courts.ca.gov]
Sent: Wednesday, February 22, 2006 9:14 AM
To: pinetwork@listserve.com
Subject: FW: [PINetwork] Sealing Financial Information in Family Law Files
Attachments: ATT294525.txt; ATT189881.txt

At the Hayward Hall of Justice in Alameda County we get very few per year, maybe 5.

S. Stuchlik
-----Original Message-----
From: Lowe-Thomas, Althea, Superior Court
Sent: Wednesday, February 22, 2006 8:31 AM
To: Stuchlik, Susan, Superior Court; Dennis, Regina, Superior Court
Cc: Lederman, Joanne, Superior Court
Subject: FW: [PINetwork] Sealing Financial Information in Family Law Files

This request came across the PINetwork, a court statewide network site. You may have information to contribute to the AOC request. If so, please forward it to Tracy Kenny at the below e-mail address.

Althea

-----Original Message-----
From: Andres, Grace A. [mailto:GANDRES@SolanoCourts.com]
Sent: Tuesday, February 21, 2006 3:34 PM
To: Berger Cathleen; Kenny, Tracy; pinetwork@listserve.com
Subject: RE: [PINetwork] Sealing Financial Information in Family Law Files

Solano County has also not had many requests for sealings, but I would anticipate that any redacting of financial information would be time consuming for the clerk's office depending on the requirements of the new legislation.

Grace Andres, Court Services Program Manager
Family Law, Probate, Adoption and Juvenile Divisions
Superior Court of California, County of Solano
707-421-7874

> -----Original Message-----
> **From:** pinetwork-bounces@listserve.com [mailto:pinetwork-bounces@listserve.com]**On Behalf Of** Berger Cathleen
> **Sent:** Tuesday, February 21, 2006 2:46 PM
> **To:** 'Kenny, Tracy'; pinetwork@listserve.com
> **Subject:** RE: [PINetwork] Sealing Financial Information in Family Law Files
>
> We have not had any requests to seal records under the existing provisions.
>
> Thank you,
>
> *Cathleen Berger*
> Senior Court Analyst
> Yolo Superior Court

Kenny, Tracy

From: Tozzi, Michael
Sent: Wednesday, February 22, 2006 11:01 AM
To: Kenny, Tracy
Cc: Sandy Almansa
Subject: Re: [PINetwork] Sealing Financial Information in Family LawFiles

From our FL supervisor.

>>> Sandy Almansa 02/22/06 10:36 AM >>>
Petitions to seal pleadings in Stanislaus County are infrequent, with filings between 1-6 per month. One reason may be that in Stanislaus we instituted a policy for filings effective November 2002 to place documents containing "confidential" information (including social security #s, tax information, bank account information, etc) into a confidential envelope maintained within the court's file that is not open to viewing by the general public. Most of the requests that we receive for sealings involve older filings prior to the November 2002 policy.

Sandy Almansa
Supervisor
Family Law/Probate/IVD Division
Superior Court of California
Stanislaus County
(209) 525-7873
sandy.almansa@stanct.org

>>> Michael Tozzi 02/22/06 9:49 AM >>>
How would we respond?

>>> "Kenny, Tracy" < Tracy.Kenny@jud.ca.gov > 02/21/06 10:40 AM >>>

I am looking for information on how often litigants are filing petitions to seal pleadings and other documents in their family law court files pursuant to Family Code section 2024.6. That section was added through urgency legislation (AB 782) in 2003, and the Court of Appeal for the 2nd District recently held that the statute was unconstitutionally overbroad in its reach. As a result, legislation has been introduced (see SB 1015 http://www.leginfo.ca.gov/pub/bill/sen/sb_1001-1050/sb_1015_bill_20060216_amended_asm.pdf) that would revise the section to require the court to ensure that it seals or redacts only that information that pertains to the parties financial assets and liabilities. In order to determine the workload burden on the courts that this change would effect, I am trying to find out how often parties are seeking to have their files sealed under the existing provisions.
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Kenny, Tracy

From: cwilliams@sftc.org
Sent: Tuesday, February 21, 2006 4:51 PM
To: Kenny, Tracy
Subject: Re: [PINetwork] Sealing Financial Information in Family Law Files

In San Francisco we have about 1-3 requests per month.

-----Original Message-----
From: Kenny, Tracy <Tracy.Kenny@jud.ca.gov>
To: pinetwork@listserve.com <pinetwork@listserve.com>
Sent: Tue Feb 21 10:40:28 2006
Subject: [PINetwork] Sealing Financial Information in Family Law Files

I am looking for information on how often litigants are filing petitions to seal pleadings and other documents in their family law court files pursuant to Family Code section 2024.6. That section was added through urgency legislation (AB 782) in 2003, and the Court of Appeal for the 2nd District recently held that the statute was unconstitutionally overbroad in its reach. As a result, legislation has been introduced (see SB 1015 http://www.leginfo.ca.gov/pub/bill/sen/sb_1001-1050/sb_1015_bill_20060216_amended_asm.pdf) that would revise the section to require the court to ensure that it seals or redacts only that information that pertains to the parties financial assets and liabilities. In order to determine the workload burden on the courts that this change would effect, I am trying to find out how often parties are seeking to have their files sealed under the existing provisions.

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Tracy Kenny
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Judicial Council of California - Administrative Office of the Courts 770 L Street, Suite 700 Sacramento, CA 95818 916-323-3121, Fax 916-323-4347 tracy.kenny@jud.ca.gov
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Kenny, Tracy

From: Chandler, Pat [Pat.Chandler@kern.courts.ca.gov]
Sent: Tuesday, February 21, 2006 11:19 AM
To: Kenny, Tracy
Subject: RE: [PINetwork] Sealing Financial Information in Family LawFiles

We only has three (3) in 2005 and none so far in 2006.

Patricia M. Chandler

Court Manager

Superior Court, County of Kern

1415 Truxtun Avenue

Bakersfield, CA 93301

Phone: 661 868-5462

FAX: 661 868-4609

Email: pat.chandler@kern.courts.ca.gov

From: itsG8WAY.SMTP.Tracy.Kenny@jud.ca.gov [mailto:IMCEAGWISE-itsG8WAY+2ESMTP+2ETracy+2EKenny+40jud+2Eca+2Egov@co.kern.ca.us]
Sent: Tuesday, February 21, 2006 10:40 AM
To: pinetwork@listserve.com
Subject: [PINetwork] Sealing Financial Information in Family Law Files

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Kenny, Tracy

From: Berger Cathleen [cberger@YoloCourts-ca.gov]
Sent: Tuesday, February 21, 2006 2:46 PM
To: Kenny, Tracy; pinetwork@listserve.com
Subject: RE: [PINetwork] Sealing Financial Information in Family Law Files

We have not had any requests to seal records under the existing provisions.

Thank you,

Cathleen Berger
Senior Court Analyst
Yolo Superior Court

From: Kenny, Tracy [mailto:Tracy.Kenny@jud.ca.gov]
Sent: Tuesday, February 21, 2006 10:40 AM
To: pinetwork@listserve.com
Subject: [PINetwork] Sealing Financial Information in Family Law Files

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Kenny, Tracy

From: Amy Silva [asilva@occourts.org]
Sent: Monday, March 06, 2006 4:46 PM
To: Kenny, Tracy
Subject: Re: [PINetwork] Sealing Financial Information in Family LawFiles

Tracy: Sorry for the delay in responding. Hope you can still use the information. We have 17 FL courtrooms which includes 3 1058 courtrooms. Courtroom clerk responses ranged from 1 a month to hardly ever. I think when this bill first passed, we got several the first few months, with a couple of them in our "fat files" i.e. several volumes, where the requests were pages long. But after that, they tapered off.

Amy Silva
Family Law Manager
Superior Court of Calif., County of Orange
341 The City Drive
Orange, Ca. 92868
714-935-7919
714-935-7963 (fax)

>>> "Kenny, Tracy" <Tracy.Kenny@jud.ca.gov> 2/21/06 10:40 AM >>>

I am looking for information on how often litigants are filing petitions to seal pleadings and other documents in their family law court files pursuant to Family Code section 2024.6. That section was added through urgency legislation (AB 782) in 2003, and the Court of Appeal for the 2nd District recently held that the statute was unconstitutionally overbroad in its reach. As a result, legislation has been introduced (see SB 1015 http://www.leginfo.ca.gov/pub/bill/sen/sb_1001-1050/sb_1015_bill_20060216_amended_asm.pdf) that would revise the section to require the court to ensure that it seals or redacts only that information that pertains to the parties financial assets and liabilities. In order to determine the workload burden on the courts that this change would effect, I am trying to find out how often parties are seeking to have their files sealed under the existing provisions.

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Kenny, Tracy

From: Tyrone Tasker [TTasker@LASuperiorCourt.org]
Sent: Tuesday, February 21, 2006 11:42 AM
To: Kenny, Tracy
Subject: Re: [PINetwork] Sealing Financial Information in Family LawFiles

Attachments: SealOrderReStip.doc; SealingChecklistSanDiego.doc


SealOrderReStip.doc (32 KB)


SealingChecklistSanDiego.doc (...

Hello Tracy.

I do not work in Family Law, but some information from Civil might help.

On average, I see about one motion to seal filed records, about every two weeks, per each courtroom, in Los Angeles Superior Court.

In my opinion, the best procedure, from the Court's prospective, is for parties to obtain permission to file narrowly redacted documents, with heavy black marker over just the financial and other protected information. If the entire document already was filed, they could get that sealed, and file a substitute for public record, that is redacted.

Unfortunately, attorneys almost always seek overly broad sealing.

Also, attached is a checklist I wrote, and distribute, that might help.

Additionally, I have attached a checklist from San Diego Superior Court that a staff attorney e-mailed to me about two years ago.

Ty

Ty Tasker
Research Attorney
Los Angeles Superior Court
Departments 18 and 40
111 North Hill Street
Los Angeles, California 90012
213-893-0118
ttasker@lasuperiorcourt.org

>>> "Kenny, Tracy" <Tracy.Kenny@jud.ca.gov> 02/21/06 10:40AM >>>
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Assembly
California Legislature

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LEORA GERSHENZON, COUNSEL
CINDY FISCHER, COMMITTEE SECRETARY
ROSIE CERECERES, COMMITTEE SECRETARY
STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0108
(916) 319-2334

DATE: 3/9

TOTAL PAGES SENT INCLUDING COVER: 4

TO: Tracy Kenny

OFFICE:

TELEPHONE:

FAX:

FROM: Drew

TELEPHONE: (916) 319-2334

FAX: (916) 319-2188

MESSAGE: SB 1015 amends

as amended March 9;

03/09/06 02:05 PM
57802 RN 06 06553 PAGE 1
Substantive

AMENDMENTS TO SENATE BILL NO. 1015
AS AMENDED IN ASSEMBLY FEBRUARY 16, 2006

Amendment 1
On page 2, before line 1 insert:

SECTION 1. The Legislature finds and declares as follows:

(a) The fundamental right of privacy protects against unwarranted intrusion into private financial affairs, including those affairs disclosed in a dissolution of marriage, nullity of marriage, or legal separation proceeding.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets, liabilities, income or expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income or expenses.

(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft.

(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic data bases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties. Existing state law is inadequate to protect these widespread privacy concerns.

(e) Local court rules regarding the disclosure of sensitive financial information vary from county to county. This act is intended to provide uniformity with respect thereto.

(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records.

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) ~~Upon~~ Notwithstanding any other provision of law, upon request by a party to a ~~petition~~ proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court shall order redacted any portion of a pleading that lists the parties' financial assets ~~and~~, liabilities ~~and~~, income or expenses, or provides the location of, including a residential address, or identifying information about, those assets ~~and~~, liabilities ~~sealed~~, income, or expenses. Subject to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy. The request may be made by ex parte application. Nothing ~~sealed~~ redacted pursuant to this section may be ~~unsealed~~ restored except upon petition to the court and a showing of good cause ~~shown~~.

(b) Commencing not later than July 1, ~~2005~~ 2007, the Judicial Council form used to declare assets and liabilities and income and expenses of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets ~~and~~, liabilities, income, or expenses listed therein. If the party making the request pursuant to subdivision (a) uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists ~~and~~ or identifies financial information and is therefore subject to this section. By the same date, the Judicial Council shall also adopt rules setting forth the procedures to be used for redacting and restoring pleadings pursuant to this section.

(c) For purposes of this section, "pleading" means a document that sets forth or declares the ~~parties'~~ assets ~~and~~, liabilities, income ~~and~~ or expenses, ~~a~~ of one or both of the parties, including, but not limited to, a marital settlement agreement ~~that lists and identifies the parties' assets and liabilities~~, exhibit, schedule, transcript, or any document ~~filed with the court~~ incidental to ~~the~~ a declaration or marital settlement agreement that lists ~~and~~ or identifies financial information.

(d) For purposes of this section and notwithstanding any other provision of law, a privately compensated temporary judge may order pleadings redacted pursuant to the provisions of this section.

(e) The party ~~making the request to seal~~ requesting redaction of a pleading pursuant to subdivision (a) shall serve a copy of the unredacted pleading, a proposed redacted pleading and the request for redaction on the other party or parties to the proceeding and file ~~a~~ the proof of service with the request ~~to seal the pleading~~ for redaction with the court.

~~(e)~~

(f) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a ~~sealed~~ pleading redacted pursuant to this section in any manner that is not otherwise prohibited by law.

(g) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings.

Amendment 2
On page 2, strike out lines 1 to 7, inclusive, and strike out pages 3 to 5, inclusive

- 0 -

Confidentiality and the Juvenile and Family Courts

BY JUDGE LEONARD P. EDWARDS

ABSTRACT

Court proceedings and court records are traditionally open to the public. The courts are public institutions, and openness serves a number of important purposes including protection of the free discussion of governmental affairs and the enhancement of the quality and integrity of the fact finding process. But court proceedings also address family matters including adoptions, juvenile delinquency, child protection, and domestic relations cases. These types of cases often involve personal issues, and many family members would prefer that they remain private. In most states, many of these proceedings have been closed to the public.

Strong policy reasons support both openness of family court proceedings and privacy considerations for family members, particularly children. This article addresses confidentiality in the context of juvenile and family court proceedings. It takes the position that the tension between these conflicting policies can be reduced if most family court proceedings are presumptively open, but judges are given the authority to place conditions on the information that can be revealed by observers outside the courtroom. Additionally, the article asserts that if the courts and the media take steps to change their practices and their relationship with one another, both the public interest and the confidentiality interest of the parties can be better served.

INTRODUCTION

Our nation's courts provide the venue for resolving many of our most important conflicts. They decide whether someone is guilty of a crime, whether someone owes damages or other compensation for acts he or she committed, and endless disputes involving persons, corporations, governmental agencies, and other entities. Our courts also decide cases relating to family matters including whether a child should be adopted, whether a youth has committed delinquent acts, whether a child has been abused or neglected, and issues relating to marital dissolution including division of property, child and spousal support, and child custody.

Some of these disputes may interest the public and the media. Other disputes involve matters the parties would prefer to keep private and that, if revealed to the public, might cause embarrassment, stigmatization, or trauma to the parties. A tension exists between the public's interest and privacy considerations concerning the work of the courts. Some legal standards define the balance between public access and private interests. The United States Supreme Court has declared that the press and general public have a constitutional right of access to criminal trials and that a defendant has the right to a public trial.[1] The Court's reasons for public access include protecting the free discussion of governmental affairs and the opportunity to participate effectively in and contribute to our republican system of self-government.[2] Additionally, the Supreme Court has declared that "public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process."[3]

The reasoning in criminal cases has been extended to civil trials.[4] But the Supreme Court has also ruled that public access to trials is not an absolute, even in criminal trials.[5] Indeed, the Court has emphasized that juvenile proceedings are usually private.[6] Federal statutes, state constitutions, state statutes, local court

Judge Leonard P. Edwards, Immediate Past President of the National Council of Juvenile and Family Court Judges, is a Superior Court Judge in Santa Clara County, California.

rules, and appellate court decisions regulate the openness of other types of legal proceedings. A recurring theme in these laws and rulings is that any restrictions of access to court proceedings must be supported by an individualized trial court determination that the need for closure is necessary to uphold a privacy interest and that any restriction must be narrowly drawn.[7]

This article will address confidentiality in the context of family court proceedings.[8] The term family court has different meanings in different court systems. In this article, family court refers to a court system in which all judicial proceedings relating to family life are addressed. Even though the term family court often includes probate, domestic violence, paternity, child support, and other types of actions involving family members, this article will address only adoptions, juvenile delinquency, child protection (juvenile dependency), and marital dissolution proceedings.[9] The suggested analysis should prove useful in developing a framework for decisions regarding confidentiality issues in all family court proceedings.[10]

Questions concerning access to family court proceedings and records are complex, involving competing values and numerous fact patterns. The competing values are essentially a family's right to privacy and a child's right to be free from the stigma of being a part of court proceedings and the public's right to know what happens in our nation's courts, including the public's interest in holding parties and the courts accountable for their actions. How these values are balanced will depend, in part, on the nature of the proceedings, the facts of the particular case, and the nature of the access to or type of information sought about a particular case. Because so many factors affect the balance to be struck, the article concludes that the legislature should establish the framework for access to court proceedings and records, and that judges should make most decisions about public access to family court proceedings and family court records on a case-by-case basis after balancing the competing interests. The article concludes that most family court proceedings should be presumptively open to the public, but that conditions and restrictions should protect privacy interests in some situations. This conclusion is contrary to the current state of the law in most jurisdictions,[11] but I reach it partly because the confidentiality and secrecy of these proceedings has led to a loss of public support and respect for the courts.[12] The article also concludes that relaxing family court confidentiality can increase public confidence in the workings of the court without a significant loss of privacy to parties. In the last sections, the article outlines several steps courts and the media can take to better inform the public about the court's workings without sacrificing the parties' legitimate privacy interests.

Information About Court Proceedings

The public can learn about cases within the court system in a number of ways. In this article, the term "public" includes the media. Indeed, the media represent the public's eyes and ears.[13] First, the public might have access to the court proceedings themselves. The courtroom could be open to some or all members of the public who would like to observe the proceedings.

Second, the public might have access to court records about one or more cases. Court records include: (1) the formal papers filed in the court indicating the nature of the proceedings including pleadings and motions; (2) reports written by social workers, probation officers, evaluators, and others professionals with a duty to prepare materials for the court's consideration in a particular case; (3) mental health reports from psychologists, psychiatrists, and counselors and medical reports from physicians, including substance abuse treatment information and HIV/AIDS records; (4) court orders, decisions, findings of fact, and conclusions of law made in a case; (5) court calendars that indicate the names of individual cases to be heard in a particular courtroom on any day; (6) notes made by investigators or other professionals who have worked on the case; (7) court reporters' transcripts or video recordings of the proceedings; (8) case information recorded in appellate decisions; and (9) aggregate information about the numbers of cases heard by a judge or court system.

Various officials control access to the courtroom and to court records. The judge usually controls access to the courtroom, to reports prepared for court proceedings, and to court records, while court administrators control access to aggregate information about the work of the court. Other persons who work in and around the courts have access to court documents and could be sources of information to the public. Court

clerks control case files and the information contained therein. Attorneys, social workers, probation officers, and other court-serving agents control their reports and files as well as any information they may have learned from participating in the legal proceedings. The parties themselves, the witnesses, and observers also have information about what has happened in the courtroom. Additionally, some persons know the facts of the case because they were witnesses to the occurrences. They may include the parties, witnesses, law enforcement, and other investigating agencies.

The judge and others in the court system may have control over the dissemination of information about what has happened in the court, but they have no control over the parties or members of the community who may know what has happened outside of the courtroom and who are willing to talk about it. For this reason, in some cases a great deal of information may be available to the public from persons who do not participate in the court process. This article addresses court control of access to family court proceedings and family court records.

Confidentiality and the Courts: Competing Interests

A number of conflicting policy considerations affect access to and information about court proceedings.

Arguments for Open Courts and Open Access to Court Records

First, many in the public, including the media, regard court proceedings as public proceedings. They argue that the public has a right to know the details of court cases because they are public. They point out that the Supreme Court has established the public's constitutional right of access to criminal trials, and they wish to extend this right to all cases.[14]

Second, it is argued that openness will encourage all participants in the family court process to comply with the law and produce better, more timely decisions for families appearing in the courts. If the courts, the attorneys, and the parties know that the public is watching, they will improve their performance.[15]

Third, many in the public also believe that openness in court proceedings is necessary to hold parties accountable for their actions. Public access fosters the appearance of fairness, thereby heightening public respect for the judicial process and for the law. Many believe that accountability for one's actions must prevail even when youthful offenders who are the subject of rehabilitative efforts by the state are brought before the court.[16] Accountability is particularly important when public entities and agencies carrying out their mandated duties are parties to the court proceedings.[17]

Fourth, some argue that courts should be open because they are publicly funded and decide issues of public interest and concern. Indeed, the juvenile courts and the agencies serving them expend large amounts of public monies to provide legal due process, services, and other interventions on behalf of the families before the court. This substantial public enterprise should be open to the community to ensure that the courts are well run and that they address public issues responsibly and efficiently.[18]

Fifth, many believe that opening proceedings to the public will bring more public attention to these cases and also may encourage more community support for programs and resources to address the problems faced by the children and families appearing in the family court.[19]

Sixth, some commentators have stated that protection of our most vulnerable citizens, our children, is public business and is of great public concern. They point to the First Amendment protection of "discussion of government affairs." To deny public access and knowledge to the system charged with that protection reduces public confidence in government and increases public suspicion about those who are appointed and paid to promote the public good.[20]

Seventh, some claim that openness will educate the public on how the family court system handles cases. If members of the public see how well many family and juvenile courts work, they will be less likely to credit the critics of the court. Openness will also result in more balanced and accurate stories in the media—stories that will be less sensational and will not contain charges of courts hiding the truth from the public.[21]

Eighth, many point out that openness will not involve a significant loss of privacy to the parties since few spectators will actually come to the court even if the courtrooms are open. The experience in several states seems to confirm this observation.[22] Additionally, in smaller communities the names and facts of court

cases are usually well known to the public anyway because of informal information exchanges.

Arguments for Confidentiality

Many others challenge the notion that all family court proceedings should be open to the public. They argue that some court proceedings must be confidential without exception, and that other proceedings should be confidential, perhaps giving the judge the authority to determine what information, if any, is made available to the public. First, they argue that citizens have a right of privacy that the courts should uphold.[23] They point out that court cases usually involve extraordinary accusations and facts potentially embarrassing to the parties. Many parties in those cases would prefer that the public not know about the sordid details of the legal actions they are involved in. They argue that there is nothing inherently newsworthy about what happens in the context of family life. They conclude that courts should not be the centers of gossip, particularly when intimate details of family life may be revealed.[24]

Second, some confidentiality proponents claim that opening the courts will discourage citizens from turning to the courts. This will result in fewer litigants using the court to resolve their problems and will discourage persons from reporting child abuse and neglect.[25] The court system seeks to provide a forum to resolve legal issues relating to the family, the argument goes, and the possible invasion of privacy will drive litigants and other participants away from the courts. To some extent this is already happening. For example, some litigants anticipate the possible disclosure of private information and resolve disputes outside the court system using private judges, arbitration, or mediation and then file the final judgment with the court without including details.[26] Using these dispute resolution mechanisms, litigants can prevent disclosure of information relating to the dispute. Of course, the ability to avoid the public court system is possible only for persons with the resources to pay for private services and only in cases that do not involve the juvenile court, the child protection agency, or other public agency.

Third, many argue that some legal proceedings should not be public because public disclosure would harm the individuals in the case. The harm might be inflicted on parties and witnesses, but the most important interest is the right of children not to be identified with family problems, particularly when they had nothing to do with those problems or were themselves victims. These children may be ridiculed by their peers, they may be unfairly labeled and stigmatized within the community, and their names will remain forever in the public record, all because they happened to be present when other family problems occurred.[27] "[I]ntense publicity surrounding the events which have brought a child into the juvenile court may psychologically harm the child, making it more difficult, if not impossible, for the child to recover from those events."[28] Other nonoffending members of the family might be similarly stigmatized were the case open to the public.

Harm can also result from disclosure of sensitive information about the litigants. For example, many domestic violence victims request that their addresses and other identifying information be kept confidential so they can avoid contact with their abuser. Open hearings might reveal that information and jeopardize their safety.

Fourth, confidentiality has been a hallmark of juvenile court proceedings since the first juvenile court was created in 1899.[29] The juvenile court creators believed that by keeping juvenile court proceedings out of the public eye, children could better be rehabilitated without the stigma of public knowledge following them into adulthood.[30] Abusive and neglectful parents would be more likely to change their ways if their conduct was not made public. Since a basic value of the juvenile court is to rehabilitate children and families, openness and the ensuing public knowledge would defeat the core purpose of the juvenile court.[31]

Fifth, some confidentiality proponents point out that confidentiality can facilitate settlement.[32] The family court has become a place where families can discuss their problems with professionals and resolve them in such a way that children can be safer, parents can change behaviors to become more competent adults, and family members can take on new responsibilities. These beneficial results can best be accomplished, they argue, in a confidential environment. Families are unlikely to disclose their problems to the court system if they know their statements might become known to the public.[33] This is one reason that the most successful mediation programs are confidential.[34] In a confidential

environment, family members can explain their personal concerns, thus making effective problem solving more possible. This fact finding and goal setting would be constrained and less likely to be effective in an open court setting. Additionally, open hearings may undermine any co-operation that has been built between the parents and service providers.

Sixth, several appellate courts have stressed that the public policy of confidentiality is an integral part of the informal and non-adversarial nature of juvenile court hearings and that publicity can potentially endanger the fairness of the proceeding and disrupt the adjudication process.[35]

Seventh, some commentators state that opening hearings will make no difference because neither the parties nor the courts will be more accountable to the public, and because more resources will not be allocated to the system.[36] Since opening the courts will make no difference, they argue, why subject the parties to potentially harmful public scrutiny?

Eighth, one commentator believes that by opening child protection proceedings, a party's admission to a charge of abuse would become a public record. Because there may be concurrent criminal charges, the parent will be less likely to admit to any charges in the child protection proceeding because the admission may influence the outcome of the criminal case.[37] The same commentator argues that opening juvenile dependency hearings would take up great amounts of court time as the court hears motions to open or close the proceedings[38] and would cost millions of dollars to retrain staff regarding open hearings.[39]

Resolving the Competing Interests

This section sets forth a framework for resolving the conflicting policies regarding public access to family court hearings and records. I believe that most types of family court hearings should be presumptively open to the public, but that the judge should have the authority to place conditions regarding access to the courtroom with orders that will protect privacy interests in appropriate cases. Under this proposed formula, court records including the legal history and outcome of the case would be presumptively open to public access, but social and mental health records would be presumptively confidential. The judge would have the authority to find these statutory presumptions rebutted on a case-by-case basis after weighing the competing interests. The proposed framework is complex and relies greatly upon the judge to whom the case is assigned, but it responds to both the privacy and openness concerns discussed in the previous section. The complexity is reflected in the type of case, the type of information sought, and the different forms of access to these cases. The framework would best be structured by the state legislature but, in the absence of legislation, could be established by state or local court rule.[40] Additionally, the approach outlined in this section should be considered in conjunction with the recommendations offered later in this article regarding the relationship between the courts, the public, and the media, and how each should modify attitudes and behaviors to maximize the goals that each is striving toward.[41]

Open Courtrooms

The law should declare that legal proceedings are to be held in open court unless the privacy rights of one of the participants outweigh the public interest in the proceedings.[42] Thus, courtrooms should be open to the public, even in the family court. Opening courtrooms would immediately end the suspicion that the courts have something to hide, that courts are secreting something of importance from the public, or that those charged with public tasks are not discharging their duties.

In some respects this proposal is not as radical as it sounds. Family courts should already be open to those who have a legitimate interest in knowing what is happening in a particular case.[43] In addition to the judge, staff, attorneys/guardians *ad litem*[44] and biological parents and guardians, persons with a legitimate interest may include relatives, foster parents, service providers, researchers, and significant others in the child's life such as a psychological parent. These persons should be permitted to be in the courtroom since they bring information and resources to the case and may be helpful in resolving the issues before the court.[45] Moreover, some jurisdictions require new attorneys and CASA volunteers[46] to spend time observing court proceedings, and some departments of children's services require new social workers to observe child protection proceedings as a part of their training.

Additionally, with some limitations, family court proceedings should be open to the general public. The public should be able to see how these courts operate. The judge should have authority to determine the number of people who may attend so the proceeding can retain some intimacy and not be over-crowded. Further, the judge should be prepared to place conditions on public access depending on the case. For child protection or less serious juvenile delinquency cases, for example, one condition would be that any person attending the proceedings shall not reveal the parties' names or other identifying information about a particular case.[47] This use of judicial discretion is not new because some state statutes already authorize this balancing process.[48] Moreover, giving the judge flexibility to determine the proper balance between the competing policies of privacy and public access on a case-by-case basis is consistent with the language of the Supreme Court in *Globe Newspaper v. Superior Court* referred to above.[49]

The policy of open courtrooms is not an absolute—the law should declare that the court for good cause may close any hearing in the best interest of a particular child or family or place conditions on dissemination of information by an observer. When the court exercises its discretion to close a court proceeding, the statutory scheme should require the court to make a finding regarding the balance between the public's right to know and the parties' privacy interests. The balancing process should address the following factors: (1) the type of case; (2) the public interest in the particular case;[50] (3) the potential harm that might be inflicted on any party to the legal action were identifying information released to the public; (4) any negative consequences public access may have on the integrity of the legal proceedings; and (5) the amount of information the public already has obtained about the particular case through other sources.[51] This policy balancing analysis within the suggested presumptive statutory scheme would lead to the following conclusions in these family court case types:

1. Adoption proceedings would likely remain private in every instance.[52] These are private matters with little public interest other than assuring that the legal process is properly completed. This assurance can be delivered by annual court reports of cases heard and decided. The adopting family could permit others to attend the hearing, but it would be the family's choice. Many families choose to make an adoption a well-publicized event, inviting family and friends to the legal ceremony. Some court systems hold court-wide events that include numerous adoptions all held on the same day. The choice to participate in such public events, however, must be left to the individual families.
2. Juvenile delinquency proceedings in which a youth is charged with serious delinquent behavior such as homicide would be open to the public in most cases.[53] The public interest in the legal decisions that must be made is great and the impact on public life is significant. The proceedings are embarrassing to the youth and the family, and some would argue that the youth's chances for rehabilitation in the community will be reduced by public knowledge of his wrongdoing,[54] but the embarrassment and possible loss of rehabilitation are outweighed by legitimate public concern.[55] The public needs to know how the accountability provided by the court system works. This balance in the weighing process will change depending on the nature of the hearing,[56] the seriousness of the crime, and the age and sophistication of the youth. The court ruling may include conditions concerning the release of identifying information.[57]
3. Child protection (juvenile dependency) cases would be open to the public, including the media,[58] but the court would have the authority to establish conditions of attendance.[59] The court would normally advise anyone attending of the conditions of attendance. The most important condition would be that no identifying information about the child or family members may be disseminated beyond the courtroom. This balance permits attendance at important legal proceedings, but protects the family and child from public embarrassment. If the judge concludes that attendance by the public might have a negative impact on the child or family members, he or she may deny access to the public in a particular case, but would have to make findings on why the proceedings must be confidential.
4. Marital dissolution proceedings would be presumptively open to the public,[60] but not a child custody case arising from a marital dissolution or other domestic relations legal action.[61]

In some of these family court cases, in addition to the court's authority to exclude the public from some or all of the proceedings, it would be useful if the court had the authority to order persons in the courtroom not to reveal certain information about what has taken place in the proceedings or to reveal the identities of some or all of the parties.[62] This can be done by conditioning access to a court hearing on the spectator's promise of non-revelation.[63]

A similar procedure is for the court to issue a gag order[64] commanding the parties and other persons in the courtroom not to speak to persons outside of the courtroom about some or all of the proceedings. Gag orders have been effective when imposed on the parties and attorneys in particular cases, but have been much more difficult to enforce against the media.[65] Judges resort to gag orders for a variety of reasons.[66] In family court cases, the judge should have the authority to condition access to the court and to issue gag orders when release of information about the case would likely cause harm to one of the persons involved in the proceedings, particularly a child.[67] Any such gag order must be narrowly drawn to avoid being a prior restraint of the media,[68] but violation of a properly drawn gag order could result in contempt proceedings.

In summary, interested members of the public, including the media, should be able to attend most types of family court proceedings. In some of the most confidential types of cases (child protection, for example) the court would set conditions for attendance. For less confidential cases (serious juvenile delinquency cases), the court would not set any conditions on attendance. The court's conditions in the most confidential cases would include the instruction that the name or other identifying information of any child or family member not be disseminated to anyone outside the courtroom. When the court determines that an otherwise open hearing should be closed or when a party requests that a hearing be closed, the court should hold a hearing to receive the arguments of all sides on the access issue.[69] Some courts follow this practice now and report that it works well.[70]

On the other hand, persons in attendance should always be encouraged to discuss the court process with others and to make suggestions for its improvement. The court must have discretion to order all non-parties to leave the courtroom during any particular case if the court finds that their presence would not serve the interests of the child, family members, witnesses, or would disrupt the court process. This might happen, for example, when the child is so distraught that she is having difficulty paying attention to the court proceedings and is distracted by strangers. The judge may decide to remove all non-parties from the courtroom if a child is to give testimony in a child protection proceeding. Indeed, some state laws permit children to give testimony in chambers out of the presence of their parents and others in the courtroom in order to encourage truthful testimony.[71]

The judge should also have control over use of cameras and electronic recording equipment in the courtroom. The law should prohibit use of such equipment, but permit the judge to exercise discretion to permit it if the public interest outweighs the privacy interests.[72]

Open family court hearings will not result in overcrowded courtrooms. Jurisdictions that have opened their courtrooms have noticed little difference in the numbers of people who attend. As one judge noted decades ago:

> ...the real problem facing the juvenile court judges in this country, is not how to keep the reporters out of the courts, but the fact that there is a lack of interest in the juvenile courts by the press and, because the press does not have that interest, by the public.[73]

Opening hearings in family court, however, will reduce public suspicion that the court process is handling cases improperly or illegally and hiding its actions behind closed doors. Openness will go a long way toward informing the public about how the family courts work and restoring confidence in our court system.

Court Records

Public access to court records should depend on the type of case and the type of record sought. The legal history, the legal documents describing the nature of the legal proceeding, and the results of court action should be open to the public. Additionally, court calendars containing the names of cases and the times for hearings

should be easily accessible by the public.[74] Other records including social reports, mental health evaluations, and medical records should be accessible to authorized participants in the court process, but should be kept confidential from the general public.[75] Statutorily protected records such as substance abuse treatment information and HIV/AIDS test results must also be protected consistent with statutory mandates.

Court records regarding adoptions should be confidential. No public interest outweighs a family and child's interest in privacy regarding a particular adoption. That is one reason that adoption calendars prepared by the courts typically do not contain the child's full name. However, the public has an interest in knowing whether the court system processes adoptions in a timely manner. Data concerning the court process for completing adoptions proceedings and aggregate numbers of adoptions finalized should be available to the public.

In juvenile delinquency cases, the public interest becomes greater in proportion to the seriousness of the allegations. In serious cases, the court should be prepared to permit access to court orders indicating the charges, whether the charges were found to be true, and the court's dispositional orders. These records, however, would not include psychological or social evaluations prepared by professionals. These are too personal in nature, and the youth's privacy interests override any public interest.[76] In less serious cases, the youth's privacy rights and society's interest in offering him or her a chance for rehabilitation should justify the decision not to release records to the public regarding the individual case, including the youth's name.[77]

In child protection cases, the public interest rarely outweighs the child and family's right to keep confidential any records revealing the names of the family members. An exception to this rule is a case involving a child's death. For too long, the public has learned of a child's death only to be told by officials (law enforcement, the courts, the Department of Children's Services) that they are forbidden to discuss the facts of the case. If there are no related criminal proceedings from which the public can learn about the facts of the case, the costs of silence are even greater. These situations have resulted in great public and media outcry and significant criticism of all officials involved.[78] Moreover, it has led to public and media distrust of the actions of those charged with protecting children including the courts.

There are good reasons to keep child death cases confidential. They are tragedies not only for the child and family, but also for everyone in the child protection system. Social workers, attorneys, and judges are all seriously impacted by a child's death. Making the case public will likely increase everyone's anguish. It may also lead to finger pointing and blaming both privately and publicly.[79] It may end the career of a social worker, a service provider, or a juvenile court judge.[80]

Nevertheless, the death of a child under the court's protection is too important for it to remain exclusively a private matter. It is a community concern. The court must be prepared to inform the public of what has happened and what will happen as a result.[81] If mistakes were made, they need to be aired publicly and promptly.[82] One approach is to hold hearings regarding the events surrounding the child's death. A judge in San Mateo County, California, conducted such hearings, and the public was permitted to attend. The public interest was well served, but there was criticism that these hearings inflicted unnecessary trauma on the participants, all of whom were already grieving the child's death.[83] Other California judges who have permitted the media to have access to some records relating to child deaths have been upheld by the appellate courts.[84]

It may be wise for judges and welfare administrators to create protocols to manage proceedings in anticipation of a tragedy such as a child death.[85] Such preventive work can ensure that the public interest in learning the facts of the case will be addressed, and at the same time, provide some process to deal with the multiple needs of grieving family members, traumatized members of the court system, and others who must continue their daily work.

In marital dissolution cases, the public interest is questionable. What public interest is served by learning how two married persons divide their property, settle alimony (spousal support) issues, or share time with their children? Have people given up their right to have some aspects of their lives remain private simply by filing a legal action to dissolve their marriage? These should be private matters between the parties.[86] The

fact of marital dissolution should unquestionably be a matter of public record. Whether parties are married has social and public implications, but the details of their dissolution do not. Thus, court records regarding the filing of a marital dissolution and the entry of a final decree should be a part of the public record, accessible to the public, but the details of the property settlement and alimony need not be public.[87]

When the parties are well known in the community, the public has a greater interest in hearing the details of their dissolution, but what is the nature of that interest? It would seem that it has little to do with public affairs and more to do with interest in the lives of the rich and famous. Some famous people publicize their personal relationships to the media. That is their choice. The question is whether courts have an obligation to permit the public access to court records revealing the details of the marital dissolution. Except in extraordinary circumstances, the parties' privacy rights outweigh the public interest in these details.[88] The courts should not release such information except when evidence demonstrates that a public interest outweighs the party's privacy interest.[89] The burden should be on persons seeking to make public these private matters.[90]

The privacy interest is particularly great when marital dissolution cases involve child custody disputes.[91] The children's interest to be free from public stigma is much greater than the public interest in knowing the details of the dispute.[92] Such records should not be public though some public agencies such as schools and medical staff must know the details of any child custody court orders so they can work with the parents to comply with the orders.

In summary, family court records of legal proceedings generally should be open and accessible to the public. Personal, psychological, medical, and other personal records should be confidential. Names and other information that would reveal the identity of individuals, particularly children, should be confidential except in matters of legitimate public interest such as serious delinquency cases and serious child protection cases. Judges should have discretion to deny or permit access to records in individual cases upon application if, after balancing competing interests, they find that one interest outweighs the other.

Court or Agency Statements Concerning Pending Cases

On occasion it may be appropriate for the court or governmental agency to release information to the public about what has happened in otherwise confidential court proceedings.[93] Disclosure might be ordered even over the objection of parties who would prefer to have the entire matter remain confidential. In a case of great public interest such as a child death or where the media has already published information about a case, it may be appropriate for the judge or someone authorized by the judge to make a statement about the status of the court case. This may be particularly important where misinformation has been spread and the court could correct the inaccuracies with little or no loss of privacy.[94] Sometimes child protection agencies want to respond to reports circulating in the public, but feel constrained because of confidentiality considerations.[95] With the court's permission, the agency should be able to make public statements concerning a particular case. Judicial or agency statements about well-known cases not only will keep the public informed; they will also demonstrate the court system's concern for accountability. It is important that the law permits judges to exercise such discretion and that judges take advantage of this opportunity in appropriate cases.[96]

For similar reasons, a judge may also wish to make a public statement about a case over which he or she has presided. The judge should be aware of ethical restrictions governing statements about pending proceedings,[97] but the Canons of Ethics do permit judges to make public statements in the course of their official duties and to explain court procedures to the public. Thus a judge or a clerk of the court might report that a petition regarding a child was filed, found to be true, and that the court made certain orders thereafter. A transcript of the judge's findings and comments at the conclusion of a trial might be released. The information would be a recitation of the legal events of the case, not a comment on the proceedings.

Particularized Need for Records

On occasion, individuals seek access to confidential court records for a specific purpose. The records often relate to parallel or related court proceedings. For exam-

ple, the parties to a criminal prosecution may seek the juvenile delinquency or child protection records from the juvenile court or reports and materials that probation officers or social workers prepared when they investigated delinquency or child abuse allegations related to the criminal case.[98] The parties in a marital dissolution may seek child protection records relating to alleged parental abuse or neglect of children who are the subject of a child custody dispute.

In these situations, the law should require the party seeking the records to petition the family court for access to the records, giving notice to all affected parties. The petition should state the reasons for the request including the relevance to the petitioner and the proposed use of the records. The court would hear arguments from all sides, examine the records and balance the probative value of any juvenile court records reviewed against the confidentiality interest of the parties involved in the records. If the probative value is greater, the court would release the records to the parties with a protective order outlining the permissible uses of the records and how the parties must dispose of the records when the related matter is resolved.[99] This process will ensure that relevant but confidential records are potentially available in related proceedings and that confidentiality interests are protected as much as possible.[100]

Additionally, court-serving agencies have a legitimate interest in obtaining information and records concerning family members who may have related court proceedings. Thus, a probation officer may be investigating a parent who has a pending child protection case, or a social worker may be supervising a parent charged with criminal conduct. These officers and workers should be able to exchange case-related information for court-related purposes without the necessity of a particularized court order. Some courts have created court rules that address this exchange of information situation.[101]

Improving Court/Media/Public Relations

Additional steps can be taken to address the legitimate interests of the courts, the parties, the public, and the media. The first step is that the courts should develop better working relations with the media and the public.[102] Judges have an obligation to educate the public about the workings of the family court and the needs of children and families who appear in this court.[103] How can that be accomplished? One approach I have used is to invite the media to attend court proceedings to learn more about what was happening in the juvenile court. I met a newspaper reporter who was interested in the workings of the juvenile court and wanted to find out more about the juvenile justice system. After we became acquainted, the reporter proposed that he and his wife write a book about the child protection court. I agreed and set into motion a process whereby the two reporters, over a two-year period, had full access to the child protection court and anyone within the child protection system who was willing to talk to them, including the families and children themselves. The only condition I established was that the court would review any proposed text before it was published, solely to address the issue of improper identification of children or families portrayed in the book.

Several court hearings were held on the confidentiality issues raised during this process.[104] At the conclusion of the reporters' investigation, the court's review process turned out to be very easy. The reporters had either secured a full release from all family members or had changed the names and facts such that the children and families could not be identified. The result was a book, *Somebody Else's Children*, that was both informative and useful. It was well received even by those who were initially concerned about possible harm resulting from a loss of confidentiality for their clients. The book marked a turning point for court-media relations in Santa Clara County. On a broader scale, many people who had never understood the child protection process have had the opportunity to read about actual case histories and how the courts work with distressed families in the child protection court system.[105]

I also regularly meet with members of the press to talk about the administration of the juvenile court and the difficult issues faced by judges and members of the child protection and juvenile justice system. The issues discussed at these meetings include the lack of foster homes in the community, the plight of foster children who cannot find a permanent home, improvements in the quality of services offered to parents attempting to reunify with their children, court innovations such as drug treatment and mental health courts, the coordina-

tion of law enforcement and child protective services when the decision to remove a child is being made, the length of time children remain in the child protection system before they are placed in permanent homes, the placement of children in congregate care, the capacity of the child protection system to provide sufficient visitation for separated families, the conditions that delinquent youth live in when they are placed in county or state facilities, the educational needs of children in foster or state care, and many more. These are issues critical to the administration of justice in the family courts and are of great public interest. Moreover, they can be discussed without jeopardizing the privacy of children and their families.

Developing better relations between the media and the courts can take other forms. In Los Angeles and Santa Clara counties, members of the bench, the bar, and the media regularly meet for dinner. One or more speakers will talk on a subject of interest to the assembled gathering. The idea is to get to know one another and to exchange ideas about the relationship among the judges, bar, and media. In Los Angeles County, the Media-Courts Committee includes judges, media representatives, and lawyers. The committee meets regularly and discusses issues of mutual concern.[106] Additionally, the Superior Court in Los Angeles has created a Public Information Office to provide information to the media and to the public about court affairs. This office can be of great assistance to anyone wishing to learn about court operations and access to court proceedings and records.[107]

The second step is that the media should take a different posture toward the courts and should make internal adjustments to reflect the changes. The media should start with a commitment that they will become educated about how the family court works. They should learn about the roles and responsibilities of each of the participants in the family court process. With that knowledge, the media will be in a position to educate the public about how the family court works. The media should build a trusting relationship with the bench and bar. That does not mean any abdication of journalistic independence or sacrifice of objectivity. It does mean that the media will endeavor to understand the context of family court proceedings when a news story breaks. This approach will also result in opportunities for stories that the media is not currently aware of.

Representatives from the media need to get to know the judges. Reporters should write profiles of the judges, their careers, and their work on the bench. They should follow a day in the life of a judge. In that context the media might, for example, research and write about a significant problem that is rarely reported on: judicial stress.[108] Few people realize the constant stress that judges, particularly family court judges, are subjected to every day. The media can tell that story. Additionally, the media needs to take a more sensitive position regarding the legitimate privacy interests of individuals and families caught in the family court. Some in the media do not know what harm can be done to an individual or to a family by publishing details about a particular case. It would be preferable to take the high road—resist the temptation to gossip or to name a victim or a child—even though it sells papers.[109, 110] The truly interested public wants to know about issues that serve public interests.

To take this new posture, the media may have to restructure their organization. The authors of *Somebody Else's Children* were able to persuade the *San Jose Mercury News* to establish a reporting/investigative division dedicated to children's issues including family court matters. The results have been higher quality reporting, better relationships with the court system, and some significant awards for reporting. Just as judges and attorneys serve the court system well when they remain in family court for significant periods of time,[111] so should the media recognize the advantages of maintaining specialists to report on the family court.

The third step is that the courts should develop a better relationship with the public, including those persons using the court system and those interested in the court system. Santa Clara County is a good example of what can be done to improve relations between the courts and the public.[112] The Santa Clara County Superior Court has developed several Web sites designed to assist the public. In addition to a Public Web site, there is a Self Help Web site, a Complex Civil Litigation Web site and a Public Access Case Information Web site.[113] These Web sites contain substantial information about the court system, the location of the courts, hours the courts are open, the different types of legal actions, substantive and procedural highlights of all types of cases, and much more. The

public can also track the progress of individual cases. The Web site informs persons called for jury duty when and where to appear.[114]

In addition to the Web sites, the Superior Court established a Self Help Center. The center is a Superior Court-run office that offers hands-on legal assistance for any litigant who needs help getting legal business completed in the court system. The Self Help Center serves more than 1,500 persons a month.[115] Additionally, the Courtmobile, a large trailer containing a lawyer, paralegals and legal materials, offers similar services to more remote areas of the county each day of the week.

These innovations have been supplemented by programs to invite students to visit the courts, for judges to speak at schools and at service clubs, and by bench-bar programs to inform the public about court proceedings. Annually, the county-wide moot court competition brings more than 40 high school teams to the court for two weeks of competition all staffed by volunteer attorney coaches with volunteer judges and attorneys hearing the cases. These and other efforts by the court educate the public about the court system.

The fourth step is that the courts should enable the public to become more involved in the workings of the court. Many members of the public are willing to serve in court-based programs, but the court must create the opportunities and then encourage participation. One of the best examples of public involvement in court activities is the Court Appointed Special Advocate (CASA) Program, which assigns court-appointed, trained volunteers to individual children in the child protection system to speak on their behalf throughout the life of the juvenile court case. There are currently more than 978 CASA programs in the United States today with more than 70,000 volunteers. Each year these volunteers provide more than 10,000,000 hours of service to the children in the juvenile and family courts of the United States.[116] Santa Clara County, California, has approximately 1,000 of these volunteers. Each knows the child welfare system well from their training, their courtroom observations, and their work with individual children. Since the creation of the Child Advocacy program in Santa Clara County in 1987, more than 2,000 volunteers have participated in the program. Each has participated in court proceedings, written reports, and become familiar with the lives of our community's most vulnerable children. One result of this community participation is that information about the otherwise confidential court system is informally spread by the advocates to other members of the community. Their families and friends learn about the child protection system and have an understanding of the context in which these cases arise, how the court system works, and how the lives of children are affected. This type of community involvement can be possible only through the proactive work of the family court and the family court judge.[117] The court system has an obligation to make it possible for interested citizens to participate in similar court-based programs. In that way, the community will be truly informed about the workings of the court.

Conclusion

There are competing interests regarding confidentiality and the family court. These interests will be better served if changes are made in the ways that court systems open their courtrooms and release records, in the ways that the media approaches these matters and structures their organization, and in the ways the courts interact with the public. This article outlines a framework for making access decisions and for specific changes that will serve all interests more effectively.[118]

The courts, the bar, the media, and the public have important roles to play to ensure that legitimate privacy rights are protected and that the public is informed and educated about the work of the courts. The public has a legitimate interest in the workings of the court system.[119] They have a right to know that the court system is efficient, fair, and makes sense. In some cases they have a right to know the details of the case. They also need to know how to use the court system for their own legal needs. Public confidence in and support for the legal system is at stake. Public understanding of the court system may lead to public support of court efforts to improve outcomes for some of our community's most needy persons and will likely diminish any suspicion about courts that has been fostered by confidentiality.

For the court system to have the necessary tools to maximize public understanding while protecting legitimate privacy rights, legislators must establish a framework outlining policies that define how much the public can learn about particular cases. Judges should decide the details of access to the courtroom and to records in

each type of case. Judges must be prepared to engage in an analysis of each case to determine who should be in the courtroom and under what conditions, and what records can be released. This is not a matter of simply drawing a bright line for all cases—it involves a consideration of competing interests in the context of different types of cases and various fact patterns. No one is better suited to address these issues than judges. No other public officials have all the facts at hand in each case.

Judges must also be ready to develop a different attitude toward both the media and the public. Judges have a role to play in educating the media and the public and in making the legal system more understandable. The media can greatly assist in this process by approaching their coverage of the family court in a different manner. It will take a different attitude from both the judiciary and the media for better results to be achieved.

The tension between the courts and the media will not end. Each has an important function to perform in our society. With better legislation and a better working relationship between the two, the tension can be minimized and the goals of each attained. The steps outlined in this article will involve more work for both court personnel and members of the media. The better results that will follow will be worth the effort.

AUTHOR'S ADDRESS:

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AUTHOR'S NOTE: The author wishes to thank Robert Masterson, Sharon Bashan, Joey Binard, Linda Szymanski, Jennie Winter, Michael Clark, Judge William Jones (Ret.), Carol Chodroff, Cheryl Romo, Tom Morton, and John Hubner for assistance in the preparation of this article.

APPENDIX A

CONDITIONS OF ENTRY TO JUVENILE COURT

The court finds that _____
PRINT LEGAL NAME HERE

has an interest in the pending proceeding(s) in the Santa Clara County Juvenile Dependency Court. Moreover, the court finds that the public interest would be served by permitting the above-named person to observe court proceedings on this date.

This person is permitted to observe court proceedings on the condition that he/she not disclose to persons outside of the court any identifying information about particular children whose cases or whose families are before the court. The purpose of these conditions is to protect the privacy rights of the child or children and other family members involved in the cases heard in the juvenile court so that they will not suffer further stigma or trauma.

These conditions in no way prohibit this person from discussing issues relating to the administration of the court, the actions of the judge or other matters concerning the operations of the juvenile court. These latter matters are of public interest and should be discussed openly in the community.

Date: _____ _____
Leonard Edwards
Judge of the Superior Court

I agree to the conditions stated above.

Date: _____ _____

APPENDIX B

PETITION TO RELEASE RECORDS/INFORMATION TO THE PUBLIC

NAME OF CASE _____

PETITIONER _____

Petitioner hereby requests permission from the court to release the following information to the public about the above-named case:

1. The nature of the allegations in the legal petition that brought the child before the court.

2. The fact that the allegations in the petition were found to be true by the court and the date of that action.

3. The disposition orders made by the court.

4. Other orders made by the court.

OTHER_____

The Petitioner believes that the public interest will be served if this petition is granted and that these public interests outweigh any loss of privacy by the parties based on the following facts:

_____

_____

_____

The Court grants/denies this Petition.

The Court makes the following order: _____

_____

_____

The Court sets this matter for hearing on _____

Date: _____ _____

JUDGE

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1 *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 558, 100 S. Ct 2818 (1979); Sixth Amendment, United States Constitution.

2 *Id.* at 587-588.

3 *Globe Newspaper Company v. Superior Court,* 457 U. S. 596, 606, 102 S. Ct. 2613 (1982).

4 *Westmoreland v. Columbia Broadcasting System,* 752 F.2d 16, 22-23; *Publicker v. Cohen,* 733 F.2d 1059, 1067-71. "The history of civil jurisprudence, like that of criminal law, reveals a tradition of public access." *Publicker* at 1068-70; *NBC Subsidiary v. Superior Court,* 20 Cal.4th 1178, 86 Cal.Rptr.2d 778 (1999); See generally, Carol A. Crocca, *Propriety of Exclusion of Press or Other Media Representatives from Civil Trial,* 39 American Law Reports 5th 103 (1996).

5 *Globe Newspaper, supra* note 3 at 611 (at footnote 27).

6 *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 105, 99 S. Ct. 2667, 2671, 61 L. Ed. 399 (1979). The court wrote at 105 that "all 50 states have statutes that provide in some way for confidentiality" in juvenile proceedings. For example, "In addition, the provisions of this chapter ensuring the confidentiality of proceedings and records are intended to protect the privacy rights of the child." CALIFORNIA WELFARE AND INSTITUTIONS CODE section 300.2, West Publishing, St. Paul (2004); The privacy of juvenile delinquency matters has eroded over the past 20 years. The laws of 42 states now allow media access to the identity, and in some situations to the physical images, of some youth involved in delinquency proceedings. Further, the trend is for state statutes to open juvenile delinquency proceedings either entirely or for serious cases. Howard N. Snyder & Melissa Sickmund, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 101 (1999) [hereinafter NATIONAL REPORT]. Washington DC: Office of Juvenile Justice and Delinquency Prevention.

7 *Globe Newspaper, supra* note 3 at 608-9.

8 This article will not discuss some of the most publicized issues surrounding confidentiality and the courts including secret settlements in cases involving sexually abusive priests, defective products, trade secrets, and incompetent professionals. These and other types of cases have resulted in criticisms from many quarters. See *Experts Blast Secret Settlements by Judges,* THE SUN NEWS, posted on Oct. 25, 2003 at http://www.myrtlebeachonline.com/mld/sunnews/news/local/7102501.htm; Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical,* 31-1 HOFSTRA LAW REVIEW (Fall 2000), at 1.

9 On the structure of family court systems and the value of family courts, see generally Judge Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes,* 44-1 JUVENILE AND FAMILY COURT JOURNAL (1993) at 1-60.

10 The analyses for the remaining types of cases heard in the family court are as follows: Criminal domestic violence cases should be analyzed the same as criminal cases. Restraining orders, probate, and child support cases should be analyzed as civil matters, while paternity and probate guardianship cases should be approached similarly to child protection cases (open, but with the court having the discretion to close the hearings when the privacy interests of a child or family members outweigh public interests).

11 See generally 39 A.L.R.5th 103, *supra* note 4, at 74-116.

12 "Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court's work. The public has a right to know how courts deal with children and families. The court should be open to the media, interested professionals and students and, when appropriate, the public, in order to hold itself accountable, educate others, and encourage greater community participation." *Children and Families First: A Mandate for America's Courts,* National Council of Juvenile and Family Court Judges, Reno, NV, at 3.

13 Many in the public sector rely upon the media to inform them about the workings of government and the courts. "[T]he media acts as the public's surrogate in attending such proceedings and reporting to the public, thus educating the public." *Richmond Newspapers, supra* note 1 at 573; See also 75 AM. JURISPRUDENCE 2d, Trial, section 212.

14 "... [T]he unmistakable force of *Richmond Newspapers, Inc. v. Virginia* ... virtually compels the greatest if not governing effect in all court trials. Together, *Richmond Newspapers v. Virginia*... [and other cases] confirm the presumptive openness of juvenile trials as a public and press right of the highest magnitude." *In re Chase,* 446 N.Y.S.2d 1000, 1006, 112 Misc. 2d 436, 450-451 (1982); see also the discussion, *supra,* at 1-2.

15 *Globe Newspaper, supra* note 3 at 2619; Harry Todd: *The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality,* 16 INDIANA LAW REVIEW 911 (1983); "All of a sudden, everyone is more cautious, more careful. They pay more attention." Bruce Boyer, Director, Loyola University, Chicago Child Law Clinic about bringing law students to observe child protection proceedings, in Molly McDonough, *Opening Doors to Juvenile Justice,* 2-45 ABA JOURNAL E-REPORT (Nov. 14, 2003); "To the extent public proceedings serve the twin goals of assuring fairness and giving the appearance of fairness, the societal values of public access first recognized in the criminal context can be beneficial to the juvenile court

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proceedings as well." *San Bernardino County Dept. of Public Social Services v. Superior Court,* 232 Cal.App. 3d 188, 283 Cal. Rptr. 332 (1991) at 201.

16 "The desire to shield juveniles from publicity to enhance chances of rehabilitation in many cases should not outweigh the public's right to know about juvenile crime." *The Juvenile Crime Challenge: Making Prevention A Priority,* Little Hoover Commission, Sacramento, CA, (Sept. 1994), at 91; Mark Fisher, *D.C. Should Let The Sunshine Into Juvenile Court,* WASHINGTON POST, (Jan. 15, 2004), at B01; "...the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile processes, procedures, and unmet needs." *Brian W. v. Superior Court,* 20 Cal.3d 618, 623.

17 "[I]t is important that governmental entities be held accountable for their actions not only to prevent further tragedies like the case of Faheem Williams, but to answer to its citizenry, whose taxpaying dollars support DYFS." *Charlie and Nadine H. v. Whitman,* Civil Action No. 99-3678(SRC) (U.S.D.C., New Jersey, 2003) at 16; "All courts should welcome constructive criticism arising from the press's actual observations. Certainly, the court process itself is as well as the delivery of auxiliary services involving these matters are or have become cumbersome and are in need of meaningful change. The perception of outside observers may provide some valuable insight." *In re "S" Children,* 140 Misc.2d 980,993, 532 N.Y.S.2d 192,200 (1988); "If the public cannot reconstruct the biography of the young victim from all governmental records created to document his or her short life—if secrets continue to be kept to protect the survivors, adults or children, then there will be no true accountability, no informed corrective action and nothing to prevent further deaths." Terry Franke, in Cheryl Romo, *Barriers, Not Access, Could Result from Law—Bill Would Shed Light on Deaths of Children in the Juvenile System,* LOS ANGELES DAILY JOURNAL, (May 13, 1999); "Public access does serve as a check against judicial and governmental abuse or misuse of power which might result in unnecessary and unjust interference with these important liberties." *San Bernardino County, supra* note 15 at 203; "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer,* 383 U.S. 75, 85 (1986).

18 "The right of access enables the public, through the media, to monitor proceedings in order to help ensure that the system as a whole is functioning properly." *Albuquerque Journal v. Jewell,* 130 N.M. 64, 66, 17 P.3d 437, 439 (2001); "It is vital that we are allowed to review court decisions and public agency actions in child abuse and neglect cases heard in our dependency courts...If a public agency is 'hiding' behind a wall of confidentiality, the safety of our children demands that the wall be torn down." Los Angeles Supervisor Michael Antonovich in Cheryl Romo, *Secrecy Battle Over Dead Kids File Escalates—Ocer Mothers Protest, County Seeks Closure,* LOS ANGELES DAILY JOURNAL, (Nov. 24, 1999); "Compared to civil cases, in which the government supplies no attorneys, the juvenile court is an expensive operation." Judge Leonard Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge,* 43-2 JUVENILE AND FAMILY COURT JOURNAL (1992), at 26.

19 "Although the purpose of a closed system is to provide a protective rehabilitative environment for both parents and children by shielding them from public scrutiny and stigmatization, a closed system allows abuses to exist uncorrected and lack of funding for children's services to go unnoticed by the public. In effect, the very confidentiality that was meant to protect children ends up harming them by keeping abuses in the system and the effects of lack of funding a secret." Minnesota Supreme Court Foster Care and Adoption Task Force, Final Report, 4, St. Paul, (1997) [hereinafter FINAL REPORT]; "The Court must add to the above salutary effect of press coverage the particular need for the public as well as the State Legislature to be informed of the crisis in our society involving child abuse and neglect and the inherent inadequacies of the systems established to protect children including foster care programs." *In re "S" Children, supra* note 17; "[T]he press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs." *Brian W. v. Superior Court,* 20 Cal. 3d, 618, 623, cited favorably in *San Bernardino County, supra* note 15 at 207.

20 "Plaintiffs argue that in light of the ongoing institutional deficiencies, it is their hope that informing the public would place DYFS under public scrutiny and thereby encourage or facilitate an overhaul of the child welfare system to improve the lives of the state's most vulnerable children." *Charlie and Nadine H. v. Whitman, supra* note 17, at 5; "The push to have the hearings open has been based on the perception that something secretive, perhaps nefarious, perhaps incompetent has been going on behind closed doors." Judge Patricia Clark, Chief Juvenile Judge of King County (Seattle) Superior Court in Jonathan Martin, *Court Door Opening on Child-Abuse Proceedings,* SEATTLE TIMES, (July 28, 2003); "Confidentiality prevents the public from knowing that the child welfare system does not function properly, foster children are killed, abused and neglected and do not receive basic services." Linda Pate, in Romo, *Barriers, Not Access, Could Result From Law, supra* note 17.

21 Mark D. McIntyre, *Juvenile Court Proceedings: The Conflict Between Juvenile Anonymity and Freedom of the Press,* 23 S.TEXAS LAW JOURNAL 383 (1982); "[C]onfidentiality virtually guarantees that misinformation gets to the public." Gary Trimarchi in Cheryl Romo, *Law to Lift Juvenile Courts Secrecy Gets Mixed Response—No Silent*

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Treatment Over Bid to Unshroud Juvenile Courts, LOS ANGELES DAILY JOURNAL, (May 25, 1999).

22 "It is nice to have a system where other people can show up and have an understanding of this process...I can't think of any bad experiences with open courts." Judge Dale Koch commenting on the open courts in Oregon, in Cheryl Romo, *Benefiting from Open Courts—Making Juvenile Proceedings Public Will Balance Perspective,* LOS ANGELES DAILY JOURNAL, Dec. 30, 1999; and see FINAL REPORT, *supra* note 19.

23 On the right of privacy generally, see William Bennett Turner, *Privacy and Newsgathering Torts,* in THE COURTS AND THE NEWS MEDIA, California Judges Association, 7th ed., 2001 at 201-244. Turner's article makes reference to the classic statement of the right of privacy, Louis D. Brandeis and Samuel D. Warren, *The Right of Privacy,* 4 HARVARD LAW REVIEW 193 (1890); 39 A.L.R.5th 103, *supra* note 4, section 12.

24 39 A.L.R.5th 103, *supra* note 4, sections 12-16; Orange County Presiding Judge Kim Dunning opposed open courtrooms in child protection cases because it would bring in nosy neighbors, Immigration and Naturalization officials, and people with agendas that have nothing to do with the welfare of kids. Romo, *supra* note 21.

25 FINAL REPORT, *supra* note 19 at D-1; *Charlie and Nadine H. v. Whitman, supra* note 17 at 22-23.

26 Utilizing private judges, private mediation, and arbitration are popular in civil disputes and marital dissolutions. W. Stolberg, & K. Pence, *Sealing the File—Closure in Dissolution Proceedings,* 59 FLORIDA BAR JOURNAL 99, (June 1995), at 1-6.

27 "Children who must face their peers in school might be subjected to special pressures if the matter is publicized." *San Bernardino County, supra* note 15 at 200, citing *Div. of Youth & Family Services v. J.B.,* 120 N.J. 112, 576 A.2d 261, 269 (1990); CALIFORNIA WELFARE AND INSTITUTIONS CODE section 300.2, West Publishing (2004); "While the public's interest in access is important and deserving of protection, the state also has a compelling interest in the protection of children." *In re T.R.,* 556 N. E. 2d. 439, 449 (Ohio, 1990); *In re M.B.,* 819 A. 2d 69 (2003).

28 *In re T.R., id.* at 451.

29 *An act to regulate the treatment and control of dependent, neglected and delinquent children,* State of Illinois General Assembly, April 21, 1899. Cited in Thomas Bearrows, Jeffrey Bleich & Michael Oshima, *Contemporary Mandate* in FROM CHILDREN TO CITIZENS 1: THE MANDATE FOR JUVENILE JUSTICE, edited by Mark Harrison Moore, New York: Springer-Verlag (1987) 52-53.

30 "The inventors of the juvenile court designed this 'new piece of social machinery' not only to remove children from the harsh criminal justice system, but also to shield them from stigmatizing publicity. In the juvenile court, its inventors envisioned hearings would be closed to spectators and the press, a juvenile's record would remain confidential, no private lawyers or juries would be part of the legal process. This vision of the juvenile court as a sheltered place to protect a child, especially during the storm of adolescence, would eventually become law in most states." David Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: The Myth of Immaculate Construction,* Chapter 2, A CENTURY OF JUVENILE JUSTICE, ed. by Margaret Rosenheim, Franklin Zimring, David Tanenhaus, & Bernardine Dohrn, University of Chicago Press, Chicago, (2001), at 43.

31 Danielle Oddo, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong With the Juvenile Justice System?,* 18 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 130, (Winter 1998); Kathleen Laubenstein, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?,* 68 TEMPLE LAW REVIEW 1897 (1995).

32 See 39 A.L.R.5th 103, *supra* note 4, section 17.

33 Presiding Juvenile Court Judge Kim Dunning stated in testimony before a legislative hearing on confidentiality and juvenile court proceedings that parents of allegedly abused and neglected children might be less forthcoming about their problems if they knew they were in the public eye. See Romo, *supra* note 21.

34 Judge Leonard Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives,* 53-4 JUVENILE AND FAMILY COURT JOURNAL (Fall 2002), at 49-65, 49; Research Update: Court-Based Juvenile Dependency Mediation in California, Judicial Council of California, Administrative Office of the Courts, San Francisco, (March 2003), at 1.

35 *San Bernardino County Dept., supra* note 15 at 199, 283 Cal. Reporter 332; *In re T.R., supra* note 27 at 451; *In re M.B.,* 819 A. 2d 59 (Pa. Super.) (2003).

36 "Other than the high profile cases, the media just does not show up. [The cases are] just not sexy enough for them," Judge Dale Koch cited in Romo, *supra* note 22; "[T]here is not a shred of evidence to support assumptions that the press and public access will improve the quality of judging, advocacy, child welfare work, or reduce the overloaded system." Esther Wattenberg, Minnesota Supreme Court Task Force, quoted in William Patton, *Pandora's Box: Opening Child Protection Cases to the Press and Public,* WESTERN STATE UNIVERSITY LAW REVIEW 181, 194 (2000).

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37 Patton, *id.* This argument is weak on four grounds: (1) The overlap between cases in child protection court that are also in criminal court is quite small; (2) The standard of proof is higher in criminal cases than in child protection cases; (3) There are several procedures that can permit a party to participate fully in a child protection case yet not create any evidence that could be used in parallel criminal proceedings; and (4) There is a statutory prohibition in some states against using any findings or testimony in a child protection case in a criminal case. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 355.1(f), West Publishing (2004).

38 The author has been conducting such hearings for more than 15 years, and has never spent more than five minutes on such a motion. Moreover, such hearings occur rarely, less than once a month.

39 The author's Superior Court has not had to retrain anyone on these issues over the past 15 years, much less spend any money. Moreover, most state courts have thousands, not millions, to spend on training.

40 This was the approach taken by the State of Minnesota in a pilot project initiated in 1998 in 12 counties. By Court Rule child protection proceedings were declared presumptively open. See Appendix B, MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, Minnesota Supreme Court, (2001). After the pilot project was completed and an evaluation completed by the National Center for State Courts, the Minnesota Court Rules were modified pursuant to Supreme Court Order effective July 1, 2002, to make hearings open and records accessible to the public; STATE OF MINNESOTA IN SUPREME COURT, C2-95-1477; Rule 8, Rule 27, Rule 44 and Rule 63, MINNESOTA RULES OF JUVENILE PROTECTION PROCEDURE, (2004); "According to the National Center for State Courts, the pilot project let to a slight increase in attendance at hearings by extended family members; showed no harm to children; enhanced professional accountability; and showed that media were responsible in their coverage of these cases. The Court's action has since led to local and national media coverage of child protection issues." *2001-2002 Annual Report,* MINNESOTA STATE COURTS, (2002), at 3; Also see *Recommendations From The Field, Balancing Accountability and Confidentiality in Child Welfare* found in EVERY CHILD MATTERS, Legacy Family Institute, Washington, DC (2003), at 14.

41 39 A.L.R.5th 103, *supra* note 4, section 41.

42 Open courtrooms in family court have been the law for years in several states including Oregon and Michigan (and more recently, Minnesota) with no reported negative consequences. See Romo, *supra* note 22; THE JANICULUM PROJECT RECOMMENDATIONS, National Council of Juvenile and Family Court Judges, Reno, NV (1998).

43 In California, the statute that permits such persons to attend reads as follows: "Unless requested by a parent or guardian and consented to or requested by the minor concerning whom the petition has been filed, the public shall not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 676, West Publishing (2004).

44 Attorneys and guardians *ad litem* have their own ethical constraints concerning the release of information about confidential matters. See Jennifer Renne, *Protecting Client Confidences in Child Welfare Cases,* 22-9 ABA CHILD LAW PRACTICE, (Nov. 2003), at 137.

45 This openness should not result in parties and attorneys from other cases on the court calendar on the same day being present when a particular case is heard by the court. These "cattle call" courtrooms where multiple cases are in the courtroom at the same time demean the family court process. They provide no sense of privacy or intimacy for the individual family before the court and they inevitably create distractions for the case before the court. These other persons have no legitimate interest in the cases of other families who happen to be on the court calendar on that day. The better practice is for the court to insist on cases being heard one at a time, with parties from other cases waiting outside the courtroom.

46 CASA stands for Court Appointed Special Advocates, trained volunteers appointed by the court to speak on behalf of abused and neglected children in the child protection system.

47 See *San Bernardino County, supra* note 15 at 207; *In Re Keisha T.,* 44 Cal. Rptr.822 (1995) where conditional access was not permitted because the information was lawfully obtained. The California law resembles many state statutes when it bans public attendance, but empowers access to persons deemed to "have a direct and legitimate interest in the particular case or work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 676, West Publishing (2003); Such conditional access has been authorized in some courts: *In re "S" Children, supra* note 17; *Mayer v. State,* 523 So.2d 1171, 13 FLW 602, 15 Media L.R.2254 (Fla. 1988); *In re Minor,* 149 Ill.2d 247, 172 Ill Dec 382, 595 N.E.2d 1052, 20 Media L.R. 1372 (1992); *In re Welfare of K.,* 269 N.W.2d 367, 4 Media L.R. 1539 (1978, Minn.); *In re Ulster County Department of Social Services ex rel. Jane,* 163 Misc. 2d 373, 621 NYS2d 428 (1993, Family Ct). Refer to Appendix A. This approach has been recommended by some commentators. *Making Good Decisions About Confidentiality 2003,* EVERY CHILD MATTERS, Legacy Family Institute, Washington, DC at 58, available online at http://www.legacyfamilyinstitute.org under Confidentiality: Laws and Policies.

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48 CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 827 and CALIFORNIA RULE OF COURT 1423, West Publishing (2003). See Appendix A for an example of a court order that can be used in both child protection and juvenile delinquency cases.

49 *Globe Newspaper, supra* note 3; The reasoning in *Globe* was followed in the case of *New Jersey Division of Youth and Family Services v. J.B.,* 120 N.J. 112, 576 A.2d 261 (1990). In the New Jersey case, the trial court permitted the press to attend a juvenile dependency hearing and the New Jersey Supreme Court affirmed the trial court stating, "This case involved the rare situation in which the public's right to attend judicial proceedings is not outweighed by the state's compelling interest in conducting a private hearing." 576 A.2d at 270.

50 "It is clear that the involvement of a public entity in the litigation is a factor weighing greatly in favor of disclosure." *Charlie and Nadine H., supra* note 17, at 12-13, citing *Pansy v. Borough of Stroudsburg,* 223 F.3d 772 93d Cir. (1994).

51 This factor has been decisive in some cases. "However, given the fact that the underlying matter has already been widely publicized, the Respondent has pled guilty to a manslaughter charge on the related matter in the County Court...the Court believes that the basis for Respondent's objections is essentially negated." *In re "S" Children, supra* note 17 at 987.

52 A Florida statute declares adoption proceedings confidential. Citing the best interests of the child, the statute was upheld against a challenge by the media in the case of *In re Adoption of H.Y.T.,* 458 So.2d 1127, 9 FLW 459 (Fla. 1984). The California statute is similar; CALIFORNIA CIVIL CODE 227, West Publishing (2003).

53 "The desire to shield juveniles from publicity to enhance the chances of rehabilitation in many cases should not outweigh the public's right to know about juvenile crime." Little Hoover Commission, *supra* note 16 at 91; Judge Gordon Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings,* 21 NEW ENGLAND JOURNAL ON CRIMINAL LAW & CIVIL CONFINEMENT 393 (1995); Stephan Oestreicher, Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings,* 54 VANDERBILT LAW REVIEW 1751 (2001). This is consistent with the national trend to open juvenile delinquency proceedings. See NATIONAL REPORT, *supra* note 6.

54 Indeed, the confidentiality of delinquency proceedings in order to enhance the possibility of rehabilitation was one of the cornerstones of the juvenile court law. See Oddo, *supra* note 31; See Laubenstein, *supra* note 31; Some appellate courts uphold this confidentiality right: *Florida Pub. Co. v. Morgan,* 253 Ga. 467, 322 S. E. 2d 2233, 11 Media L. R. 1021 (1984); *In re M.,* 109 Misc. 2d. 427, 439 N.Y. S. 2d. 986, 7 Media L. R. 1773 (1981); *In re Gillespie,* 150 Ohio App. 3d 502, 782 N. E. 2d 140 (10th Dist. Franklin County 2002); *In re J.S.,* 140 Vt. 458, 438 A 2d 1125, 7 Media L. R. 2401 (1981).

55 THE JUVENILE COURT AND SERIOUS OFFENDERS: 38 RECOMMENDATIONS, NCJFCJ, (1984), Chapter V. This publication recommended that in addition to the public, others had a legitimate need to know about juvenile delinquency proceedings including law enforcement, adult courts, and parties to related legal proceedings. The California legislature, like many others, has taken this approach. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 676 permits the public to attend juvenile delinquency proceedings on the same basis they would be admitted to adult criminal trials if the youth is charged with one of a long list of serious crimes. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 676, West Publishing, (2004). For other offenses the statute excludes the public except where the judge determines that a person has "a direct and legitimate interest in the particular case or the work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE Section 676, West Publishing, (2004). In this article, I take the position that all such hearings should be presumptively open, but that the judge should have the discretion to close a part or all of the hearing if the privacy interests of the child or other party or witness outweigh the public interest in viewing the hearing. Using this analysis, the more serious the case, the less reason for closing any part of the hearing.

56 *In the Matter of N.H.B.,* 769 P.2d 844 (1989), the juvenile court heard a motion to recall jurisdiction from the circuit court to the juvenile court. The juvenile court closed the proceedings and the media challenged the ruling. The court denied the challenge and the media appealed. The Utah Court of Appeals held that the media had the right to challenge the judge's decision to close the hearing, but held that the media did not have a right to attend the hearing and that the juvenile court properly considered the relevant factors in denying the motion.

57 Even where the charge is serious and the public is admitted, one appellate court cautioned the court staff "not to use the respondents' or witnesses' names within the hearing of the reporter. The corporation counsel and the law guardian agree to make every effort to ensure that no names will be used during the proceeding." *In re Chase, supra* note 14 at 450-451; "Although not constitutionally required, the court should consider whether it would be feasible to allow press access to portions of the proceedings and excluding the press from other portions." *San Bernardino County, supra* note 15 at 207-8. These approaches support the principle that public access can

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be combined with restrictions on the release of information about individuals in the case. A related technique adopted by many appellate courts is to refer to any child in appellate proceedings by his or her initials. Many of the cases cited in this article exemplify this technique.

58 The media would be advised that they must comply with the conditions of admission unless they obtained their information from a public source. See *infra* note 65. If the judge believes that even with "conditional access" there would be a detrimental effect upon the child or parties, he or she should consider closing the hearing. Federal law now grants states the discretion to establish their own policies on public access to child abuse and neglect courts as long as long as they "at a minimum, ensure the safety and well-being of the child, parents, and families." THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA), 42 U.S.C. section 5106(b)(2)(A)(v) and 42 U.S.C. section 6781(a)(8); *Public Access to Child Abuse and Neglect Proceedings,* National Center for State Courts, 4-5 ISSUE BRIEF, (July 2003).

59 The Pennsylvania law seems to have adopted this approach. In the case of *In re M.B., supra* note 35, one of the parties to a juvenile dependency proceeding sought to close the proceedings by rebutting the presumption of openness. That party demonstrated that closure served a compelling governmental interest and that no less restrictive means exists to serve that interest. (The interest in this case was protecting children from further embarrassment, psychological harm, and trauma). *Accord, In re R.L.K., Jr. and T.L.K. v. Minnesota,* 269 N.W.2d 367 (Minn. 1978); See Appendix A of this article for an example of a conditional attendance agreement.

60 The law in the United States is in conflict in this area. See W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective,* 17 J. AM. ACAD. MATRIMONIAL LAWYER 29 (2001). The Pennsylvania courts have held that the trial court has the discretion to permit the public in an equitable distribution hearing in a divorce action. *Katz v. Katz,* 356 Pa Super 461, 514 A. 2d 1374, *allocator denied,* 527 A.2d 542 (Pa. 1986); 13 Media L.R. 1296, app den 515 Pa 581, 527 A2d 542. Even with privacy interests at stake, the appellate courts in Connecticut have held that the public cannot be excluded from divorce proceedings. *Wendt v. Wendt,* 45 Conn. Supp. 208, 706 A. 2d 1021 (Super. Ct., 1996). *Accord, State ex rel. Gore Newspapers Co. v. Tyson* (1975, Fla App D4) 313 So.2d 777; *Merrick v. Merrick* (1992, Sup) 154 Misc.2d 559, 585 NYS2d 989, *affd* (1st Dept) 190 App Div 2d 5416, 593 NYS2d 192 and *supp op* (Sup) 165 Misc 2d 180, 627 NYS2d 884, *affd* (NY App Div 1st Dept) 636 NYS2d 1006; 103 A.L.R.5th 103, *supra* note 4, section 15.

61 *Firestone v. Time, Inc.,* 271 So. 2d 745 (Fla. 1972); *Whitney v. Whitney,* 14 Cal. App. 2d 577, 330 P. 2d 947 (1958); 39 A.L.R.5th, *supra* note 4 at sections 12, 13, and 15.

62 *United States v. Davis,* 902 F Supp 98, 102 (ED La, 1995); See generally, Tijani Cole, *The Courts & the Media Bench Book,* 35 NEW ENGLAND LAW REVIEW 853, (Summer 2001).

63 The conditional access of the press to child protection proceedings has worked well in other courts. *In re "S" Children, supra* note 17, at 992.

64 A gag order in a consolidated dependency and child custody cases was upheld in *In re T.R., supra* note 27. A gag order is similar to a "non-dissemination order." See *In re Tiffany G.,* 29 Cal. App. 4th 443 (1994).

65 The media cannot be sanctioned for the publication of truthful information obtained in official court records open to public inspection or from sources outside of the court. *Smith v. Daily Mail Publishing, supra* note 6; *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975); *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 97 S. Ct. 1045, 51 L.Ed2d 355 (1977); However, in one state the media was sanctioned for violating a gag order in an otherwise confidential court proceeding. *In re "S" Children, supra* note 17. In some cases, the judge may conclude that the release of a youth's name could result in harm because of possible retribution from others in the community, such as rival gang members. The law should permit the judge to restrict release of a youth's name in these and similar circumstances.

66 Gag orders have been used to protect the criminal defendant's right to a fair trial: *Nebraska Press Assn v. Stuart,* 427 U.S. 539, 564, 96 S. Ct. 2791, 2805, 49 L.Ed.2d 683 (1976), to protect a litigant's confidentiality interest in information subject to civil discovery: *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984), and to protect trade secrets: *Triangle Ink & Color Co., Inc v. Sherwin-Williams Co.* (N.D.Ill.1974), 61 F.R.D. 634.

67 That is why the trial court issued a gag order in the case of *In re T.R., supra* note 27. The Appellate Court in this case relied, in part, on the Code of Professional Responsibility adopted by the Ohio Supreme Court. DR 7-107(G) cited at 556 N.E.2d 439, 455.

68 *Arkansas Democrat-Gazette v. Zimmerman,* 341 Ark. 771, 20 S.W.3d 301, 28 Media L. Rep. 2321 (2000).

69 "[T]he court must in an expeditious manner give the public or press an opportunity to present evidence and argument to show that the state's or juveniles' interest in a closed hearing is overridden by the public's interest in a public hearing." *Florida Pub. Co. v. Morgan,* (1984) 253 G. 467, 322 S.E. 2d 233, 238; See also *State ex rel. Dispatch Printing Co. v. Lias,* 68 Ohio St.3d 497, 628 N.E.2d 1368 (1994); *In re M.B., supra* note 35.

70 For an example of a form describing the terms and con-

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ditions of news media participation in juvenile court cases, see Judge Terry B. Friedman, *Access to Juvenile Court,* in THE COURTS AND THE NEWS MEDIA, *supra* note 23 at 82, and Appendix A of this article.

71 CALIFORNIA WELFARE AND INSTITUTIONS CODE, Section 350(b), West Publishing (2003).

72 For examples of court regulations regarding the use of cameras and other electronic equipment in court proceedings, see Rule 5.1 and 5.2, RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I and CALIFORNIA RULE OF COURT 980, *Photographing, Recording and Broadcasting in Court,* California Judicial Council, West Publishing (2003).

73 Judge Byron B. Conway, *Publicizing the Juvenile Court,* 16-1 JUVENILE COURT JUDGES JOURNAL (1964), at 21-22.

74 The media and public complain that court calendars are often posted in obscure places and thus do not give sufficient notice to those interested in attending hearings. Courts should have a central location for the posting of all calendars for the court system and should consider posting calendars on the Internet.

75 This approach is consistent with the RULE ON PUBLIC ACCESS TO RECORDS RELATING TO OPEN JUVENILE PROTECTION PROCEEDINGS, Minnesota Supreme Court Advisory Committee On Open Hearings in Juvenile Protection Matters, Minnesota Supreme Court, 2001. Subdivision 4 of that RULE specifies those records that shall not be accessible to the public. See also JANICULUM PROJECT, *supra* note 42.

76 However, some family court records may have relevance in other court proceedings. Parties to those proceedings should have the right to petition the family court for access to those records. The family court judge would then make the decision whether to release the records, to whom they would be released and how those records could and could not be utilized. This is the procedure followed by several states. See CALIFORNIA WELFARE AND INSTITUTIONS CODE section 827, and CALIFORNIA RULE OF COURT 1423, West Publishing (2004).

77 "We imagine a juvenile justice system that is informal and private in handling minor affairs, but that becomes quite formal and accountable when deciding matters of importance." Moore, *supra* note 29.

78 R. Berezny & J. Levine, *State Scapegoats Parents, Workers in New Jersey Child Welfare Scandal,* (article on file with author); M. Gougis, *Child-welfare blunders led to boy's death,* LOS ANGELES DAILY NEWS, (Nov. 5, 2003).

79 R. Berezny & J. Levine, *id.*

80 Craig Schneider, *DFCS Workers Fired, Disciplined After Child Deaths,* ATLANTA JOURNAL-CONSTITUTION, (Aug. 28, 2003); N. Badertscher & J. Galloway, *Perdue Ousts DHR Commissioner Jim Martin,* ATLANTA JOURNAL-CONSTITUTION, (Aug. 20, 2003); Craig Schneider, *Dead Boy's Mom: I Saw No Danger,* ATLANTA JOURNAL-CONSTITUTION, (Aug. 27, 2003); D. Kocieniewski, *New Jersey Child Welfare Commissioner to Step Down,* NEW YORK TIMES, (Dec. 6, 2003); R. Johnson & B. de la Cruz, *Plaintiffs Want DCS Held in Contempt,* TENNESSEAN, (Dec. 8, 2003).

81 "And if the child died, I don't think you need anyone's permission to see the file." Virginia Weisz in Cheryl Romo, *Despite Law, Paper Maze Slows Access to Dependency Records,* LOS ANGELES DAILY JOURNAL, (July 8, 2002); see also *Charlie and Nadine H. v. Whitman, supra* note 17 at 19.

82 Cheryl Romo, *Facts Behind Fatalities Lie On Hard Path—When Kids Die in Custody, Answers Come Slowly,* LOS ANGELES DAILY JOURNAL, (July 9, 2001); Cheryl Romo, *Freeing "Confidential" Records,* LOS ANGELES DAILY JOURNAL, (Sept. 10, 1998).

83 *Courageous Judge Pushes for Reform,* PALO ALTO DAILY NEWS, (April 11, 2003); The Department of Human Services appealed the some of the judge's orders in the case and the Court of Appeal reversed the judge's order appointing a particular social worker to supervise the case; *In re Ashley M.,* 2003 Cal. App. LEXIS 1815.

84 *In re Keisha T., supra* note 47; *Bee Wins Access to Juvenile Court Records to Scrutinize System,* SACRAMENTO BEE, (Sept. 9, 1995), at B3; *Records Reveal Failure to Assist Abused Kids,* SACRAMENTO BEE, (July 3, 1998), at A1; Cheryl Romo, *Quest Yields a Look at Failed System,* LOS ANGELES DAILY JOURNAL, (May 25, 1999).

85 Annie E. Casey Foundation, *Strategic Communications for Child Welfare,* Family to Family Tools for Rebuilding Foster Care, Baltimore, MD, March 2002; *Making Good Decisions About Confidentiality in Child Welfare, supra* note 47 at 42-45.

86 "...divorce files should be presumptively private." Laura Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Records On Line,* 17 J. AM. ACAD. MATRIMONIAL LAWYER, 45 (2001). *Accord, Katz v. Katz, supra* note 60.

87 See *Merrick v. Merrick* (1992, Sup) 154 Misc.2d 559, 585 NYS2d 989, *affd* (1st Dept) 190 App Div 2d 516, 593 NYS2d 192 and *supp op* (Sup) 165 Misc 2d 180, 627 NYS2d 884, *affd* (NY App Div 1st Dept) 636 NYS2d 1006, a case in which the court prohibited court personnel from distributing or showing any matters relating to the dissolution except for court decisions or orders.

88 There are many who disagree with this position. R. Perez, *Isle divorces can be kept hush hush—for a price,* HONOLULU STAR-BULLETIN, (Aug. 25, 2002), (http://starbulletin.com/2002/08/25/news/perez.html)

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89 On the issue of public figures and their privacy rights in divorce proceedings, see 39 A.L.R. 103, *supra* note 4, at section 13.

90 Appellate cases have found that the details of litigation involving famous people may be made public. See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 56 Cal. Rptr.2d 645 (1996) (involving a palimony suit by Sandra Locke against Clint Eastwood) and *In re the Marriage of Lechowick,* 64 Cal.App.4th 1406 (1998) (involving divorce proceedings of a local judge and his wife).

91 *Barron v. Florida Freedom Newspapers, Inc.,* (Fla. 1988) 531 So. 2d 113, 13 F.L.W. 497, 15 Media L. R. 1901.

92 "Custody proceedings in the juvenile court would benefit little from public access. Custody disputes generally delve into the private relations of parents and children. While curiosity may be incited by custody cases involving bizarre facts or famous persons, this does not necessarily translate into a significant positive public role. '[W]e perceive a clear distinction between mere curiosity, or in undeniably morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and real public or general concern on the other.'" *In re T.R., supra* note 27 at 16, citing *Firestone v. Time, Inc., 271 So. 2d 745, 748 (Fla. 1972).* But some courts have permitted access to custody proceedings. *In re Anonymous v. Anonymous* (1190, 1st Dept) 285 App. Div 2d. 296, 550 NYS 2d 704, 18 Media L.R. 1560.

93 McDonough, *supra* note 15.

94 "I can't tell you how many times I've said something is confidential and the media know more than I do about the case. Yet when it comes to confronting the welfare system to confirm facts, reports hit a wall. We end up with all this silliness. The people who have the answers and are responsible can't give the answers while often the perpetrators or those relatives causing trouble freely speak to the media." Judge James Payne, Presiding Judge, Marion County (Ind.) Juvenile Court, in McDonough, *supra* note 15.

95 Many state laws prohibit the departments of social services/children's services from making public comments regarding their cases.

96 A sample petition for permission to speak about otherwise confidential matters is contained in Appendix B.

97 Canon 3B(9), REVISED CODE OF JUDICIAL CONDUCT; Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. B. Adjudicative Responsibilities. (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonable be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

98 *Davis v. Alaska,* 415 U.S. 308 (1974); *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987); *People v. Hammon,* 938 P.2d 986 (Cal. 1997).

99 A typical protective order might read as follows: "The attached juvenile court records are released to the parties on the following conditions: (1) they shall be used exclusively in the pending criminal prosecution involving the petitioner and shall not be further disseminated, and (2) after the conclusion of the criminal prosecution, they shall be destroyed or returned to this court."

100 This is the approach used by some state legislatures. See CALIFORNIA WELFARE AND INSTITUTIONS CODE section 827, West Publishing (2004).

101 *Juvenile Dependency, Juvenile Delinquency, Family and Probate Exchange of Information,* Section L, JUVENILE RULES, GENERAL PROVISIONS, Superior Court, Santa Clara County, CA, (2003).

102 "Juvenile Court Judges should reach out to the media and make it possible for them to get to know how the juvenile court works." Judge Leonard Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps,* 48-4 JUVENILE AND FAMILY COURT JOURNAL (1997) at 11.

103 "Judges of the juvenile court...are encouraged to:...(7) Educate the community and its institutions through every available means including the media concerning the role of the juvenile court in meeting the complex needs of at-risk children and their families." Section 24(e), STANDARDS OF JUDICIAL ADMINISTRATION, California Judicial Council, West Publishing (2003); "...the juvenile court judge has an even broader role: providing the community information about how well the juvenile court is completing the tasks assigned to it. The juvenile court judge both informs and advocates within the community on behalf of children and their families." Edwards, *supra* note 18 at 29. See also Moore, *supra* note 77 at 181.

104 John Hubner & Jill Wolfson, SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES, Crown Publishing, NY, (1996), at vii-xiv.

105 The book is now required reading for new social workers and child advocates (CASAs) in several jurisdictions and has a national audience. Its popularity has led to republication.

106 For further information about the Los Angeles County Media-Bench Committee, contact the Los Angeles Superior Court Public Information Office at (213) 974-5227.

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108 On the issue of judicial stress, see Peter Jaffe, Claire Crooks, Billie Lee Dunsford-Jackson, & Judge Michael Town, *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice,* 54-4 JUVENILE AND FAMILY COURT JOURNAL, (2004) at 1-9; and see Page, *supra* note 9 at 22-23.

109 The Code of Ethics of The Society of Professional Journalists Sigma Delta Chi supports this position. In Section V, Fair Play, the following ethical admonitions are written: "Journalists at all times will show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting news.... 2. The news media must guard against invading a person's right to privacy.... Journalists should show compassion for those who may be affected adversely by news coverage. Use special sensitivity when dealing with children and inexperienced sources or subjects." Code of Ethics found in THE COURTS AND THE NEWS MEDIA, *supra* note 23 at 319-321. Apparently, this code of ethics is not utilized by all journalists: Edwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II,* 37 SANTA CLARA LAW REVIEW 913 (1997). "When a story does contain context, the particular context the media chooses often distorts the account." Judge Ernestine S. Gray, *The Media—Don't Believe the Hype,* 14-1 STANFORD LAW AND POLICY REVIEW, (2003) at 45-56.

110 There are many examples of the media publishing sensitive information identifying child victims and likely retraumatizing them in the process. See *In the Matter of Ruben R.,* 641 N.Y.S. 2d. 621 (N.Y.App.Div. 1996); *State v. Oregonian Publishing Co.,* 613 P.2d 23 (Or. 1980). On the other hand, reports from states that have opened their child protection courts are that the news media has been sensitive and has rarely published children's names. FINAL REPORT, *supra* note 19 at 122-3 and *2001-2002 Annual Report, supra* note 40, at 3.

111 "Presiding judges should assign judges to the juvenile court for a minimum of three and preferably for five years." Edwards, *supra* note 102 at 5; CALIFORNIA STANDARDS OF JUDICIAL ADMINISTRATION, Section 24(a), West Publishing (2003).

112 The Santa Clara County Web sites have been designated the best court-based Web site in the world by Justice Served. See www.justiceserved.com.

113 The public Web site is http://www.sccsuperiorcourt.org. The self-help Web site is http://www.scselfservice.org. The complex litigation Web site is http://www.sccomplex.org, and the Public Access Case Information Web site is http://www.sccaseinfo.org.

114 The response from the public has been extremely favorable to the juror information offered on the Web. The Superior Court has been receiving a steady stream of letters of appreciation from members of the public.

115 The public interest and enthusiasm for this service has been overwhelming. In addition to the 1,500 people served each month, hundreds of others are turned away. The demand is so great that the public starts lining up at the self-help center hours before it opens.

116 ANNUAL REPORT, National CASA, Seattle, WA (2003).

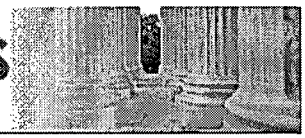
117 "An important role for the juvenile court judge is to reach out to these organizations and to offer opportunities for them to assist the court and the child welfare system." Edwards, *supra* note 102 at 11-12; Page, *supra* note 9.

118 A good example of an appellate court advising the trial courts how to approach the balancing of public and private interests is contained in the case of *In re T.R., supra* note 27.

119 "It is high time public consciousness was raised about the issues surrounding Family Court as well as about the people in Family Court." Judge Judith Kaye, Chief Judge, New York State as the Family Court in New York State was opened to the public for the first time. Joe Sexton, *Opening the Doors on the Secrets and Problems of Brooklyn's Family Court,* NEW YORK TIMES, (Sept. 17, 1997), at 1; "Frankness and openness will also more likely render publicity about the juvenile dependency system informative and accurate rather than uninformed and destructive." Edwards, *supra* note 102 at 11.

CALIFORNIA APPELLATE COURTS

Case Information



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Case Summary

Supreme Court Case:	S141394
Court of Appeal Case(s):	Second Appellate District, Division Eight B181878
Case Caption:	BURKLE v. BURKLE
Case Category:	Review - Civil Appeal
Start Date:	02/27/2006
Case Status:	case initiated
Issues:	none
Case Citation:	none

Cross Referenced Cases

No Cross Referenced Cases Found

Detailed Information

Docket Entries (Register of Actions)

E-mail Notification

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From the Los Angeles Times

MICHAEL HILTZIK / GOLDEN STATE

Backdoor Bill Would Seal Data on Divorce

Michael Hiltzik
Golden State

March 2, 2006

Reasonable people may differ about the merits of an obscure bill filed last year in Sacramento to shore up the state Office of Homeland Security.

But one question about it legitimately interests all of us: How and why did it become transformed, as though by the touch of a magic wand, into a bill that helps out one of California's wealthiest citizens in his exceedingly ugly divorce?

The apparent beneficiary of this legislative legerdemain is Ronald W. Burkle, a prominent investor and former supermarket magnate who has been trying for more than year to keep the lid on scads of financial details piled up in his divorce case.

A member of the Forbes 400 (at No. 112, worth an estimated $2.3 billion), Burkle rose from bag boy at Stater Bros. to the owner of Ralphs, Food4Less and other chains. He later sold the supermarkets, but his regime is fondly remembered by union members as a period of sound and fair labor relations, unlike the thuggery practiced by his successors. He's also a leading donor to UCLA and major contributor to Democrats.

Whatever his laudable personal qualities, they aren't much in evidence in the divorce papers. I hesitate to go into the noisome particulars, but if he and his ex-wife, Janet, left any of the deadly sins out of their descriptions of each other in court, then I can't count to seven.

That brings us to Burkle's penchant for secrecy. In April 2004, he asked a state judge to strike from public court filings his home addresses, Social Security number and financial account numbers on the grounds that publication might expose his young son to the threat of kidnapping. The judge complied but refused to black out such details as the balances in the accounts or to seal the Burkles' revealing post-marital agreement.

Two months later, the Legislature enacted — hastily, unanimously and without a single hearing — a law requiring judges in divorce court to seal in their entirety (upon a party's motion) any documents that mention the party's assets or other financial details even in passing.

Burkle then applied to seal weeks of trial transcripts, 22 exhibits and 28 other documents. In January, responding to motions by his ex-wife and a group of newspapers including The Times, a state Court of Appeal made short work of the 2004 law. Because it deprived judges of any discretion to weigh a litigant's desire for privacy against the public's right of access to court records, the court ruled, the law was unconstitutional.

Burkle appealed that ruling to the state Supreme Court on Wednesday. But meanwhile, state Sen. Kevin Murray (D-Culver City) has come to his aid. On the heels of the appellate ruling, Murray quietly implemented what is known as a "gut-and-amend" job on the homeland security measure, which had been gathering dust on a committee shelf. He struck out the old language and replaced it with a fresh version of the overturned law, much as one might scoop out a cantaloupe and fill it with crab dip.

The new bill would require judges to shroud only the financial details at issue, not the entire document. But because it still would prohibit them from making the customary balance test between privacy and openness at their own discretion and line by line, Janet Burkle and the newspapers still object.

The bill, which is currently in committee, also would allow privately paid judges to seal documents. This is *very* intriguing. It just happens that one of the issues in Burkle's case is precisely whether such judges — a corps mostly made up of retired Superior Court judges paid by rich litigants to conduct quasi-private trials — can seal public records. (The Burkles' handpicked judge regretfully concluded that he didn't have that authority.)

Murray and a spokesman for Burkle say the latter had absolutely nothing to do with the former's bill. (There's no public record, such as campaign contributions from Burkle to Murray, linking them.) The bill's actual author, a Los Angeles divorce attorney named Fred Silberberg, told me he never heard Burkle's name until the appeals court ruling came down.

Silberberg and Murray both claim to be motivated by genuine concern for families whose personal financial affairs get aired unnecessarily in the process of breaking up. Yet, everybody knows that exposing dark corners of your life to public view is the price of using the public's civil judicial system to settle your private grievances. Neither Silberberg nor Murray can adequately explain why divorce litigants deserve special rights.

Silberberg cites the kidnap threat, but that's a dodge. No sleazeball with child abduction in his heart needs to read a court filing to know that Ron Burkle is a billionaire; he can learn it from Forbes. And Silberberg's measure applies to all divorce cases, not only those involving children. In any event, Family Court judges have the right to redact identifying information like home addresses and Social Security numbers from court papers; indeed, after the Court of Appeal ruling, Burkle asked Superior Court Judge Marjorie S. Steinberg to use her preexisting authority to do exactly that.

As for the assumption that no one could have anything but a prurient interest in a divorce party's financial affairs ("I don't think there's a great public desire or need to disclose everything," Murray told me), who says so?

The public has a right to know how its judges are performing, and the only way to determine that is to know what they're ruling on. Parties in future divorce cases need to know what to expect, based on the facts underlying earlier rulings. Moreover, numerous entities have a legitimate interest in financial disclosures made in divorce court — government agencies may scour files for evidence of

tax cheating, for instance, and creditors for hints of fraud. Nor should we forget that the party trying to keep financial data confidential is almost always the one who controls those assets — in other words, the party (usually the husband) with the upper hand in divorce cases from the outset. Murray's bill tilts the playing field more in the stronger party's favor, by taking away a strategic weapon (i.e., disclosure) from the weaker side.

The divorce bill is merely another way of giving the wealthy and powerful a justice system all their own. Here's a question for Sen. Murray: Just who does he think he works for?

Golden State appears every Monday and Thursday. You can reach Michael Hiltzik at golden.state@latimes.com and view his weblog at latimes.com/goldenstateblog.

'Night of the Living Dead': Alive in Sacramento?

New Divorce Law Looks Like Replay

Column
By Garry Abrams

LOS ANGELES - Has the California Legislature gone into the horror-movie business?

That's the question some attorneys are asking about a capital chop-o-rama they call "The Law That Wouldn't Die."

These legal-film critics have seen a rough cut of this slice-and-dice epic and say it's a celluloid crime, so bad that it may be unconstitutional.

There's no question that the plot to this alleged Sacramento bloodfest is a brazen rip-off of a gore-genre staple. You've seen it a zillion times: Drooling creatures from the grave or beyond Pluto attack humans for the purpose of fine dining.

Of course, these ghastly gourmands cannot be killed no matter how many times they are sliced, diced, clubbed, machine-gunned or blasted into quantum bits. So just when Buffy thinks she can relax, here comes the reconstituted slime again.

The capital version of this cinematic cliché, the critics say, is Senate Bill 1015, a so-called "gut and amend" measure that provides for the sealing of certain divorce records, notably including spousal splits overseen by a private judge. The "gut and amend" procedure puts the bill on a legislative fast track.

Sen. Kevin Murray of Los Angeles introduced the amended bill Feb. 16, less than a month after a California appellate court struck down as unconstitutional a similar 2004 family-law statute that allowed for the wholesale sealing of divorce records on right-to-privacy grounds.

The court ruled in favor of the Los Angeles Times and Associated Press, which challenged the law on First Amendment and public-access grounds.

Janet Burkle, the estranged wife of billionaire Ronald Burkle, had joined the media companies in the appeal. Ronald Burkle had long sought to have the divorce records sealed, particularly documents about his finances. Gov. Arnold Schwarzenegger had signed the 2004 legislation as an "urgency" matter after the grocery-store magnate had donated more than $121,000 to the governor's political committees.

Now attorneys for the media companies and Janet Burkle are questioning whether Murray's new sealing measure is a revived version of the 2004 law slain by the appellate court.

I wasn't able to reach Murray's office Wednesday. However, the senator has denied publicly at least twice any involvement by Burkle in his decision to introduce the legislation.

Still, Susan Seager, who represented the Times and the Associated Press, and Hillel Chodos, who is Janet Burkle's divorce attorney, assert that Murray's bill is a bad copy of the 2004 law.

"The law is still unconstitutional," Seager said of the new bill, because like its predecessor, the measure requires a judge to seal documents about divorce parties' assets and liabilities at the request of only one of the parties in the divorce.

In a Feb. 24 letter to Murray, Chodos charged that the new bill gives private judges new powers to seal divorce records. Chodos noted that a private judge has handled some of the Burkle divorce proceedings. That judge, he noted, had lifted a sealing order because California court rules say "that a privately compensated temporary judge may not seal court records from public view."

Chodos ended the letter by asking Murray to withdraw the bill.

In a related development and an apparent big win for Ronald Burkle, 2nd District Court of Appeal judges indicated Tuesday that they have decided tentatively to uphold a post-marital agreement that Janet Burkle is challenging. During oral arguments after the announcement of the tentative decision, Chodos told the panel he hoped to change their minds.

I have a lousy record reading the minds of judges, and I have no idea whether they actually will decide in favor of Ronald Burkle. If so, it would bring a marathon divorce battle a step closer to an end and end a source of income for quite a few attorneys.

But it seems absolutely clear that in the future some of us will still be fighting to see what we can't see.

That's scary enough for me.

PE.com

Open justice

08:37 PM PST on Tuesday, February 28, 2006

Citizens cannot know how -- or even if -- their courts dispense justice if state law lets interested parties seal court records needlessly. The public has a direct interest in an open judicial system, and that principle should include no exception for cases of the rich and famous.

Lamentably, some legislators don't understand that concept. The Legislature in 2004 passed a law allowing either party in a divorce case to seal the court records, even if only a fraction of the information is personal. Billionaire investor Ron Burkle then used the law to seal his divorce case.

The public issue, of course, is not Burkle's finances but a law that whittles loopholes in the people's ability to monitor their official institutions.

In January, the state 2nd District Court of Appeal upheld a lower-court decision that the law unconstitutionally trampled the public's ability to review court cases.

A month later, SB 1015 miraculously transformed from a bill addressing homeland security to legislation reinstating this unwise law in slightly altered form. State Sen. Kevin Murray, D-Los Angeles, used the gut-and-amend process to rush this bill into existence.

But Murray's new version of the court-voided law is still bad policy. There's no need to let one party in a divorce seal all court records relating to finances. The concern about identity theft is a red herring: Simple redaction of sensitive data can offer adequate protection, without undercutting public scrutiny of divorce proceedings.

Access to court documents gives residents a way to judge the fairness of their court system, and openness helps guard against unfair or sloppy judgments or partiality to specific parties. Secrecy makes it tough to know if justice is being done and stifles all possibility of public accountability.

That civic interest outweighs any perceived needs of celebrities. The best way to ensure the wealthy -- or anyone else -- fair treatment is to keep their cases squarely in the public spotlight.

There may be legitimate reasons for sealing some court records -- to protect minors, for example -- but to let convenience for the rich trump the public interest is terrible policy. The Legislature should summarily reject SB 1015.

Online at:
http://www.pe.com/localnews/opinion/editorials/stories/PE_OpEd_Opinion_D_op_01_ed_burkle1.12752643.html

Lassen
Sacramento
(Interest Riverside
week)

Kern
SF
Stanislaus
Alameda

PJs / CEs Leg. Subcommittee Feb. 27th, 2006

SB 1015 (Murray) Family law files

Sonoma 115 - 2005 - not too much burden order to do it

Sacramento - Candee
- once it is there folks will ask for it -- becomes the norm

→ fa

San Diego - not that many - will have more

Contra Costa Mallock 1-2 people
- family law judges
- crushing DA - prior report
→ Reduction to a legal standard
→ need atty or judge

UPON REQUEST COURT SHALL DO
- workload

Los Angeles "100 people"

TRIAL COURT PRESIDING JUDGES AND COURT EXECUTIVES ADVISORY COMMITTEES (TCPJAC/CEAC)

JOINT LEGISATION SUBCOMMITTEE CONFERENCE CALL
1-888-318-9100
Wednesday, February 27, 2006
12:15 – 1:00 p.m.

AGENDA

Time	Item	Action Required
12:15 p.m.	**Welcome** *Hon. Thomas Maddock, Co-chair, (TCPJAC)*	
12:15 – 12:25 p.m.	**1.** SB 1128 (Alquist), as amended February 9, 2006 (Sex offender Punishment, Control, and Containment Act of 2006) *Ms. June Clark, Senior Attorney, Office of Governmental Affairs* This bill establishes a comprehensive scheme addressing sex offenders. Most of its provisions are outside the scope of the Judicial Council's purview. We are, however, seeking input on one provision that will impact court operations. That provision would require courts to keep all records relating to persons required to register as sex offenders for the life of the offender. Comments are requested on the feasibility and cost implications of this provision. See page 8, lines 19 - 21, amending Government Code section 68152.	Review/Comment
12:25 – 12:35 p.m.	**2.** SB 1015 (Murray) as amended February 16, 2005 (Dissolution of marriage: sealing and redaction of files) *Ms. Tracy Kenny, Legislative Advocate, Office of Governmental Affairs* Provides that, upon request by a party, a court shall seal or redact any portion of a pleading in a dissolution of marriage action that lists the parties' financial assets, liabilities, income, or expenses, or provides the location of, or identifying information about, those assets and liabilities, including a residential address. Requires the court to ensure that the sealed or redacted portions are no more than necessary to prevent the identification or location of the financial information. Requires the Judicial Council to adopt rules setting forth the procedures for sealing, unsealing, and redacting, and restoring pleadings pursuant to the above provision. This bill would rework existing law in response to the holding in a recent Court of Appeal case which found the existing statute was unconstitutionally overbroad (see Burkle v. Burkle http://www.courtinfo.ca.gov/opinions/documents/B181878.PDF). The key changes are that redaction of documents is now allowed, and the court is required to ensure that only information pertaining to finances is sealed or redacted. As a result, the new statute may raise workload issues that the prior version did not. Comments are requested on the workload implications for the court, and how often you expect, based on existing practice, that this provision will be used.	Review/Comment

Time	Item	Action Required
12:35 – 12:45 p.m.	**3.** AB 1995 (Koretz), as introduced February 9, 2006. (Trial Court Employees; personnel files) *Ms. Eraina Ortega, Manager, Office of Governmental Affairs* Under existing law, Government Code 71660 requires each trial court to adopt personnel rules, subject to the obligation to meet and confer in good faith, to provide trial court employees with access to their **official** personnel files. Further, current law specifies the minimum requirements for the personnel rules. This bill strikes all reference to "official" in Government Code 71660.	Review/Comment
12:45 – 1:00 p.m.	**4.** AB 1797 (Bermudez), as amended February 14, 2006. (Trial courts: limited-term employees) *Ms. Eraina Ortega, Manager, Office of Governmental Affairs* Provides that any limited-term law clerk in Los Angeles shall become a regular employee of the court if the employee works more than 180 days. Additionally, states the Legislature's intent that long-term employees that are performing the regular work of the trial courts not be classified as limited-term employees. This bill is provided for informational purposes. The Judicial Council's Policy Coordination and Liaison Committee (PCLC) has adopted an oppose position on AB 1797 on the basis of last year's opposition to AB 176, a nearly identical bill.	Review/Comment
1:00 p.m.	**Adjourn** Next meeting: April 12, 2006, 12:15 – 1:00 p.m.	

AMENDED IN ASSEMBLY FEBRUARY 16, 2006

AMENDED IN SENATE AUGUST 30, 2005

AMENDED IN SENATE AUGUST 17, 2005

AMENDED IN SENATE AUGUST 15, 2005

AMENDED IN SENATE JULY 1, 2005

SENATE BILL No. 1015

Introduced by Senator ~~Romero~~ *Murray*
~~(Principal coauthor: Assembly Member Parra)~~
~~(Coauthors: Senators Ackerman, Kehoe, and Poochigian)~~
~~(Coauthor: Assembly Member La Suer)~~

February 22, 2005

~~An act to add and repeal Section 12016.1 of the Government Code, and to add and repeal Section 11105.06 of the Penal Code, relating to homeland security, and declaring the urgency thereof, to take effect immediately.~~*An act to amend Section 2024.6 of the Family Code, relating to dissolution of marriage.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1015, as amended, ~~Romero~~ *Murray*. ~~Office of Homeland Security.~~ *Dissolution of marriage: financial declarations.*

Existing law permits a party to request that documents listing or identifying the parties' assets and liabilities be sealed in specified family law proceedings, including dissolution of marriage.

This bill would extend those provisions to include documents listing or identifying the parties' income or expenses, permit those records to be sealed or redacted, and make related changes. The bill would

require the Judicial Council to adopt rules governing procedures for sealing, unsealing, redacting, and restoring those records.

~~(1) Existing law requires the Governor to appoint a Director of Homeland Security to coordinate homeland security activities in the state, and to appoint a deputy director of homeland security to serve at the pleasure of the director. Existing law sets forth certain duties of an Office of Homeland Security in state government.~~

~~Existing law also authorizes the Attorney General to furnish specified summary criminal history information to certain peace officers of the state, subject to specified conditions.~~

~~This bill would, until January 1, 2007, provide that the Office of Homeland Security shall be considered a Class II criminal justice agency and would require the Attorney General to furnish state summary criminal history information to persons employed within the Office of Homeland Security whose duties and responsibilities require the authority to access criminal history and other intelligence information, and who have been cleared to do so by both the state Department of Justice and the United States Department of Homeland Security for these purposes.~~

~~(2) The California Public Records Act specifies that certain security, investigatory, and other information of certain law enforcement entities is not subject to disclosure.~~

~~This bill would, until January 1, 2007, specify that the Office of Homeland Security is a law enforcement organization as required for receipt by employees of the office of confidential intelligence information pursuant to these provisions.~~

~~(3) This bill would declare that it is to take effect immediately as an urgency statute.~~

Vote: ~~⅔~~ *majority*. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) The people have a right of privacy in their financial affairs, as well as in matters relating to marriage.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public

record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets and liabilities and income and expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income and expenses.

(c) The sensitive financial information which the law compels a party to a proceeding for dissolution or nullity of marriage or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft, yet is rarely if ever a matter of legitimate public interest.

(d) The Legislature also finds that protecting the sensitive financial information subject to this section will further the prompt and efficient resolution or settlement of proceedings for the dissolution or nullity of marriage or legal separation by preventing or discouraging the disclosure or threatened disclosure of that information for improper purposes or to secure collateral or unfair advantages.

(e) Existing law concerning the sealing of court records was not enacted or otherwise promulgated with consideration of the extensive financial disclosures required of parties to a proceeding for dissolution or nullity of marriage, or legal separation. Much of existing law concerning the sealing of court records was also enacted or otherwise promulgated prior to the current epidemic of identity theft and the current widespread use of electronic data bases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Existing law was enacted prior to the widespread concern over and federal legislation designed to protect and guard against, the misuse of personal information and child abduction.

(f) For these reasons, the Legislature finds that existing law concerning the sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution or nullity of marriage are entitled. It is the intent of the Legislature to protect more fully that right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, it enacts this act.

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) ~~Upon~~ *Notwithstanding any other provision of law, upon* request by a party to a ~~petition~~ *proceeding* for dissolution of marriage, nullity of marriage, or legal separation, the court shall order *sealed or redacted any portion of* a pleading that lists the parties' financial assets ~~and~~, liabilities ~~and~~, *income or expenses, or* provides the location *of, including a residential address,* or identifying information about, those assets ~~and~~, liabilities ~~sealed~~, *income, or expenses. Subject to the direction of the court, no more of any pleading shall be sealed or redacted than is necessary to prevent identification or location of the financial information subject to this section.* The request may be made by ex parte application. Nothing sealed *or redacted* pursuant to this section may be unsealed *or restored* except upon petition to the court and *a showing of* good cause ~~shown~~.

(b) Commencing not later than ~~July 1, 2005~~ ____, the Judicial Council form used to declare assets ~~and~~ *or* liabilities of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets ~~and~~, liabilities, *income, or expenses* listed therein. If the party making the request *set forth in subdivision (a)* uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists ~~and~~ *or* identifies financial information and is therefore subject to this section. *By the same date, the Judicial Council shall also adopt rules setting forth the procedures to be used for sealing, unsealing, redacting, and restoring pleadings pursuant to this section.*

(c) For purposes of this section, "pleading" means a document that sets forth or declares the ~~parties'~~ assets ~~and~~, liabilities, income ~~and~~ *or* expenses, ~~a~~ *of one or both of the parties, including, but not limited to marital settlement agreements, exhibits, schedules, transcripts, or any document incidental to any declaration or* marital settlement agreement that lists ~~and~~ *or* identifies ~~the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists and identifies~~ financial information.

(d) *For purposes of this section and notwithstanding any other provision of law, "court" includes a privately compensated judge.*

(e) The party making the request ~~to seal a pleading~~ pursuant to subdivision (a) shall serve a copy of the pleading *containing financial information subject to this section* on the other party *or parties* to the proceeding and file a proof of service with the request ~~to seal the pleading~~.

~~(e)~~

(f) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a ~~sealed~~ pleading *sealed or redacted pursuant to this section* in any manner that is not otherwise prohibited by law.

All matter omitted in this version of the bill appears in the bill as amended in Senate, August 30, 2005 (JR11)

O

FISCAL ANALYSIS FOR AB 782 AS PROPOSED TO BE AMENDED

There are approximately 160,000 family law filings per year. If parties were authorized to request the sealing of documents containing financial asset information by a motion, we estimate that around 5% of all filings would involve such a request (approximately 8,000 filings annually). The result of this provision would be the establishment of a separate sealed file for this information. The requirement that a separate sealed file be maintained for each case would result in costs associated with the material expenses and staff time to meet this requirement. Assuming average staff time per case of three minutes to prepare separate files for clerks earning $20 per hour, and material costs of 50 cents per case (for folders, labels, etc.), the cost per case for staff time and materials would be $1.50 or $12,000.

Additional costs would be associated with the expense of granting the motion for the sealing of the documents. We estimate that it would take, on average, two minutes of judicial time to make this order, resulting in a total of 266 additional hours of judicial time. Based on figures relating to the annual cost of judicial positions, including necessary support staff, an hour of judicial time costs approximately $480 per hour. Thus the cost associated with the time of judicial officers is $127,680.

The provision deleting the maintenance of the social security form required in Family Code section 2024.5 would result in savings for the court, because it would eliminate the need to maintain a confidential file for these documents in all family law cases. We estimate that approximately 50 percent of family law files would require no confidential file if this provision were eliminated, as many of these cases have no need for a confidential file other than this requirement (cases involving child custody evaluations or recommendations would still require a confidential file). Given the $1.50 estimate from above, we estimate the savings from this provision to be approximately $120,000.

These numbers are very rough estimates, and represent our best estimate at this time.

Judicial Council of California

ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GOVERNMENTAL AFFAIRS

770 "L" Street, Suite 700 • Sacramento, California 95814-3393

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RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

RAY LEBOV
Director, Office of Governmental Affairs

January 24, 2005

Honorable Christine Kehoe
Member of the Assembly
State Capitol, Room 5150
Sacramento, California 95814

Subject: AB 782 (Kehoe) as amended May 5, 2004 – No Position

Dear Assembly Member Kehoe,

The Judicial Council has not taken a position on AB 782, which would authorize family law litigants to request that pleadings containing financial asset information be sealed by the court. We appreciate the amendments that you have taken in order to help ensure that the bill will achieve its policy objectives without creating significant additional workload for the courts.

We anticipate that courts will be able to implement the provisions of AB 782 within their existing resources.

Sincerely,

Tracy Kenny
Legislative Advocate

TK/wb

Family Law (Marital) Filings by County and Case Type
Fiscal Year 2003–04

Superior Courts
Table 4a.fl

COUNTY	Total (A)	Dissolution of Marriage (B)	Legal Separation (C)	Nullity of Marriage (D)
STATEWIDE	**150,180**	**143,330**	**4,732**	**2,118**
ALAMEDA	5,655	5,407	163	85
ALPINE	—	—	—	—
AMADOR	205	181	20	4
BUTTE	1,192	1,139	47	6
CALAVERAS	223	220	3	0
COLUSA	(i) 19	18	1	0
CONTRA COSTA	4,017	4,017	0	0
DEL NORTE	152	149	3	—
EL DORADO	957	957	—	—
FRESNO	4,138	3,870	200	68
GLENN	137	134	3	0
HUMBOLDT	(i) 149	140	8	1
IMPERIAL	—	—	—	—
INYO	103	98	4	1
KERN	3,432	3,166	134	132
KINGS	715	699	9	7
LAKE	338	310	21	7
LASSEN	151	145	3	3
LOS ANGELES	37,307	36,150	772	385
MADERA	620	587	27	6
MARIN	979	895	70	14
MARIPOSA	96	91	3	2
MENDOCINO	401	379	14	8
MERCED	916	869	25	22
MODOC	—	—	—	—
MONO	51	47	2	2
MONTEREY	1,527	1,496	16	15
NAPA	557	500	53	4
NEVADA	483	447	31	5
ORANGE	11,538	11,538	0	0
PLACER	1,328	1,227	80	21
PLUMAS	126	120	6	—
RIVERSIDE	8,324	7,854	336	134
SACRAMENTO	6,699	6,173	339	187
SAN BENITO	303	281	21	1
SAN BERNARDINO	9,201	8,750	281	170
SAN DIEGO	13,835	13,074	511	250
SAN FRANCISCO	3,016	2,876	85	55
SAN JOAQUIN	3,013	2,868	90	55
SAN LUIS OBISPO	1,039	1,000	30	9
SAN MATEO	2,555	2,404	105	46
SANTA BARBARA	1,600	1,506	73	21
SANTA CLARA	6,339	6,073	183	83
SANTA CRUZ	1,031	945	60	26
SHASTA	1,139	1,045	72	22
SIERRA	13	13	—	—
SISKIYOU	277	256	19	2
SOLANO	2,035	1,888	119	28

Family Law (Marital) Filings by County and Case Type
Fiscal Year 2003–04

Superior Courts
Table 4a.fl

COUNTY	Total *(A)*	Dissolution of Marriage *(B)*	Legal Separation *(C)*	Nullity of Marriage *(D)*
SONOMA	2,138	1,967	133	38
STANISLAUS	2,255	2,072	135	48
SUTTER	514	469	24	21
TEHAMA	366	339	17	10
TRINITY	—	—	—	—
TULARE	1,932	1,843	63	26
TUOLUMNE	(i) 28	23	5	0
VENTURA	3,738	3,440	238	60
YOLO	823	741	60	22
YUBA	455	434	15	6

Notes:

(i) Incomplete data; reports were submitted for less than a full year.

0 or — The court reported that no cases occurred or the court did not submit a report in this category.

Joe Lane

(213) 830-7112

[redacted]

B188735

March 15th | two exhibits tax returns | 13 Ct. | Rule 24 | 3:34 - Diane Nunn

2/19 - Final
3/1 - last day to file - not often

Yesterday

January 2011

number w/in 60 30-60

trial court | 31818784 | 1/20 21 | did not

Burkle v. Burkle

Marriage of Burkle judgment

now motion to seal in state remittitur court

Rule 28 ~~Tracy Kenny~~

S. Ct. jurisdiction

60 days - 90

file w/in 10 days of finality

3/22

petition Hon. Marjorie Steinberg

amounts - ~~1st~~ issue

Rule 244 constitutional

public (916) 323-3077

three rounds
- statute
- divorce
- temporary judge
- can they seal?

clerk of the court

If petition filed w/ S.Ct. then stops case

SB 1015

plan to file w/ Supreme Ct.

how can a judicial officer be paid

each district has someone

Frank McGuire - principal attorney
415 - 865 - 7226

12:03
a (818) 766 - 8962 - Joe Lane

Filed 1/20/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JANET E. BURKLE, Plaintiff and Respondent, v. RONALD W. BURKLE, Defendant and Appellant.	B181878 (Los Angeles County Super. Ct. No. BD390479)

APPEAL from an order of the Superior Court for the County of Los Angeles. Roy L. Paul, Judge. Affirmed.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Patricia L. Glaser and Nabil L. Abu-Assal; Wasser, Cooperman & Carter, Dennis M. Wasser and Bruce E. Cooperman; De Goff and Sherman and Richard Sherman, for Defendant and Appellant.

Philip Kaufler, Hugh John Gibson and Hillel Chodos for Plaintiff and Respondent.

Karlene W. Goller; Davis Wright Tremaine, Kelli L. Sager, Alonzo Wickers IV and Susan E. Seager, for Intervenor Press Organizations Los Angeles Times Communications LLC, The Associated Press and California Newspaper Publishers Association.

SUMMARY

Family Code section 2024.6[1] requires a court, upon the request of a party to a divorce proceeding, to seal any pleading that lists and provides the location or identifying information about the financial assets and liabilities of the parties. We conclude that section 2024.6 is unconstitutional on its face. The First Amendment provides a right of access to court records in divorce proceedings. While the privacy interests protected by section 2024.6 may override the First Amendment right of access in an appropriate case, the statute is not narrowly tailored to serve overriding privacy interests. Because less restrictive means exist to achieve the statutory objective, section 2024.6 operates as an undue burden on the First Amendment right of public access to court records.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2003, Janet E. Burkle filed a petition to dissolve her marriage to Ronald W. Burkle. Several months later, Mr. Burkle moved to seal or redact certain pleadings. The parties' son and his parents were considered persons of "high public interest." On April 13, 2004, the trial court ordered the redaction of various documents in order to protect the son from possible harm. The court's order redacted certain financial information "based solely upon the potential impact that financial information may have on [the son's] safety." The redacted financial information consisted of residence addresses, and names and account numbers for bank and brokerage accounts. The court, however, refused to redact account balance information. It also refused Mr. Burkle's request to seal the parties' post-marital agreement in its entirety, allowing redaction only of addresses, residences and bank and brokerage account information within the post-marital agreement.

Less than two months later, the Legislature passed AB 782, adding section 2024.6 to the Family Code as urgency legislation. The governor signed the legislation and section 2024.6 became effective June 7, 2004. Subsection (a) of section 2024.6 provides:

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[1] All further statutory references are to the Family Code unless otherwise indicated.

> "Upon request by a party to a petition for dissolution of marriage, nullity of marriage, or legal separation, the court shall order a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities sealed. The request may be made by ex parte application. Nothing sealed pursuant to this section may be unsealed except upon petition to the court and good cause shown."

Section 2024.6 defines "pleading" as

> "a document that sets forth or declares the parties' assets and liabilities, income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists and identifies financial information." (§ 2024.6, subd. (c).)[2]

Six months after the enactment of section 2024.6, on December 21, 2004, Mr. Burkle brought an ex parte application to seal 28 pleadings under the authority of the section.[3] The documents to be sealed included such pleadings as Ms. Burkle's income and expense declaration, notices of lis pendens, motions to which the parties' post-marital

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[2] Section 2024.6 also states that the Judicial Council form used to declare assets and liabilities must require the filing party to state "whether the declaration contains identifying information on the assets and liabilities listed therein." If the party uses a pleading other than the Judicial Council form, the pleading must "exhibit a notice on the front page, in bold capital letters, that the pleading lists and identifies financial information and is therefore subject to [section 2024.6]." (§ 2024.6, subd. (b).) Section 2024.6 further contains service requirements (§ 2024.6, subd. d) and a provision stating that it does not preclude a party from using "any document or information contained in a sealed pleading in any manner that is not otherwise prohibited by law." (§ 2024.6, subd. (e).)

[3] After the trial court's April 13, 2004 redaction order, the parties' counsel agreed on a procedure to redact portions of the files. Section 2024.6 became law before that procedure could be implemented. The parties then deferred the redacting process because, according to a declaration from Mr. Burkle's counsel, "each of the documents which was to have been redacted now is subject to being sealed under the new statute."

agreement was an exhibit, pleadings that contained street addresses of real property, a motion for summary adjudication, discovery motions, and so on.

The Los Angeles Times and The Associated Press (collectively, the press) filed a request to intervene for the purpose of opposing Mr. Burkle's ex parte application, arguing that the press and the public have a presumptive right of access to records and proceedings in divorce cases, and that section 2024.6 is unconstitutional because it requires trial courts to seal divorce court records without providing for the document-by-document analysis and the threshold inquiries required by the First Amendment.[4] The trial court ordered the 28 documents filed under seal conditionally, subject to further hearing, and granted the press's request to intervene.

In his opposition, Mr. Burkle argued that section 2024.6 was presumptively constitutional, and the press had failed to (1) balance Mr. Burkle's right of privacy against the press's right of access, and (2) prove "that the statute does not serve a compelling purpose or that it is not narrowly tailored to achieve its purpose." In response, the press argued that section 2024.6 is unconstitutional because it reverses the First Amendment presumption that court records are open to the public, by requiring a trial court to seal records without evaluating whether the sealing is necessary to protect a compelling interest. The press also argued that Mr. Burkle bore the burden of demonstrating that section 2024.6 furthers a compelling governmental interest and is narrowly tailored to serve that interest, and that he failed to do so. Moreover, the press argued, even if a compelling interest existed in financial privacy, section 2024.6 is not narrowly tailored to protect that interest "because it requires the wholesale sealing of entire divorce pleadings and files." Ms. Burkle advanced similar arguments.[5]

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[4] We refer to "divorce" proceedings for sake of simplicity. The statute refers to proceedings for "dissolution of marriage, nullity of marriage, or legal separation . . . ." (§ 2024.6, subd. (a).)

[5] Ms. Burkle's response purported to incorporate a writ petition and reply she had filed with the Court of Appeal, and counsel declined the opportunity to resubmit his

Balancing "a traditional access to court files in dissolution proceedings and the right to privacy," the trial court ruled that section 2024.6 violated the First Amendment:

> "The court finds that while there is a compelling state interest underpinning Family Code § 2024.6, it is not narrowly tailored to effectuate that interest and unduly burdens the competing Constitutional right of public access to civil court proceedings and records. The court concludes the statute is overbroad because it mandates sealing entire pleadings to protect a limited class of specified material. The court also observes that the defect is readily curable by the Legislature."

The trial court explained it had no difficulty finding that a compelling governmental interest underpinned section 2024.6, as the right of privacy is guaranteed by the California Constitution. However, it observed there was no compelling interest in streamlining the process of sealing confidential information "to the point that the court is totally divested of discretion in all instances." Responding to Mr. Burkle's argument that discretion should be implied, consistent with the rule that doubts should be resolved in favor of constitutionality, the court observed that "there is not even a glimmer" that the Legislature intended court discretion. It further stated, "Protection of the competing right of public access requires some discretion on a case-by-case basis before entire pleadings are sealed on behalf of some small portion within them." The court continued:

> "The statute is not unconstitutional merely because it deprives the court of discretion as to what should be sealed, but because as enacted it seals the entirety of a pleading if any of the specified materials are included in it. Thus, a 100 page pleading filled with legal argument of genuine public interest must be sealed if a party's home address appears even in a footnote. Absent judicial scrutiny prior to such sealing, § 2024.6 could indeed become an instrument of gamesmanship. The statute cannot be deemed 'narrowly tailored' because it necessarily will seal material in which there is no overriding right to privacy."

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arguments to the trial court in a form complying with court rules. The trial court struck the improperly incorporated appellate pleadings from Ms. Burkle's response.

The trial court thereupon vacated its provisional sealing order, but ordered the pleadings to remain sealed for 60 days to permit Mr. Burkle to seek appellate review. This appeal followed.[6]

DISCUSSION

A. Introduction.

In *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC Subsidiary*), the California Supreme Court held that "in general, the First Amendment provides a right of access to ordinary civil trials and proceedings, [and] that constitutional standards governing closure of trial proceedings apply in the civil setting . . . ." (*Id.* at p. 1212.) After an extensive examination of federal and state precedents, the court concluded "it is clear today that substantive courtroom proceedings in ordinary civil cases are 'presumptively open' . . . ." (*Id.* at p. 1217.) The court held that the statute under review – Code of Civil Procedure section 124 governing public court sittings – "must be interpreted to preclude closure of proceedings that satisfy the . . . historical tradition/utility considerations" applied by the United States Supreme Court in *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596 (*Globe*). (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1217.) The presumption of openness, or preclusion of closure, in ordinary civil cases applies unless the trial court (1) provides notice of a contemplated closure, and (2) holds a hearing and expressly finds that:

> "(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218, fns. omitted.)

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[6] Ms. Burkle moved to dismiss Mr. Burkle's appeal, asserting the trial court's order was not appealable. This court heard oral argument on the appealability issue and, on July 19, 2005, denied Ms. Burkle's motion, concluding the order was appealable as a final order on a collateral matter.

This case requires us to decide whether the presumption of openness applicable to substantive courtroom proceedings in ordinary civil cases likewise applies to court records in divorce proceedings and, if so, whether section 2024.6 is a constitutionally permissible restriction on the right of access under the standards announced in *NBC Subsidiary*. We conclude the presumption of openness applies, and section 2024.6 is unconstitutional.[7] Specifically, we conclude that:

- In general, the same First Amendment right of access applicable in ordinary civil cases applies in divorce proceedings.
- No meaningful distinction may be drawn between the right of access to courtroom proceedings and the right of access to court records that are the foundation of and form the adjudicatory basis for those proceedings. Consequently, court records in divorce cases, as in other civil cases, are presumptively open.
- When a statute mandates sealing presumptively open court records in divorce cases, as section 2024.6 does, the state's justification for the mandatory sealing rule must be scrutinized to determine whether the statute conforms to the requirements enunciated in *NBC Subsidiary*. That is, a mandatory sealing rule is permissible only if (1) an overriding interest supports the sealing rule; (2) a substantial probability of prejudice to that interest exists absent the sealing; (3) the sealing required by the statute is narrowly tailored to serve the overriding interest; and (4) no less restrictive means is available to achieve the overriding interest. (See *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218.)
- In this case, section 2024.6's mandated sealing of location and identifying information about assets and liabilities is supported by constitutionally-guaranteed privacy rights, thus meeting the first requirement. Moreover, the statute arguably meets the second requirement, as we ordinarily defer to legislative findings on the

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[7] Ms. Burkle contends that section 2024.6 also violates equal protection and separation of powers principles. The trial court did not rule on these contentions, and we see no reason to consider them.

probability of prejudice, in the form of identity theft and the like, to the privacy interest protected by the statute. However, the statute clearly runs afoul of the third and fourth requirements, because it is neither narrowly tailored to serve the privacy interest being protected nor is it the least restrictive means of protecting those privacy interests.

In the succeeding sections, we discuss each point necessary to our conclusion that section 2024.6 is a constitutionally impermissible burden on the First Amendment right of public access to court records.[8]

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[8] The parties have filed two requests for judicial notice and one motion to augment the record.

1. Mr. Burkle requests judicial notice of various documents relating to the legislative history of section 2024.6. While a few of the items submitted are not properly cognizable legislative history (letters to legislators from interested parties), the request is granted as to the remainder of the documents. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26.)

2. The press requests judicial notice of (a) several news articles about Mr. Burkle and (b) public reports submitted by Mr. Burkle to the California Secretary of State and the Securities and Exchange Commission, contending these materials show that information about Mr. Burkle's financial assets, homes and political activities have been placed in the public record. We deny the press's request, because these materials are entirely irrelevant to the only matter before us for review: the facial challenge to the constitutional validity of section 2024.6.

3. The press asks us to augment the appellate record with several court records filed in the trial court, including a stipulation and order for the appointment of a privately compensated temporary judge; a statement showing the temporary judge's activity and charges in the case; a sealing order entered by the temporary judge; and Mr. Burkle's ex parte application to seal trial exhibits and reporter's transcripts from the Burkles' divorce trial. The press states that these trial court records should be added to the appellate record to respond to Mr. Burkle's assertion in his opening brief that the parties had not expected a public trial in this case, and to provide "important background." Again, we discern no relevance in these documents, and deny the press's motion to augment the record.

B. The same First Amendment right of access applicable in "ordinary civil cases" applies in divorce proceedings.

We begin where the Supreme Court ended in *NBC Subsidiary*, with the now-settled principle that substantive courtroom proceedings in ordinary civil cases are presumptively open. The court reached that conclusion after exhaustively analyzing federal and state precedents on the First Amendment right of access. While that analysis need not be repeated, we will describe the principles employed by the United States Supreme Court – and relied upon in *NBC Subsidiary* – to confirm the existence and scope of the right of access, because those are the principles that must be used to determine whether the right of access applicable to "ordinary civil cases" also applies to divorce proceedings.

As *NBC Subsidiary* instructs, the First Amendment generally precludes the closure of proceedings that satisfy the high court's "historical tradition/utility considerations . . . ."[9] (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1217.) These considerations, first identified in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555 (*Richmond Newspapers*), were confirmed in *Globe, supra*, 457 U.S. 596. *Globe*, which established the First Amendment right of access to criminal trials, considered that (1) the criminal trial historically was open to the press and the general public, a "uniform rule of openness" (the historical tradition),[10] and (2) the institutional value of the open criminal trial was "recognized in both logic and experience" (the utility consideration).[11]

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[9] References to the "high court" are to the United States Supreme Court, following the usage employed by the California Supreme Court in *NBC Subsidiary*.

[10] The "uniform rule of openness" was significant in constitutional terms both because "'the Constitution carries the gloss of history'" and because "'a tradition of accessibility implies the favorable judgment of experience.'" (*Globe, supra,* 457 U.S. at p. 605, quoting *Richmond Newspapers, supra*, 448 U.S. at p. 589 (Brennan, J., concurring).)

[11] The Supreme Court observed that public scrutiny of criminal trials safeguarded the integrity of the factfinding process; fostered an appearance of fairness, heightening

(*Id.* at pp. 605-606.) After analyzing the reasoning in *Globe* and subsequent high court cases, our Supreme Court observed that:

> "[T]he high court has not accepted review of any of the numerous lower court cases that have found a general First Amendment right of access to civil proceedings, and we have not found a single lower court case holding that generally there is no First Amendment right of access to civil proceedings. Under these circumstances, we believe there is no reason to doubt that, in general, the First Amendment right of access applies to civil proceedings as well as to criminal proceedings." (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1209.)

The court stated its belief that "the public has an interest, in *all* civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases."[12] (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1210, original italics.) In short, the court concluded that civil proceedings, like criminal proceedings, satisfied the high court's two considerations: historical tradition and the utility or institutional value of open trials. "[T]he dicta in the high court criminal cases, and the clear holdings of numerous civil progeny of those cases, convincingly conclude that the utilitarian values supporting public criminal trials and proceedings apply with at least equal force in the context of ordinary civil trials and proceedings."[13] (*Id.* at p. 1211, fn. omitted.)

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respect for the judicial process; and permitted the public to participate in and serve as a check on the judicial process, an essential component of the structure of self-government. (*Globe, supra,* 457 U.S. at p. 606.)

[12] The Supreme Court expressly rejected the contention that First Amendment access rights should be limited to those civil trials or proceedings that directly involve the public or are deemed newsworthy to a significant portion of the public. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1210.)

[13] See, e.g., *Richmond Newspapers, supra*, 448 U.S. at p. 580, fn. 17 ["[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open"].

The question for this court is whether divorce proceedings are sufficiently different from "ordinary civil trials and proceedings" to justify a different conclusion on the right of access. We do not think so. To be sure, the Supreme Court in *NBC Subsidiary* stated, in footnote 30, that its opinion addressed the right of access to "ordinary civil proceedings in general, and not any right of access to particular proceedings governed by specific statutes." As to those proceedings, footnote 30 referred to differing opinions from other courts in cases involving parental termination proceedings and juvenile proceedings, and listed the Family Code, as well as the Code of Civil Procedure and the Welfare and Institutions Code, as providing for the closure of certain civil proceedings.[14] (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1212, fn. 30.) While Mr. Burkle relies on footnote 30 to conclude that *NBC Subsidiary* requirements do not apply to divorce proceedings, we do not agree. The Supreme Court's care in confining its decision to the case at hand, and its mention of the Family Code among statutes that provide for closure of certain proceedings, does not portend or imply that divorce proceedings are not among the ordinary civil proceedings that are presumptively open. The court simply did not address that question.

To determine whether divorce proceedings are presumptively open, we follow the principles enunciated by the Supreme Court in *NBC Subsidiary*: proceedings that satisfy the high court's "historical tradition/utility considerations" are presumptively open. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1217.) We therefore assess those two considerations.

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[14] The court cited a New Jersey Supreme Court case holding that the First Amendment right of access applies to parental termination proceedings and that per se rules of closure were inappropriate (*Div. of Youth & Fam. Serv. v. J.B.* (1990) 120 N.J. 112), and a California case declining to recognize such a right in juvenile dependency proceedings, absent compulsion by the high court. (*San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal.App.3d 188.)

First, as *NBC Subsidiary* directs, we look to historical tradition, and find nothing to suggest that, in general, civil trials in divorce cases have not historically been open to the public, just as any other civil trial. To be sure, section 214 of the Family Code provides an exception to the general statutory rule that the sittings of every court are to be public. (Code of Civ. Proc., § 124.) Section 214 authorizes the court, "when it considers it necessary in the interests of justice and the persons involved, [to] direct the trial of any issue of fact joined in a proceeding under this code to be private . . . ." Section 214, however, is obviously the exception, not the general rule, in divorce cases. We do not doubt that divorce cases in particular and family law in general may produce a greater abundance of situations in which it is appropriate, "in the interests of justice and the persons involved," to try a particular fact issue privately. The existence of an expressly limited exception to a general rule, however, does not obviate the general rule. We are not aware of, and Mr. Burkle does not offer, any cases or commentary supporting the notion that divorce proceedings have ever been generally excepted from California's historical tradition of presumptively open civil proceedings. Indeed, in the context of court records, which we address in the succeeding section, California courts have made the point virtually unassailable: "[N]o California case holds or even hints that the principles articulated in these cases [the generally open nature of court files] vary when family law litigation is involved. . . . In general, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files." (*In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1413-1414, fn. omitted (*Lechowick*).)

Second, and again in accordance with *Globe* and *NBC Subsidiary*, we look to the utility considerations – "the institutional value of the open . . . trial" (*Globe, supra*, 457 U.S. at p. 606) – enunciated in those cases. *NBC Subsidiary* concluded that "the utilitarian values supporting public criminal trials and proceedings apply with at least equal force in the context of ordinary civil trials and proceedings." (*NBC Subsidiary, supra*, at p. 1211, fn. omitted.) *NBC Subsidiary* mentioned a court of appeal decision "not[ing] the utility of open access in civil cases," and referred to probate and juvenile

court cases. (*Id.* at p. 1211, fn. 28; see *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 625, 622-623 [upholding juvenile court's discretion to permit press attendance at a fitness hearing and observing that the high court has "repeatedly recognized the salutary function served by the press in encouraging the fairness of trials and subjecting the administration of justice to the beneficial effects of public scrutiny"; also describing a commission report concerning the benefit of "'greater participation by the press'" in juvenile court proceedings]; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 784 [probate case stating that "[i]f public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism"; "Anglo-American jurisprudence ... favors a policy of maximum public access to proceedings and records of judicial tribunals"].)[15] As the Supreme Court further observed:

> "[Public access plays an important and specific structural role in the conduct of [civil trials]. Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding." (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1219.)

Long before *NBC Subsidiary*, the high court observed that "in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." (*Gannett Co. v. DePasquale* (1979) 443 U.S. 368, 386-387, fn. 15.) We are unable to discern, from policy and precedent, any principled basis for concluding that the same utilitarian values that apply "with at least equal force" in

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[15] *NBC Subsidiary* rejected the argument that civil cases such as the one at issue there – a suit between celebrities, brought by Sondra Locke against Clint Eastwood – are purely private disputes, observing that a trial court is a public governmental institution, and that parties to a civil case are entitled to a fair trial, not a private one. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1211.)

criminal and civil trials (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1211) somehow lose their potency in the context of divorce proceedings.

Mr. Burkle insists divorce cases are not ordinary civil proceedings. Consequently, the presumption of openness does not apply and *NBC Subsidiary's* four part test should not be used.[16] His rationale is that family law proceedings are governed by their own

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[16] Mr. Burkle asserts that eight other states treat divorce proceedings differently from "ordinary civil proceedings." Nevada closes divorce proceedings upon the request of any party (Nev.Rev.Stat. § 125.080 ["[i]n any action for divorce the court shall, upon demand of either party, direct that the trial and issue or issues of fact joined therein be private"]), and New York restricts access to all divorce records. (N.Y. CLS Dom. Rel. § 235 [copies of documents or testimony in a matrimonial case may not be taken by anyone other than a party, except by order of the court].) Other states cited by Mr. Burkle as restricting access to court records in family matters are Connecticut, Florida, Iowa, Maine, Wisconsin and New Hampshire. Most of the statutory restrictions on access in these states are either much like those in California (prior to section 2024.6), or provide for the sealing only of specific sworn documents such as financial statements and child support affidavits. (See Conn.Gen.Stat. § 46b-11 [allowing exclusion of public and press from family relations matters "if the judge hearing the case determines that the welfare of any children involved or the nature of the case so requires"; records and other papers "may be ordered by the court to be kept confidential"; court rules on sealing files in family matters (Conn.Super.Ct. § 25-59A) state there is a presumption that documents filed with the court are available to the public, but provide for "automatic" sealing of certain sworn financial statements, with termination of automatic sealing when any hearing is held at which financial issues are in dispute]; Fla.Fam.Law R.Proc., rule 12.400 [closure of proceedings or sealing of records may be ordered by court only as provided under Florida's rules of judicial administration governing public access to judicial branch records; court may conditionally seal financial information required by mandatory disclosure rule if it is likely that access to the information would subject a party to abuse, "such as the use of the information by third parties for purposes unrelated to government or judicial accountability or to first amendment rights"]; Iowa Code, § 598.26 [record and evidence closed until a decree of dissolution has been entered; court shall, absent objection by a party, grant a party's motion to require sealing of a financial statement]; Me. R.Civ.Proc., rule 80(c) [financial statements and child support affidavits, required to be signed under oath, "shall be kept separate from other papers in the case and shall not be available for public inspection"]; Wis.Stat. § 767.27 [requiring full disclosure of assets on standard disclosure form and making the information disclosed confidential].) New Hampshire's Supreme Court recently concluded that a portion of its statute automatically sealing financial affidavits (N.H. Rev.Stat. § 458:15-b) was unconstitutional. The court concluded that its legislature could, with sufficient justification, make a narrow category

rules of court, making family law proceedings *sui generis*. The argument misses the mark for two reasons. First, it ignores entirely the analysis mandated by *Globe* and *NBC Subsidiary* for determining whether court proceedings are presumptively open: whether they "satisfy the high court's historical tradition/utility considerations" just discussed. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1217.) Second, the contention that family law proceedings have their own rules and may be considered *sui generis* is correct, but irrelevant. The same may be said of criminal proceedings and probate proceedings, which are nonetheless presumptively open. (*Globe, supra,* 457 U.S. 596; see *Estate of Hearst, supra*, 67 Cal.App.3d at p. 784 ["[a]bsent strong countervailing reasons, the public has a legitimate interest and right of general access to court records, one of special importance when probate involves a large estate with on-going long-term trusts which reputedly administer and control a major publishing empire"].)[17]

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of documents confidential upon filing with the court, so long as the documents retained their status as presumptively open and the public was afforded procedural safeguards required by the constitutional right of access. (*The Associated Press v. State of New Hampshire* (Dec. 30, 2005, No. 2004-830) ___ N.H. ___ [2005 N.H. Lexis 187, pp. 32-33].) One section of the statute was unconstitutional because it placed the burden of proof upon the proponent of disclosure, rather than the proponent of nondisclosure, and because it "abrogate[d] entirely the public right of access to a class of court records" and was not narrowly tailored to serve the allegedly compelling interest in protecting citizens from identity theft. (*Id.* at p. 42.)

[17] Mr. Burkle points to other provisions in the Family Code that provide for the closure of proceedings or the sealing of documents, such as hearings and records in conciliation court proceedings (§ 1818); sealing of children's psychological evaluations and parents' alcohol and drug tests and closing of mediation proceedings in custody and visitation proceedings (§§ 3025.5, 3041.5 & 3177); sealing tax returns in support proceedings (§ 3552); sealing records relating to artificial insemination (§ 7613); closing hearings to determine the parentage of a child (§ 7643); closing proceedings to declare a child free from parental custody (§ 7884); and sealing adoption records (§ 9200). These proceedings and records, however, are merely examples of the "particular proceedings" to which *NBC Subsidiary* referred when it stated that its opinion addressed "the right of access to ordinary civil proceedings in general, and not any right of access to particular proceedings governed by specific statutes." (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1212, fn. 30.) These specific statutes governing particular proceedings do not tell us

Mr. Burkle asserts several other reasons for concluding the *NBC Subsidiary* analysis is inapplicable in this case. None is meritorious.

First, Mr. Burkle argues that "financial privacy" is "an 'inalienable right' now enshrined in the California Constitution" and was not at issue in *NBC Subsidiary*.[18] Moreover, when the California Constitution was amended in 2004 to expressly provide for the broad construction of statutes furthering the people's right of access to information concerning the conduct of the people's business, the amendment specifically provided that it did not modify the constitutional right of privacy or affect the construction of any statute protecting the right to privacy.[19] From this, Mr. Burkle deduces the *NBC Subsidiary* test should not be used to evaluate the constitutionality of section 2024.6. We do not agree. No authority supports the notion that the constitutional right of privacy is to be treated differently from any other potentially overriding interest for purposes of First Amendment analysis. *NBC Subsidiary* did not involve the right to privacy, but it implicated the right to a fair and impartial jury in civil proceedings. Other

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anything about ordinary divorce proceedings. (See *Lechowick, supra*, 65 Cal.App.4th at p. 1413 [no California case even hints that the principle of historically and presumptively open court records varies when family law litigation is involved].)

[18] Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

[19] Article I, section 3, subdivision (b) of the California Constitution provides for "the right of access to information concerning the conduct of the people's business," the broad construction of statutes and other authority furthering the people's right of access, and the narrow construction of statutes limiting the right of access. (Cal. Const., art. I, § 3, subd. (b), par. (1)&(2).) Section 3, subdivision (b) specifies that it does not supersede or modify the right of privacy guaranteed in section 1 of article I, or affect the construction of any statute or other authority protecting the right to privacy. (Cal. Const., art. I, § 3, subd. (b), par. (3).) It also provides that a statute adopted after its effective date (November 3, 2004) that limits the right of access "shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. I, § 3, subd. (b), par. (2).)

"overriding interests" analyzed by the courts have been premised upon rights of constitutional dimension. (*Globe, supra,* 457 U.S. 596 [protection of minor victims of sex crimes from further trauma and embarrassment]; *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501, 512 (*Press-Enterprise I*) [privacy interests of a prospective juror during individual voir dire]; *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S.1 [criminal defendant's right to fair and impartial trial].) We scarcely need note that state constitutional privacy rights do not automatically "trump" the First Amendment right of access under the United States Constitution. Neither constitutional right is absolute. In short, Mr. Burkle's suggestion that the California Constitution tells us "how those interests [privacy and First Amendment access] must be weighed" is without merit.

Second, Mr. Burkle contends that section 2024.6 specifies the grounds for sealing records, whereas *NBC Subsidiary* involved an "absence of legislative guidance and the consequent need for judicial intervention . . . ." The statute at issue – Code of Civil Procedure section 124, which provides generally that the sittings of every court must be public – did not identify the findings that were necessary to close a civil proceeding. This argument ignores the fact that the Supreme Court's analysis of section 124 was necessitated by its conclusion that the First Amendment provides a right of access to ordinary civil trials and proceedings, thus requiring section 124 to be construed in accordance with First Amendment requirements. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1212.) Precisely the same analysis necessarily applies to section 2024.6. Moreover, Mr. Burkle's argument presumes the very point at issue. The fact that section 2024.6 states the circumstances under which a pleading must be sealed on request – if it lists and provides the location or identifying information about assets and liabilities – does not answer the question whether divorce proceedings are presumptively open, or whether the statute comports with the First Amendment right of access.[20]

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[20] Mr. Burkle cites *Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821, contending that *Pack* "distinguish[ed] and decline[d] to follow *NBC*

In sum, the two considerations that require a presumption of openness in substantive courtroom proceedings – historical tradition and the utility or institutional value of open proceedings – apply with equal force in divorce cases as in any other ordinary civil case. Divorce cases undoubtedly present issues different from those in other civil cases. In that sense, divorce cases are, as Mr. Burkle suggests, *sui generis*. However, the factors that differentiate divorce cases from "ordinary civil cases" – the intrusions into family privacy that accompany the dissolution of intimate relationships – do not support Mr. Burkle's view that no First Amendment right of access exists in divorce cases.[21] Instead, the factors unique to marital dissolutions are weighed in the balancing process that necessarily occurs in a decision whether to close divorce proceedings or to seal records that are presumptively open. In other words, divorce cases are different only in that they present different factors to be weighed in the balance against First Amendment access rights. Indeed, the issues distinguishing divorce cases from other civil cases – such as psychological evaluations in child custody disputes and

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Subsidiary" in a case involving a statute requiring the release of records pertaining to deceased foster children under specified circumstances. In *Pack*, the trial court refused to release any information about a deceased child on the ground release would be detrimental to the well-being of another child connected to the case. (*Id.* at p. 826.) *Pack* did not "decline to follow" *NBC Subsidiary*. The court in *Pack* merely pointed out, in response to the press's claim that the trial court was required to make specific factual findings when the press is denied access to otherwise public information, that the information sought was not public; that there was "no overarching First Amendment right to unfettered access to juvenile court proceedings"; and that *Pack* was "not a case analogous to *NBC Subsidiary* . . . ." (*Id.* at pp. 832-833.) As *Pack* pointed out, no party in that case argued "that the protection of other, involved children is not a legitimate 'overriding interest' which can legally support a restriction or outright ban on the disclosure of a decedent child's juvenile records." (*Id.* at p. 833.) Indeed, no party asserted a right to disclosure "other than as may be permitted under [the statute] . . . ." (*Id.* at p. 833, fn. 12.) In short, the First Amendment right of access to public records was neither asserted nor adjudicated.

[21] Notably, "ordinary civil cases" often require the parties to reveal the same types of financial information that section 2024.6 seeks to protect in divorce cases, including, for example, civil actions in which punitive damages are sought.

the like – are often the subject of statutory exceptions to the general rule of public access, in which the Legislature has already engaged in the necessary balancing of privacy rights and public access rights. Nothing about these exceptions contradicts the conclusion that both historical tradition and the institutional value of open proceedings mandate a presumption of openness in divorce proceedings just as in other civil cases. Accordingly, an assessment of the constitutionality of section 2024.6 must comport with the standards enunciated in *NBC Subsidiary*.

C. No meaningful distinction may be drawn between the right of access to courtroom proceedings and the right of access to court records.

Before applying the standards required by *NBC Subsidiary*, we address Mr. Burkle's further contention that *NBC Subsidiary* does not apply because section 2024.6 does not involve the closure of court proceedings, but merely the sealing of court records which "can be accessed again . . . at any time by any person upon a showing of good cause." Mr. Burkle does not inform us as to the nature of the "good cause" the press or public could show to obtain access, nor does he cite any persuasive authority distinguishing the closure of court proceedings from the closure of court records for First Amendment purposes.[22] The precedents suggest no such distinction.

As *NBC Subsidiary* points out, numerous reviewing courts "likewise have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication." (*NBC Subsidiary, supra,* 20 Cal.4th at p. 1208, fn. 25, citing, for example, *Brown & Williamson Tobacco Corp. v. F.T.C.* (6th Cir. 1983) 710 F.2d 1165, 1179 [vacating orders sealing documents filed in civil litigation; "[i]n either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring

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[22] Mr. Burkle merely argues that *NBC Subsidiary* involved the closure of court proceedings, not the closure of records, and that sealed records can be accessed again upon a showing of good cause, whereas prejudice from exclusion of the public from a trial may be irreversible.

incompetence, and concealing corruption"]; *Rushford v. New Yorker Magazine, Inc.* (4th Cir. 1988) 846 F.2d 249, 253 [First Amendment standards apply to issue of press access to documents filed in connection with a summary judgment motion in a civil case]; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111, fn. omitted [observing that the First Amendment provides "broad access rights to judicial hearings and records" and that a "lengthy list of authorities confirms this right in general, and in particular as it pertains to the press, both in criminal and civil cases"].) And, in *Green v. Uccelli* (1989) 207 Cal.App.3d 1112, the court stated that: "The contents of the file of a divorce proceeding are 'historically and presumptively' a matter of public record." (*Id.* at p. 1120; see also *Lechowick, supra*, 65 Cal.App.4th at p. 1414, fn. omitted ["[i]n general, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files"]; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 & fn. 3 ["'*NBC Subsidiary* test applies to the sealing of records,'" quoting Judicial Council advisory committee comment to California Rules of Court, rule 243.1; rules 243.1 and 243.2 "were adopted to comply with the Supreme Court's decision"].)[23]

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[23] Mr. Burkle contends *Green v. Uccelli* and *Lechowick* do not, contrary to Ms. Burkle's assertion, "express California law" in holding that divorce proceedings and records in California have traditionally been open. *Green*, he points out, was not itself a divorce case, and does not cite other divorce cases for the proposition that divorce records have traditionally been open. *Lechowick*, he asserts, was criticized by *NBC Subsidiary*, which "cast grave doubts on its continued viability." We do not agree. *NBC Subsidiary* did not criticize *Lechowick*'s holding that, in general, court files in family law cases should be treated no differently than the court files in any other cases, or its statement that no California case even hints that the principle of historically and presumptively open court records varies when family law litigation is involved. (*Lechowick, supra*, 65 Cal.App.4th at pp. 1413-1414.) *NBC Subsidiary* describes *Lechowick* as one of the few cases to mention Code of Civil Procedure section 124 (the statute construed in *NBC Subsidiary*, providing that court sittings shall be public). The Supreme Court's "critici[sm]" of *Lechowick* was only with respect to the guidance *Lechowick* gave to the trial court on remand, about the closure of future hearings. Indeed, the criticism was that *Lechowick*'s description of closure requirements "fail[ed] to take into account rules of procedure and substance set out in . . . cases construing the First

In short, no basis exists for concluding that court records should be differentiated from courtroom proceedings for purposes of First Amendment access rights. Court records in divorce proceedings, like divorce proceedings themselves, are presumptively open, and the standards delineated in *Globe* and *NBC Subsidiary* apply. We turn now to those standards and their application in this case.

D. Application of *Globe* and *NBC Subsidiary* principles to section 2024.6 compels the conclusion that the statute runs afoul of constitutional requirements.

Section 2024.6 mandates the sealing of presumptively open court records at the request of either party to a divorce proceeding. Under *NBC Subsidiary*, the mandatory sealing of presumptively open records is constitutionally permissible only if (1) an overriding interest supports the sealing rule; (2) a substantial probability of prejudice to that interest exists absent the sealing; (3) the sealing required by the statute is narrowly tailored to serve the overriding interest; and (4) no less restrictive means is available to achieve the overriding interest. (See *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1217-1218.) Under *Globe,* the test is similar: "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (*Globe, supra*, 457 U.S. at pp. 606-607.) Under either formulation, section 2024.6 is unconstitutional, as it is not narrowly tailored to serve the privacy interests it is intended to protect, and less restrictive means of protecting the privacy interests are available. Section 2024.6 thus fails the third and fourth factors of the *NBC Subsidiary* test.

Amendment . . . ." (*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1195-1196, fn. 11.) There is not the faintest hint of disagreement with *Lechowick*'s conclusion that divorce proceedings and records in California are presumptively open.

1. The first factor: the overriding privacy interest.

We entertain no doubt that, in appropriate circumstances, the right to privacy may be properly described as a compelling or overriding interest. The right to privacy is an inalienable right guaranteed under the California Constitution, and has been acknowledged as an overriding interest in certain individualized contexts. (*Press-Enterprise I, supra*, 464 U.S. at p. 512 [privacy interests of a prospective juror during individual voir dire].) The right to privacy extends to one's personal financial information. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656 ["we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life"].) This does not mean that parties who come to court, voluntarily or not, are entitled to privacy in respect of court records that are, as discussed at length *ante*, presumptively public records.[24] Nevertheless, if there is a substantial probability of prejudice to a privacy interest of higher value than the public's right of access to court records – such as, in this case, the avoidance of identity theft or other crimes relating to the misuse of personal financial information – a statute narrowly tailored to serve the privacy interest may be constitutionally permissible. (See *Press-Enterprise I, supra*, 464 U.S. at p. 510 ["[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"].)

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[24] In *Estate of Hearst, supra*, 67 Cal.App.3d at pp. 783, 784, the court observed that "when individuals employ the public powers of state courts to accomplish private ends, . . . they do so in full knowledge of the possibly disadvantageous circumstance that the document and records filed . . . will be open to public inspection," and that "with public protection comes public knowledge" of otherwise private facts.

2. The second factor: a substantial probability of prejudice to the overriding interest absent the sealing.

We are less sanguine about the existence of a substantial probability of prejudice to divorcing litigants' privacy interests absent the sealing mandated by section 2024.6. Mr. Burkle asserts that the legislative history of section 2024.6 is "replete" with evidence of the Legislature's concern about the risk of identify theft and other misuse of the personal financial information which divorcing parties must disclose. The legislative history indicates that the bill's author cited "numerous anecdotes" of stolen identities. More specifically:

> "According to the author, concerns about identity theft, stalking, kidnapping of the divorcing couple's children, theft of art works and other property, and other finance-related crimes have instigated parties and their attorneys to file motions to make such records private under seal. . . . [¶] . . .[¶] Since the courts' decisions in *Uccelli* and *Lechowick* [stating that general principles against protecting personal information in civil cases apply to family law cases as well], concerns related to financial privacy and identity theft resulting from information made available to the public on the internet and public documents such as court filings have indeed proliferated. The author notes that accounts of the ease by which criminals have accessed financial and other identifying information of private individuals have attracted intense media attention." (Assem. Com. on Judiciary, analysis of Assem. Bill No. 782 (2003-2004 Reg. Sess.) as amended May 5, 2004, pp. 3-4.)

The press concedes that identity theft is a serious problem and that litigants have a privacy interest in their bank account and social security numbers. However, the press insists the State does not have a compelling interest in "drawing a veil of secrecy over the financial information – such as the assets held by the couple – at the heart of a divorce proceeding and the basis for a divorce court's decision on the division of marital property." Even if there is a compelling interest in protecting divorcing litigants from

identity theft and other crimes, the press asserts there is no empirical evidence that section 2024.6 furthers that interest.

The legislative history provides scant evidence that sealing pleadings in divorce cases is necessitated by the risk of identify theft or other crimes, since it consists principally of "anecdotes" and "concerns" about identity theft. Notably, the legislative history also shows the bill's author cited "intrusive and unjust media publicity about divorcing couples with substantial assets," and stated "the public clearly has no need to know what assets a couple has accumulated, where those assets are located, and how those assets are to be divided." (Assem. Com. on Judiciary, analysis of Assem. Bill No. 782 (2003-2004) Reg. Sess. as amended May 5, 2004, p. 3.) On the other hand, it "is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment" (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 372), and in some cases the existence of facts supporting the legislative judgment is presumed. (See *Dribin v. Superior Court* (1951) 37 Cal.2d 345, 352.) Consequently, while we entertain some doubt as to the linkage between access to court documents and identity theft, we defer, for purposes of this analysis, to the presumed legislative findings, and conclude that a statute narrowly drawn to protect divorcing parties from identity theft by denying the right of access to sensitive information would be constitutionally permissible.

3. The third factor: the statute is not narrowly tailored to serve an overriding interest in protecting divorcing couples from identify theft and other misuse of private information.

Section 2024.6 runs afoul of the constitutional requirement that a statute which seals presumptively open court records must be narrowly tailored to serve the privacy interest being protected – in this case, the avoidance of identify theft and other crimes founded on the misuse of private information. The reach of the statute extends far beyond the overriding interest in protecting divorcing litigants from identity theft,

kidnapping, stalking, theft or other financial crimes, and the defect is apparent from the face of the statute.

Section 2024.6 mandates the sealing, on request, of any pleading – defined as a declaration or document setting forth assets and liabilities, a marital settlement agreement, and any document incidental to a declaration or marital agreement – that "provides the location or identifying information about [the parties'] assets and liabilities . . . ." (§ 2024.6, subds. (a) & (c).) Consequently, routine pleadings – such as, in this case, a motion for summary judgment, discovery motions, and so on – with any location or identifying information about assets may be sealed without regard to the content of the remainder of the pleading. Moreover, the statute closes to public view not only the identifying information that would facilitate identity theft or other financial crimes – social security numbers, account numbers, locations – but all information pertaining to any asset, including its existence, its value, the provisions of any agreement relating to the asset, and any contentions that may be made about the resolution of disputes over an asset. In short, much of the information contained in documents as to which sealing is mandated may be completely unrelated to the asserted statutory goal of preventing identify theft and financial crimes.

Mr. Burkle asserts section 2024.6 is narrowly tailored to prevent the kind of harm the statute seeks to forestall because it applies only to divorce cases (which require the parties to divulge personal financial information), and only to the pleadings that list and identify assets (not to all pleadings). We are not persuaded. The harm that the statute seeks to forestall – the overriding interest it must be narrowly tailored to serve – is, as Mr. Burkle states elsewhere, "the risk of identity theft and other misuse of personal financial information which divorcing parties are required to disclose." Section 2024.6, however, mandates the sealing of the entirety of any pleadings that list and identify or locate assets and liabilities. It is plainly not narrowly tailored to seal only the information which arguably presents a risk of identity theft or other misuse, such as credit card numbers, account numbers, social security numbers and the like.

Mr. Burkle also contends the statute is narrowly tailored because it provides for "particularized determinations in individual cases," citing *Globe, supra*, 457 U.S. at p. 611, fn. 27. In *Globe,* the high court held that a rule of mandatory closure of criminal trials during the testimony of minor sex victims was constitutionally infirm, because it failed to require "particularized determinations in individual cases . . . ." (*Ibid.*) Section 2024.6, Mr. Burkle claims, provides for "not merely one but two 'particularized determinations in individual cases,'" because (1) a party must ask for sealing, and the trial court reviews the documents to confirm they contain identifying information before ordering them sealed; and (2) documents may be unsealed if good cause is shown. Again, we are not persuaded. An ex parte application that cannot be denied (unless the applicant asks to seal documents containing no asset information) is not, we are confident, the kind of particularized determination contemplated by the high court in *Globe*. Moreover, the possibility of later unsealing documents, upon a petition and showing of good cause, is entirely irrelevant to the pertinent question under *NBC Subsidiary*: whether the initial sealing mandated by the statute is narrowly tailored to serve an overriding interest in protecting divorcing parties from identity theft and other financial crimes. Clearly it is not.[25]

4. The fourth factor: less restrictive alternatives.

Mr. Burkle argues that section 2024.6 is constitutional because the press did not meet its burden of showing "there is no less restrictive means of achieving the overriding interest." (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1218, fn. omitted.) The press's only proposal, Mr. Burkle asserts, was the redaction of specific identifying information instead

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[25] Mr. Burkle argues that section 2024.6 gives courts "at least as much discretion" to decide what to seal as many other statutes in the Family Code, citing statutes relating to adoption records, psychological evaluations of children in custody disputes, and so on. We do not assess the constitutionality of a statute by comparing it to other statutes not at issue, particularly where those statutes govern matters as to which the necessary requisites for a presumption of openness – historical tradition and utilitarian value – have not been found to apply. (See discussion in part B, *ante*.)

of sealing the document in which the information appears. While Mr. Burkle correctly states that the burden of demonstrating reasonable alternatives rests with the press (*id.* at p. 1218, fn. 40), he suggests no reason why redaction is not a reasonable alternative to effect the statutory purpose.[26] He merely states that redaction "is unnecessary where . . . the sealing statute is already so narrowly tailored . . . ," and that any benign information is inextricably intertwined with prejudicial information. Both points are without substance. As we previously concluded, the statute is not narrowly tailored, and the claim that benign and prejudicial information is inextricably intertwined is entirely speculative, since the statute allows sealing without any such assessment. (See *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1026 [redacting information from a search warrant affidavit was impossible because benign information was inextricably intertwined with prejudicial information].) In short, it is obvious that less restrictive alternatives exist, and Mr. Burkle's argument to the contrary is without merit. (See *Globe, supra*, 457 U.S. at p. 609 [statute mandating closure could not be viewed as a narrowly tailored means of accommodating state's compelling interest in safeguarding the well-being of a minor; "[t]hat interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure"].)

E. Section 2024.6 cannot be interpreted or reformed to avoid constitutional infirmity.

Finally, Mr. Burkle alternatively argues that section 2024.6 should be construed "to authorize judges to seal or redact only the specified financial information rather than the entirety of the pleading in which it was contained." Specifically, Mr. Burkle suggests that subdivision (a), which states that:

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[26] Indeed, Mr. Burkle himself argues, in the alternative, that this court should interpret the statute to require redaction of only the information specified in the statute, rather than the entire pleading. (See part E, *post.*)

> "the court shall order a pleading that lists the parties' financial assets and liabilities . . . sealed"

should be construed to mean that:

> "the court shall order *that part of* a pleading . . . sealed [i.e., redacted]."

This "minor emendation," according to Mr. Burkle, would be consistent with the legislative intent "to protect only the specified financial information" and is "clearly preferable to outright invalidation of the statute." We conclude this is not a proper case in which to reform the statute to preserve its constitutionality.

It is settled that courts should interpret statutes to avoid constitutional infirmities and that, in an appropriate case, a court may reform or rewrite a statute to preserve it against invalidation. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661 (*Kopp*).) The rule is this:

> "[A] court may reform – i.e., 'rewrite' – a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute." (*Ibid.*)

The *Kopp* standards for reformation of a statute are not met in this case.

The text of the statute and its legislative history make it apparent that we cannot "say with confidence" that Mr. Burkle's proposed re-writing of the statute, or any other re-writing, would "closely [effectuate] policy judgments clearly articulated by" the Legislature. (*Kopp, supra*, 11 Cal.4th at p. 661.) The legislative intention was clear: the Legislature intended to "establish[] procedures for keeping the location or identifying information about the assets and liabilities of the parties in a dissolution matter sealed."[27]

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[27] The only policy judgment expressly articulated by the Legislature in the legislation appeared in connection with its passage as an urgency statute:

(Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 782 (2003-2004 Reg. Sess.) as amended May 25, 2004, p. 1.) Moreover, the procedures selected by the Legislature – mandating the sealing, on an ex parte basis, of any document containing information on marital assets and liabilities – were clearly intended to streamline the process of sealing documents in dissolution proceedings by entirely eliminating the need for individualized determinations of good cause to justify a sealing order.[28] However, the streamlining procedure selected by the Legislature – the sine qua non of the statute – is, as we have seen, incompatible with constitutional requirements. Further, as the trial court observed, "there is not even a glimmer" of legislative intent to authorize trial court discretion to redact specified financial information, rather than to mandate sealing of entire pleadings. And, even if we were to construe section 2024.6 as Mr. Burkle suggests – to redact "that part of" the pleadings containing lists of assets and identifying information – the statute as so construed would shield from public view not only the information necessary to achieve the legislative purpose of preventing identity theft and other crimes, but also, we presume, all other information pertaining to any asset

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> "It is necessary that this act take effect immediately as an urgency statute because the records that this act seeks to protect may disclose identifying information and location of assets and liabilities, thereby subjecting the affected parties and their children, as well as their assets and liabilities, to criminal activity, violations of privacy, and other potential harm." (Assem. Bill No. 782 (2003-2004 Reg. Sess.) § 4.)

[28] One report on the bill recites the necessity, under current law, for an individualized determination of good cause to restrict public access to portions of court records, including noticed motions and hearings, weighing of the privacy interest against the public's right of access, and a compelling showing to justify a sealing order. The analysis describes the "well-established policy in California to allow maximum public access to judicial proceedings and records," and observes that "the same general principles against protecting personal information in civil cases generally currently apply to family law cases as well . . . ." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 782 (2003-2004 Reg. Sess.) as amended May 5, 2004; see also Assem. Com. on Judiciary, analysis of Assem. Bill No. 782 (2003-2004 Reg. Sess.) as amended May 5, 2004, p. 4.)

or liability, including its existence, nature and value. Information on the nature and value of marital assets, however, has little to do with the Legislature's only clearly articulated policy judgment: its interest in preventing disclosure of "identifying information and location of assets and liabilities" that would subject divorcing couples to criminal activity.

Moreover, an interpretation of the statute that would render it constitutional would necessarily amount to a wholesale revision of the statute, and would require us to interpret the statute to mean, in some respects, precisely the opposite of what it states. For example, section 2024.6 not only mandates sealing of pleadings with identifying information about assets without regard to the remainder of the pleading's contents, but also prohibits unsealing "except upon petition to the court and good cause shown." (§ 2024.6, subd. (a).) As the press correctly points out, this provision effectively destroys the presumption of access to court records by automatically sealing them, and placing the burden of showing good cause for unsealing them on the party presumptively entitled to access. This burden on the party presumptively entitled to access is, by definition, wholly at odds with the presumption. (See *Oregonian Pub. v. U.S. Dist. Court for Dist. of Or.* (9th Cir. 1990) 920 F.2d 1462, 1466-1467 [under the First Amendment, the party seeking access "is entitled to a presumption of entitlement to disclosure" and it is the burden of the party seeking closure to present facts supporting closure]; *Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 317 ["the burden rests on the party seeking to deny public access to those records to establish compelling reasons why and to what extent these records should be made private"].) The Legislature obviously intended this impermissible result, and we cannot construe the statute contrary to its plain meaning.

To summarize, reforming section 2024.6 to render it constitutional would require us to construe the statute to provide for trial court discretion to redact rather than, as the statutory language provides, mandatory sealing. Alternatively, it would require us to construe section 2024.6 to provide for mandatory redaction of parts of pleadings rather than, as the statutory language states, sealing of entire pleadings, and to determine which

parts of the pleading should be automatically redacted.[29] And, it would require us to conclude that section 2024.6 does not place the burden of showing good cause for unsealing on the party presumptively entitled to access, when it plainly does exactly that. These constructions of the statute are not in accordance with its plain language, nor do they "closely [effectuate] policy judgments clearly articulated by" the Legislature. (*Kopp, supra*, 11 Cal.4th at p. 661.) Accordingly, it is impossible to discern how the Legislature would have chosen to proceed in light of the constitutional infirmity we have described[30] and we cannot, consistent with the principles established in *Kopp*, reform the statute to preserve its constitutionality.

CONCLUSION

The First Amendment provides a right of access to court records in divorce proceedings, just as in other ordinary civil cases. While the interest in protecting divorcing parties from identity theft and other financial crimes may override the First Amendment right of access in a proper case, section 2024.6 is not narrowly tailored to serve that interest. Because less restrictive means of achieving the statutory objective are

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[29] At oral argument, Mr. Burkle's counsel took the position that, in reforming section 2024.6, the statute should be construed to require redaction of the value of the assets, as well as location or identifying information. However, the statutory language suggests that a pleading that lists assets and liabilities, but does not provide location or identifying information, is not covered by section 2024.6. The Judicial Council form to which section 2024.6, subdivision (b) refers (FL-316, Jan. 1, 2005), consonant with the statutory language, likewise indicates that the trial court must seal listed documents "because they contain the location or identifying information about" assets or debts.

[30] The Legislature might choose, for example, to specify limited items of identifying information, such as account numbers, for "automatic" or mandatory redaction that would survive constitutional scrutiny. (Section 2024.5, for example, which was enacted as a part of the legislation that includes section 2024.6, provides for the redaction of any social security number from any pleading, attachment, document, or other written material filed with the court pursuant to a dissolution petition.) This court, however, cannot deduce any such intention from the policy judgments articulated by the Legislature in the statute and its history.

available, section 2024.6 is unconstitutional on its face as an undue burden on the First Amendment right of public access to court records.

DISPOSITION

The trial court's order of February 28, 2005, vacating its provisional sealing order of December 21, 2004, is affirmed, and the stay ordered by the trial court is vacated. Costs are awarded to respondent and intervenors.

CERTIFIED FOR PUBLICATION

BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.

Potential Points for the Bench Bar coalition on language access, language access need in criminal, and the Self Help Pilot Projects.

Here are some numbers I've picked up that may be helpful to you.

- U.S. Census Bureau 13,385,483 Californians, 41.3 %, speak a language other than English at home.
- 19.9% speak English less than "very well",
- 11.1% of Californians are "linguistically isolated", meaning a household where "all members of the household 14 years and over have at least some difficulty with English."

2005 Language Need and Interpreter Use Study

- In 2004-2005, in **15%** of the service days for interpreter use in designated languages, a **non-certified interpreter was used**.
- In 2004-2005, in **35%** of the service days for interpreter use in the 10 most used non-designated languages **a non-registered interpreter was used**.

Percent of Service Days provided by non-certified non- registered interpreters in designated languages
REGION 1: Los Angeles, San Luis Obispo, Santa Barbara, & Ventura

- 67% of 1,463 service days for Cantonese.
- 64% of 2,842 service days for Korean.
- 100% of 328 service days for Tagalog.

REGION 2: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, & Sonoma

- 90% of 97 service days for Japanese.
- 62% of 151 service days for Portuguese.
- 87% of 601 service days for Tagolog.

REGION 3: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, & Yuba

- 54% of 79 service days for Arabic.
- 73% of 157 service days for Korean.
- 60% of 60 service days for Mandarin.
- 87% of 89 service days for Portuguese.
- 100% of 65 service days for Tagolog.

REGION 4: Imperial, Inyo, Orange, Riverside, San Bernardino, San Diego

- 63% of 261 service days for Arabic.
- 90% of 24 service days for Cantonese.
- 91% of 102 service days for Japanese.
- 76% of 26 service days for Portuguese.
- 85% of 222 service days for Tagolog.

Percent of Service Days provided by non-certified interpreters in the ten most used non-designated languages.
REGION 1

- 100% of 17 service days for Hmong (Mien).
- 100% of 44 service days for Samoan.
- 100% of 40 service days for Tongan.

REGION 2

- 93% of 37 service days for Farsi.
- 73% of 72 service days for Hmong (Mien).
- 72% of 71 service days for Ilocano.
- 73% of 166 service days for Khmer.

REGION 3

- 75% of 30 service days for Farsi.
- 65% of 150 service days for Ilocano.
- 100% of 5 service days for Samoan.
- 63% of 25 service days for Tongan.

REGION 4

- 82% of 28 service days for Hindi.
- 100% 10 service days for Hmong (Mien).
- 96% of 53 services days for Punjabi.
- 98% of 81 service days for Samoan.
- 90% of 25 service days for Tongan.

Model Self-Help Pilot Program - CFCC
2005 Report to Legislature

Only two of the five models examined the language access issues related to the self-represented litigant: Fresno County Spanish-Speaking model and San Francisco County Multilingual model.

The report stated that **interpreters are needed in family law and other civil hearings.** Both centers found that they needed to send interpreters into the courtroom for non-English-speaking people whose cases required hearings.

Fresno County: Centro de Recursos Legales (CRL)

- In fiscal year 2001-2002 there were 21,909 cases filed in family law, probate, small claims, and limited civil cases,
- Approximately 40% of the Spanish-speaking litigants in these cases needed language assistance,
- Lack of access to court-certified or trained interpreters results in unfair proceedings due to the inadequacy of the interpretation,
- Interpretation provided by friend or family member were often biased or inaccurate,
- 80% of services provided at the CRL provided in Spanish, and
- Respondents to a survey expressed hope that the CRL would increase the languages provided by the center.[1]

San Francisco County: Assisting Court Customers with Education and Self-Help Services (ACCESS)

- In fiscal year 2002-2003 there were 25,477 cases filed in family, probate, small claims, and limited civil cases,
- In 2004 ACCESS averaged over 1,000 customers per month.
- Without bilingual legal assistance, non-English-speaking monolingual self-represented litigants were often sent home to get someone to help communicate with court staff,
- 45% of the foreign language-speaking ACCESS customers preferred to receive services in a language other than English,
- Relatively few cases assisted Chinese, Russian, Vietnamese, or Tagolog, partly due to the difficulty recruiting and retaining volunteers in those languages.[2]

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[1] Administrative Office of the Courts, "Model Self Help Pilot Program: Report to Legislature (2005)".
[2] Id.

Kenny, Tracy

From: Fancy, Audrey
Sent: Friday, February 24, 2006 4:45 PM
To: Kenny, Tracy; Morhar, Lee
Subject: Sealing records Article

See the article below on the new legislation.

Divorce info secrecy bill spurs dispute—Bill Ainsworth, San Diego Union Tribune
Billionaire Ron Burkle has tenaciously tried to keep records in his bitter divorce case secret, invoking a law that some claimed was designed specifically for his situation. But two courts have declared that law unconstitutional. Now a powerful lawmaker is quietly trying to rush a bill through the Legislature that would restore key parts of the law and could help Burkle win his fight to keep his records out of public view.
http://www.signonsandiego.com/uniontrib/20060224/news_1n24secret.html

SACRAMENTO – Billionaire Ron Burkle has tenaciously tried to keep records in his bitter divorce case secret, invoking a law that some claimed was designed specifically for his situation.

But two courts have declared that law unconstitutional.

Now a powerful lawmaker is quietly trying to rush a bill through the Legislature that would restore key parts of the law and could help Burkle win his fight to keep his records out of public view.

State Sen. Kevin Murray, D-Culver City, said his bill protects privacy.

"There's too much financial information disclosed in a divorce that makes either party vulnerable to attack," he said.

Opponents say the bill would impose secrecy on a public proceeding.

"There's a right of access to court proceedings. This throws the whole thing out by allowing one party to make it a private proceeding," said Tom Newton, general counsel for the California Newspaper Publishers Association.

Critics also claim that legislators are acting on behalf of a wealthy donor. Burkle, a supermarket magnate, is a big contributor to Democrats and Republican Gov. Arnold Schwarzenegger. The original law was passed quickly as his divorce case was heating up.

Hillel Chodos, a lawyer who represents Burkle's wife, Janet, in their divorce case, said he believes that Burkle or his aides are behind the new legislation. But he said he has no direct evidence of a Burkle link.

"I'm indignant," Chodos said. "His basic idea is that if you have enough money, it doesn't matter what the courts say."

Burkle's spokesman, Frank Quintero, said in an e-mail message that Burkle is traveling. Quintero didn't respond to questions.

Murray's Senate Bill 1015 would, at the request of one party, require a judge to seal the part of a court record that contains financial information.

Significantly, the bill also authorizes privately paid temporary judges to seal records. Privately paid judges, who often act as court-sanctioned mediators, are increasingly used at the request and expense of opposing parties in legal proceedings. One was used in the Burkle case.

Murray, chairman of the Senate Appropriations Committee, said he introduced the bill this month in response to

the appellate court decision in the Burkle case that threw out the 2004 divorce-records law.

He said neither Burkle nor his aides urged him to introduce the bill.

"Is (Burkle) interested in it? Sure," Murray said. "Clearly, his name is on the court case. Clearly, it's not lost on anybody that he's involved somewhere."

But Chodos said the provision authorizing the private judges to seal records, though a small part of the legislation, shows that the bill was written with Burkle in mind. He said the legislation could help Burkle win a pending court case over divorce records.

Burkle lost the main case involving the constitutionality of the 2004 divorce law. But in a separate case, he's asking an appeals court to rule that a privately paid temporary judge has the authority to seal records.

At Burkle's request, the private judge sealed records, but a Superior Court judge later ruled that private judges don't have the authority to do that.

Murray said the provision was included not to help Burkle, but to encourage litigants to use private judges.

Susan Seager, an attorney who challenged the previous law on behalf of several news organizations, said the private-judge provision directly relates to Burkle's case.

"It's very interesting. That's an issue that's exactly the same as the one being decided in the Burkle case," said Seager, who represented The Associated Press, the *Los Angeles Times* and the California Newspaper Publishers Association, which includes *The San Diego Union-Tribune.*

Critics say the new bill, in both style and substance, continues the pattern of the previous law.

The original law, sponsored by Democratic state Sen. Christine Kehoe of San Diego when she was in the Assembly, was rushed through the Legislature by then-state Senate Pro Tem John Burton in 2004, shortly after Burkle failed to persuade a judge to seal most of his divorce records.

The new bill is on a controversial fast-track process, often derisively referred to as "gut and amend." Advocates of open government, including Schwarzenegger, have criticized that process because it completely changes the substance of a bill while allowing it to speed through the Legislature, sometimes without a policy committee hearing.

Senate Bill 1015, for example, started out as legislation involving homeland security before becoming a divorce-case bill.

Murray defended the process, saying the Legislature had already passed a similar law unanimously.

"People only make those complaints when they are against something," he said.

Burkle is worth an estimated $2.3 billion and is the owner of a fabled estate in Beverly Hills and a mansion in La Jolla. He recently teamed up with a labor union to make a bid for the Knight-Ridder newspaper chain – something of an irony given that he has tried to keep certain information about himself out of the news.

Last year, he had his employees buy stacks of copies of the *Los Angeles Business Journal* to keep people from reading an article about his divorce in the newspaper. His spokesman said he was trying to protect his child.

Burkle and his estranged wife have been battling over the terms of their divorce since 2003. His attorneys say the divorce should be governed by a 1997 agreement that would give Janet Burkle $30 million. Her attorneys say she should get more money because that agreement is invalid and because he has hidden assets.

The timing of the previous law raised suspicions among First Amendment advocates and political observers.

For years, Republicans, including state Sen. Bill Morrow of Oceanside, had seen their bills to seal divorce records blocked by Democrats who control the Legislature. Democrats said the bills would restrict public access to courts.

But in 2004, Burton, a San Francisco Democrat and usually a champion of public access to records, steered the bill to seal divorce records through the Legislature. Schwarzenegger signed the bill, which took effect immediately.

A few months before the Legislature passed the bill, Burkle donated $121,000 to Schwarzenegger and $26,600 to the California Democratic Party. Burkle said he didn't have anything to do with getting the law passed.

Later, Burkle cited the law to seal his records.

In addition, Kern County District Attorney Ed Jagels, also involved in a divorce case, invoked the law in an attempt to seal his records.

Last year, a Superior Court judge ruled the law unconstitutional.

In January, an appellate court in Los Angeles agreed, saying the law is an "undue burden on the First Amendment right of access to court records."

The new bill isn't as broad as the previous law. But it still requires a judge, at the request of one party, to seal or redact any portion of a pleading that contains financial records, including income, expenses and assets.

Murray said the bill protects those getting a divorce from identity theft and inappropriate disclosure of financial records.

Seager said the new bill is unconstitutional because it doesn't require a judge to balance privacy interests against public access.

Divorce cases are often about money, she said, adding, "Deleting all references to dollar amounts would make divorces secret."

FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

March 15, 2006

The Honorable Kevin Murray
Member of the Senate, District 26
State Capitol, Room 5050
Sacramento, CA 95814

SB 1015, as amended 3/9/06 – Support, Recommend Amendment
Family Law Section

Dear Senator Murray:

The executive committee of the Family Law Section of the State Bar of California, composed of practitioners and adjudicators with extensive experience and expertise in the field of family law, is pleased to support your SB 1015 for the reasons expressed in the attached report. The committee recommends an additional amendment to the bill that it believes will improve its operation.

If you have any questions concerning this position, please contact either the author of the report, Melvyn Jay Ross, at: (310) 278-4000, or myself at: (916) 442-8018.

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

Thank you.

Best Regards,

Larry Doyle
Chief Legislative Counsel

cc: Drew Liebert, Chief Counsel, Assembly Judiciary Committee
Mark Redmond, Republican Counsel, Assembly Judiciary Committee
Sheldon Sloan, Chair, Board Committee on Stakeholder Relations
Peter M. Walzer, Chair, Family Law Section
Elizabeth L. Harrison, Legislative Chair, Family Law Section
Jill Barr, Legislative Vice Chair, Family Law Section
Melvyn Ross, Member, Family Law Section
Eric Csizmar, Deputy Legislative Secretary, Office of the Governor
Rick Zanassi, Office of General Counsel, State Bar of California
Anthony Williams, Director of Governmental Affairs, State Bar of California
Saul Bercovitch, Office of Governmental Affairs, State Bar of California

FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

TO: Larry Doyle, Chief Legislative Counsel

FROM: Melvyn Jay Ross
Attorney at Law
9401 Wilshire Boulevard
Suite 1250
Beverly Hills, California 90212-2926
Phone: (310) 278-4000
Fax: (310) 278-4101
Email: mjrlaw@earthlink.net

DATE: March 15, 2006

RE: Senate Bill 1015 (Murray), as amended March 9, 2006[1])

FLEXCOM'S POSITION:

Support (recommend amendment)

FLEXCOM'S VOTE:

Ayes 7; Noes 0; Abstain 3

("Super Legislative Telephone Conference" following amendments of March 9, 2006)

ANALYSIS

1. **SUMMARY OF EXISTING LAW:**

On January 20, 2006, the current version of Family Code Section 2024.6 was declared unconstitutional by the Second District Court of Appeal in Burkle v. Burkle 2006 DJDAR 808 (Second District, Div. 8; No. B181878; filed January 20, 2006).

[1] All references herein to Senate Bill 1015 are to the version of the bill amended in the Assembly on March 9, 2006.

The appellate panel in Burkle stressed that the public's right to know sufficiently outweighed the scheme of "confidentiality" envisioned by current (and defective) Family Code Section 2024.6. The Burkle court concluded that Family Code Section 2024.6 as currently in effect did not withstand constitutional scrutiny and that it constituted a constitutionally impermissible burden on the First Amendment and the public's right of access to court records.

In finding current Family Code Section 2024.6 unconstitutional as violative of First Amendment rights of access to public court records, the Burkle panel additionally declared:

- Current Family Code Section 2024.6 was not sufficiently narrowly drafted.
- Current Family Code Section 2024.6 was not sufficiently narrowly tailored to serve overriding privacy interests and that there existed a less restrictive means of protecting those interests, i.e., "redacting."
- Current Family Code Section 2024.6 required sealing of entire pleadings and documents and did not give the court discretion to determine which information should be protected and which should not.

As an "urgency" bill, current Family Code Section 2024.6 (found unconstitutional in Burkle) became effective as of June 7, 2004 and established various procedures for keeping "sealed" the location/identifying information about the assets and liabilities of the parties in a family law matter, reading in part as follows:

> "Upon request by a party to a ... [family law proceeding] the court shall order a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities **sealed**." (Emphasis added.)

2. **CHANGES TO EXISTING LAW PROPOSED BY SB 1015:**

Proposed SB 1015 would re-enact Family Code Section 2024.6 as more narrowly prescribed by Burkle and references only "redacting" (there is no mention of "sealing"):

> "Notwithstanding any other provision of law, upon request by a party to a ... [family law proceeding] the court shall order **redacted any portion of a pleading** that lists the parties' financial assets, liabilities, income or expenses, or provides the location of, including a residential address, or identifying information about, those assets, liabilities, income, or expenses." (Emphasis added.)

To pass constitutional scrutiny under the Burkle standards, SB 1015 does not involve any type of "sealing."

As more narrowly drafted to meet the main constitutional objection enunciated in Burkle, SB 1015 authorizes only that the court "shall order redacted any portion of a pleading" listing the described protected information that is entitled to remain "confidential."

SB 1015 additionally appropriately provides:

> "(a) ... Subject to the direction of the court, **no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy**. The request may be made by ex parte application. Nothing redacted pursuant to this section may be restored except upon petition to the court and a showing of good cause. (Emphasis added.)
>
> "(d) For purposes of this section and notwithstanding any other provision of law, 'court' includes a privately compensated judge."
>
> "(g) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings."

3. **HISTORY AND REASONS FOR FLEXCOM'S SUPPORT:**

In 2004, FLEXCOM voted to support AB 782 enacting the current form of Family Code Section 2024.6 found unconstitutional in Burkle.

Family law attorney's have tremendous concern for the safety and well-being of their client-litigants who become involved in family law proceedings.

To obtain the required legal relief that is afforded only through the various family law court proceedings, parties have no choice but to resort to the public legal system.

One of the special vulnerabilities of family law client-litigants is "identity theft" as amply and accurately described and proclaimed in the preamble to SB 1015:

> "(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft.
>
> "(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic data bases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse

> of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties. Existing state law is inadequate to protect these widespread privacy concerns."

As more narrowly drafted, SB 1015 properly balances the public's right to know against the privacy needs of family law litigants to be reasonably and rationally protected in their persons and estates. As further described and proclaimed in the preamble to SB 1015:

> "(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records."

SB 1015 now proposes only "redacting portions of pleadings" and eliminates any reference to "sealing the entirety of pleadings."

Under the current state of law in California regarding the reasonable, efficient and effective ability of family law litigants to protect themselves against unwanted and unjustified personal or financial harm, the appropriate (and now narrowly tailored) protections of SB 1015 are needed as it is extremely difficult (if not impossible) to get any meaningful protective relief under the demanding user-unfriendly proof requirements of California Rules of Court, Rules 243.1 and 243.2 (setting forth the procedures for obtaining a court order sealing confidential documents filed with the court).

4. **PROPOSED AMENDMENT:**

FLEXCOM recommends that SB 1015 be further amended to make it clear that the "confidentiality" protections afforded by SB 1015 also extend and apply to any proceeding dissolving a domestic partnership relationship recognized under the California Domestic Partner Rights and Responsibilities Act of 2003 (AB 205, effective January 1, 2005).

5. **GERMANENESS:**

The issue of the confidentiality of the parties' statutorily identified financial information contained in the court pleadings of any proceeding for dissolution of marriage, nullity of marriage, legal separation or the dissolving of a domestic partnership is a matter of ever-present intense concern to family law practitioners and is particularly within the special expertise, knowledge, training and experience of FLEXCOM.

The subject matter of SB 1015 (as amended March 9, 2006 and as here recommended to be further amended) will have a direct, explicit and immediate beneficial impact on family law attorneys and their clients.

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

Respectfully submitted,

MELVYN JAY ROSS
Certified Family Law Specialist
Family Law Executive Committee Member
(FLEXCOM)

cc: Larry Doyle, Chief Legislative Counsel
Anthony Williams, Director, Office of Governmental Affairs
Saul Bercovitch, Staff Attorney, Office of Governmental Affairs
Jocelyne Daillaire, Office of General Counsel
Sheldon Sloan, Chair, Board Committee on Stakeholder Relations
Elizabeth Harrison, Legislative Chair, Family Law Section
Jill Barr, Legislative Vice-Chair, Family Law Section
Peter M. Walzer, Chair, Family Law Section
Susan Orloff, Family Law Section Administrator

A marriage unravels unhappily: Ron Burkle's wife seeking bigger slice of his billions

Los Angeles Business Journal, Jan 10, 2005 by Amanda Bronstad

The estranged wife of billionaire Ron Burkle is threatening to dismantle a 1997 post-marital agreement she says unfairly benefited the supermarket magnate, according to divorce papers filed in Los Angeles Superior Court.

After a contentious year and a half, Janet Burkle has appealed the decision of a private judge who ruled against her last month. She claims the earlier agreement is invalid because it fails to account for certain assets in her $30 million share of the community property, divorce papers say.

As a result, she says a spousal support waiver in the agreement should be lifted, and she is seeking $232,800 in monthly living expenses. She also says Ron Burkle has failed to make payments required under the agreement.

Ron Burkle, whose net worth was estimated last year by the Business Journal at $1.9 billion, says in court papers that he has abided by the agreement. He also said she waived spousal support as part of the 1997 agreement.

Both sides have taken to personal attacks in detailing their arguments during the divorce, according to filings in the court. In repeated requests to have additional security for their son, Ron Burkle has accused Janet Burkle of being an irresponsible parent. He claims she threatened the child's safety by dating a personal trainer with a criminal record. Janet Burkle, meanwhile, says Ron Burkle has harassed her by conducting intrusive surveillance of her and her then-boyfriend.

"My husband cannot tolerate losing--anything!" Janet Burkle said in a court declaration filed in the divorce. "I know that he views my leaving him as a loss, not necessarily in the personal sense, but in the sense of 'win or lose.' I cannot sense (sic) strongly enough that my husband will do anything to win! This has made him a tremendous success as a business person but not very successful husband or father."

One of Ron Burkle's attorneys, Patricia Glaser, told the Business Journal in an e-mail that "Jan obviously walked away from the table with a win/win environment in 1997 and she received the benefit of that win/win from 1997 until 2002."

Janet Burkle claims the couple separated in 2002, a decade later than her husband alleges.

Burkle, who in a separate e-mail to this newspaper describes himself as "a private person," has succeeded in getting some records from the divorce sealed, most of which outline personal details about the Burkles' younger son. For that, he claims to have spent more than $100,000 in attorneys' fees.

In his e-mail to the Business Journal, Ron Burkle describes his wife's claims as "a final desperate attempt to extract money from me for a lifestyle which I find shocking."

Last month, at a Superior Court heating in Long Beach, his lawyers sought to seal a foot-high stack of documents under a new California law that became effective in mid-2004. The law, which has yet to be used in a high-profile case, loosens the requirements needed to seal financial information in a divorce.

At the hearing, Susan Seager, an attorney representing both the Los Angeles Times and the Associated Press, opposed the law on grounds it eliminates a judge's discretion to weigh the privacy rights of an individual against the public's right to know. The California Newspaper Publishers Association made similar arguments in opposing the legislation last year.

Los Angeles Superior Court Judge Roy Paul temporarily sealed the documents until he determines the applicability of the new law. Last week, Seager opposed Ron Burkle's request to seal his wife's appeal documents.

The Business Journal had obtained court documents prior to the sealing order, and it has received additional information through emails from Ron Burkle and his lawyers. Janet Burkle's lawyer, Philip Kaufler, issued a statement saying, "We prefer to litigate this matter in the courthouse where it properly belongs and not in the press."

Privileged life

In court papers, Ron Burkle cites his wife's interest in publicizing his business affairs to the media, as well as his "constitutional right of privacy," as reasons for his requests to seal the documents. "She will use the threat of such dissemination as leverage to attempt to extract a bigger financial settlement in this proceeding," he said in a declaration filed in February 2004.

Burkle says his wife "greatly exaggerated the lavishness of the lifestyle which I lead," but it is, by any measure, a privileged existence.

The Burkles took vacations with some of the area's most prominent individuals, including billionaire Eli Broad and former Los Angeles Mayor Richard Riordan. They stayed at the White House and bought Jaguars and BMWs as gifts to one another. They made substantial contributions to local causes such as the Walt Disney Concert Hall, where his name is displayed. They regularly hosted dinners for UCLA, which named its Center for International Relations after him.

He is a friend of and investor with former President Bill Clinton, and has held numerous fundraisers for high-profile Democrats, including Sen. John Kerry and former Gov. Gray Davis.

In one declaration, he acknowledges that "many of my present and contemplated business activities directly involve labor unions. I believe that public dissemination of detailed information about my lifestyle (especially as exaggerated by Petitioner) could be very damaging to those relationships by making those union leaders uncomfortable with the concept of being associated by their rank and file members of working closely with someone who purportedly lives that kind of lifestyle."

Much of Janet Burkle's claims alleging inequities in the post-marital agreement center on timing: the draft was prepared just before her husband cut a string of billion-dollar business deals. Burkle, who built his wealth primarily through investments in supermarket chains, saw his net worth skyrocket in 1999 when his investment firm, Yucaipa Cos., sold its holdings in Fred Meyer Inc. to Kroger Co. in a $13 billion deal. Fred Meyer owned the Ralphs, Food 4 Less and Hughes grocery chains.

In divorce filings, Janet Burkle specifically mentions an earlier $4.8 billion merger of Ralphs and Fred Meyer that was announced the same month they signed the post-marital agreement, but which was not included as community property.

Had those business deals been included, as well as several other assets acquired in the years following the 1997 agreement, Janet Burkle might be entitled to a substantially larger share of her husband's wealth, depending upon the date of separation. Under California law, the division of separate and community property occurs after the couple legally separate, a date Janet and Ron Burkle continue to dispute.

In the post-marital agreement, the couple resolved their different opinions about the separation date by agreeing to value the community property as of June 1997, about the time Janet Burkle filed for divorce. No hearings were held in the divorce after she signed the post-marital agreement, and the agreement assessed the community property at about $60 million.

She dismissed the original divorce case after filing for divorce a second time in June 2003.

Dispute over separation

As part of her recent claims invalidating the agreement, Janet Burkle alleges that she and her husband were not legally separated until 2002. She lists in court papers dozens of family functions and public events that occurred up to 2002 at which Ron Burkle introduced her as his wife.

Ron Burkle asserts they separated in the early 1990s. He defends the post-marital agreement, saying he was paying $400,000 to $500,000 per year in her living expenses during the five years they were married prior to the agreement, even though he says he has "significant evidence of living separate and apart from 1991 to 1997."

Even if they were officially separated at the time they signed the agreement, Janet Burkle alleges her husband breached his fiduciary duty to her by concealing certain assets while negotiating the terms, court papers say.

California courts increasingly have enforced the rules of fiduciary duty that pertain to marital agreements, according to divorce lawyer Cary Goldstein, who is not involved in the case.

Under state law, the wage-earning partner must pay the full value of an asset as a penalty if the spouse proves he or she hid that asset and thus breached fiduciary duty. In most circumstances, the non-wage earning spouse gets 50 percent of the community property.

"If there is one person who really is controlling the finances, and controlling the assets, his fiduciary duty to the other spouse is very strong," Goldstein said. "He's going to be held accountable for any abuse of the fiduciary duty."

Ron Burkle married Janet Steeper, a descendent of the Wright brothers, when he was 21 years old and an assistant manager of a Stater Bros. store in Upland. She was 19. "I married the first girl I kissed," he said in the e-mail to the Business Journal. Soon after, they had a son and a daughter, now adults. Their third child was born in 1992.

By the accounts of both sides, the marriage began coming apart in the 1990s. In court papers, Burkle says he had been living at his newly purchased five-acre estate, Green Acres, which was once part of a 20-acre compound owned by the late silent film star Harold Lloyd. His wife stayed at their ranch in Yucalpa with their children.

In June 1997, Janet Burkle filed for divorce. At this point, the accounts begin to differ.

According to Janet Burkle's appeal to the 2nd Appellate District, her husband gave her a diamond ring soon after the divorce filing and suggested they reconcile. During the last half of August, according to her appeal, the two went on a Mediterranean cruise.

"On their return from the cruise, however, Ron made it clear to Jan that the contemplated reconciliation would not be consummated by him unless and until she agreed to sign the post-marital agreement in essentially the form he had proposed," wrote lawyers for Janet Burkle in her appeal.

She agreed in September but did not feel comfortable talking about financial issues with her husband, court papers say. At one meeting in September 1997, Janet Burkle read a five-page handwritten letter

she wrote addressing her concerns about the property issues. But her lawyers hammered out most of the details of the agreement, leaving the negotiations between the couple at "arm's length," court papers say.

Questions about mergers

By the time they signed the post-marital agreement, they were living together at Green Acres, according to the agreement fried in the divorce papers.

Now, in her appeal, Janet Burkle claims her husband failed to disclose all the community assets at that time, which included the Ralphs-Fred Meyer merger. She says that merger was under negotiation in September and October 1997 but signed a day after Janet Burkle signed the post-marital agreement.

Burkle became chairman of the merged company.

Janet Burkle also claims the post-marital agreement was unfair because the community assets, which include primarily business partnerships,

limited liability corporations, real estate and cash accounts, would remain in Ron Burkle's possession until either one filed for a divorce.

A house he bought for her near the Green Acres compound in 2001, as part of the post-marital agreement, requires his signature on the deed, she says in court papers. She claims she cannot refinance the house because he refuses to sign the paperwork.

Under the post-marital agreement, Ron Burkle would pay her $1 million each year in cash or negotiable securities that represent rent, profit, appreciation and income from the community property until either person files for divorce. A divorce filing would trigger Ron Burkle's cash payments of the community property to Janet Burkle.

In court papers, Janet Burkle claims that her husband has not paid the full $1 million per year since signing the agreement. Instead, he has credited those payments with non-cash purchases, such as the house he bought for her. He also has failed to make the first $5 million installment of her community property that became effective when she filed for divorce in June 2003. Instead, he agreed in September 2003 to pay her $3.5 million, which she rejected because she had already challenged the entire post-marital agreement.

Ron Burkle says he has complied with the agreement, which he calls fair. He notes that under the agreement she receives half of the $60 million in community assets "no matter what business losses I might sustain or other obligations I might incur."

In addition, his lawyers claim in correspondence to her lawyers that she signed receipts in 1998, 1999 and 2000 acknowledging he paid her the $1 million each year, court papers say. He says he is entitled to the "offsets" included in the $3.5 million offer in September 2003 that she rejected. He said he has not paid her the second $5 million check, which came due in December 2003, because she relieved him of the responsibility when she "took the position that the agreement was 'void and unenforceable,'" according to court documents filed in June 2004.

Agreement affirmed

Janet Burkle says her husband's failure to pay his portion of the agreement has forced her to sell her stock and ask her grown daughter for money while seeking temporary monthly spousal and child support of about $232,800 per month and a child custody evaluation.

Ron Burkle, who reiterates that she waived her right to spousal support in the agreement, says that even if she is entitled to temporary support it would come closer to $73,000 per month, according to his estimates of her living expenses.

Further, signing the deed to her house "does nothing to protect Ron against further financial demands from Jan," his lawyers said in a letter to Janet Burkle's lawyers. Allowing her to sell the house would encourage her to move to Manhattan Beach with their son--further away from Green Acres--and threatens the child custody arrangement, he says in court papers. "What purpose does child support serve except to give Jan additional funds to burn?" wrote one of Burkle's lawyers in a May 2003 letter, which was filed in the court.

After several hearings last spring, Stephen Lachs, a retired state judge serving as the private judge in the divorce, issued a tentative decision in September 2004, affirmed in December 2004, that validated the post-marital agreement. The decision says Burkle did not breach his fiduciary duty to his wife because he disclosed the community assets while negotiating the post-marital agreement.

The decision also says she acknowledged Ron Burkle paid her $1 million each year, as required in the agreement, but that he was "legally excused" from making payments toward the $30 million in community funds because she had already challenged the validity of the agreement.

As to the Ralphs-Fred Meyer deal, attorneys on both sides discussed the merger in the days before and after the Nov. 6, 1997, public announcement, the decision says. Although her lawyer sent a memo to his attorneys requesting she receive part of the appreciated value of shares impacted by the merger, the change was never made in the agreement, the decision says.

Janet Burkle, the decision states, had six months and at least seven attorneys, two accountants and a private investigative firm involved in the negotiations. "'Never did he ever pressure her to sign the agreement at any point in time," the decision says of Ron Burkle.

Janet Burkle has appealed that decision.

Security concerns

Personal attacks have become a part of the complex case.

In court papers, Ron Burkle alleges it is no coincidence that she made financial demands soon after she began dating Charles Allen, a personal trainer. Ron Burkle says Allen and his wife had been house-hunting in Manhattan Beach about the time she began to challenge the custody arrangement.

"I am concerned that Jan's sudden demands for much more money suggests that she may well feel under pressure to give money to others," he said in court papers filed in mid-2003.

He said her decision to invite Allen to her home threatened the security of their son. Court records show Allen was charged in 1998 with attempted murder, mayhem and assault with a firearm on a person. He was convicted of the latter charge.

Janet Burkle claims her relationship with Allen was nonexclusive and that she had not given him any extraordinary gifts. She said she bad not introduced Allen to her son.

"My husband is extremely wealthy and powerful," she claimed in court papers. "He is used to exerting control over all the people that he comes into contact with."

Last year, in a civil harassment suit Ron Burkle filed against Allen, a judge ordered Allen to stay at least 300 yards away from Burkle, his home, his office, his car and his children. "Our wealth makes our child a potential target of abduction," Burkle said in the divorce's court papers. He called Allen a "real and viable threat" to his family.

He also accuses Janet Burkle of having tried to abduct their children, once in 1979 and again in 1997, court papers say. In one instance, he claims Janet Burkle hid the children at a hotel near Ontario International Airport. He says she planned to move them to Nevada.

She denies she ever tried to kidnap their children, explaining that the couple had temporarily separated during those times. During one incident, which happened while they were negotiating the agreement, she "feared he would take the children to exert power over" her, so she had her mother take them to a hotel for the evening, according to her July 2003 declaration.

In a January 2004 court declaration, Ron Burkle admits he has had a fear of abduction since 1973, when he was working at Stater Bros. at the time the daughter of the company's owner was kidnapped. In court papers, Ron Burkle said he and Janet, whom he had just started dating, counted out the money to be put in four suitcases and delivered to the kidnappers of the 15-year-old gift. The girl was found alive three days later.

"That incident had a profound effect on me, since I knew the kidnap victim very well," he said in the declaration. "Since that experience, I have had a heightened appreciation for the necessity of attempting to protect one's family from potential kidnappers and other criminals."

Burkle says that's why he does not allow photographs of his son to be made public and that the family cars are registered under third party names. Family members and other drivers of family vehicles also have taken a "driver evasion course to learn how to escape from potential criminals," according to the January 2004 declaration.

Surveillance claims

Allegations of car chases have become part of the divorce file. In November 2003, according to a declaration filed by Burkle, he was taking his son to school when Allen is alleged to have driven in front of his car and slammed his brakes as if to force Burkle to hit his car. Allen proceeded to follow him through the streets of Beverly Hills, Ron Burkle's declaration says. At one point, he said Allen attempted to push him into oncoming traffic.

Allen's attorney, Christopher Darden, had made similar allegations against Burkle in a May 2003 letter to Burkie's attorneys. In the letter, Darden said his client was followed by Burkle's employees on the San Diego (405) Freeway "in an aggressive manner, as if the driver intended to run my client off the road." After he exited the freeway, the drivers followed him and cornered him in a cul-de-sac, the letter states.

Darden did not return repeated calls. Allen could not be reached. Glaser, Burkle's attorney, said the claim was "baseless," but noted that given Allen's history, Ron Burkle "may feel he has concern that he is being followed."

Janet Burkle had at one time sought a domestic violence order against her husband. She says he had private investigators conduct surveillance on her

for more than a year, and he told her he was doing so to protect their son from Allen. He also told her Alien was cheating on her, according to a declaration she filed in the summer of 2003.

In one incident, she said she recognized one of Ron Burkle's security people arriving at Jerry's Famous Dell while she and Allen were having lunch in April 2003. The following month, she said, other security people followed her to a park while she walked her dogs. The Burkles' daughter, who filed a declaration supporting the restraining order against her lather, said Ron Burkle called her up to five times a day to tell her what her mother was doing.

His daughter has also sued her father for $938,000 in investments owed her. Burkle, who sought sanctions against his daughter in March, denies her claims and says she owes him about $76,000. A trial date is set for March 14.

president, who sent word urging him to get back into the race.

"If the president asks you, you don't take that lightly," he said.

House Speaker **J. Dennis Hastert** (R-Ill.) and White House Deputy Chief of Staff **Karl Rove** also made personal appeals, Gallegly said."

From our **Baca-Baca-Baca Files**: "Six members of the Congressional Hispanic Caucus, including five from California, have **split from their group's fundraising arm because of concerns about donations to caucus members' relatives**."

...now, who would be interested in making contributions to relatives?

"The fundraising committee's chairman, Rep. **Joe Baca**, D-San Bernardino, defended the donations."

"The members - including Democratic California Reps. **Linda Sanchez, Loretta Sanchez, Hilda Solis, Dennis Cardoza** and **Jim Costa** - asked in a March 1 letter to be removed from any materials that connect them to the committee, known as the Building Our Leadership Diversity PAC."

"'Over the past months, we have grown increasingly concerned about both the manner in which decisions within BOLDPAC have been made and the selection of certain nonfederal candidates to receive contributions,' the letter to Baca said."

"California Assemblyman **Joe Baca Jr.**, a state Senate candidate, and **Jeremy Baca**, an Assembly candidate, received $3,300 each, Federal Election Commission filings show. **Silvestre [Reyes]**'s sister-in-law got $3,000 for her unsuccessful bid for a seat in the Texas legislature, and a donation also was made to [**Ruben] Hinojosa**'s daughter, according to The Hill, a Washington, D.C.-based newspaper."

The Chron's Carolyn Said reports that supermarket mogul super-donor **Ron Burkle may be interested in buying the twelve newspapers** McClatchy plans to dump after buying Knight Ridder, including the Merc News and Contra Costa Times.

We're guessing our friends over at the Merc and the CC Times are rooting for Burkle instead of the other rumored suitor, Dean Singleton's ANG Newspaper Group.

Just wondering, if Burkle bought the papers, would he **allow any reporting on his own divorce?**

Finally, from our **Legal Affairs Desk, a man in Lodi wants to sue himself** after backing into his own car. "When a dump truck backed into Curtis Gokey's car, he decided to sue the city for damages. Only thing is, **he was the one driving the dump truck**. But that minor detail didn't stop Gokey, a Lodi city employee, from **filing a $3,600 claim for the December accident**, even after admitting the crash was his fault. After the city denied that claim because Gokey was, in essence, suing himself, he and his wife, Rhonda, decided to file a new claim under her name."

February 24, 2006

Hon. Kevin Murray
California State Senate
State Capitol Building
Room 5050
Sacramento, CA 95814

Re: Senate Bill No. 1015

Dear Senator Murray:

I represent Janet E. Burkle, who was married for over thirty years to Ronald W. Burkle. Ronald is listed in Forbes as having a net worth of over $2 billion, and he is well known as a major political donor. The Burkles are currently involved in contested marital litigation in the Los Angeles Superior Court, and in the Court of Appeal for the Second Appellate District, Division 8.

One issue which has been heavily litigated between them concerns the efforts of Ronald to have the court file sealed. My client, then represented by other counsel, filed a Petition for Dissolution of their marriage in June of 2003. In November of 2003, Ronald applied to the Superior Court for an Order sealing various pleadings and documents, claiming that a sealing order was required to protect his financial privacy(notwithstanding extensive public discussion, much of it generated by him of his wealth and assets) , prevent hypothetical identity theft, and (supposedly) to protect the minor son of the parties, then ten years old, from kidnapping. The application for sealing was made under California Rules of Court Rules 243 *et seq.* Judge Roy Paul declined to seal the documents as requested, but in early 2004 he did order some minor redactions of bank account numbers and residence addresses, and some family photos.

In June of 2004, a Bill (AB 782) was passed by the Legislature which provided for the automatic and compulsory sealing of court documents in Family Law matters which identify the parties' financial assets and liabilities, upon the ex parte application of either party. The Bill was introduced on April 1, 2004 (only a couple of weeks after Judge Paul denied Ronald's blanket sealing request) by Assembly Member Kehoe and co-authored by Senator Burton. The Bill was passed as "urgency legislation," and signed by the Governor. According to my

understanding, it was signed on June 7, 2004, and became law immediately as Family Code §2024.6.

On December 20, 2004, Ronald applied to Judge Paul for an order sealing a large volume of court documents in the marital case, basing his application on §2024.6. On December 21, 2004, he made a similar application to Hon. Stephen M. Lachs, a retired judge, who was acting as a privately compensated temporary judge in the matter, to seal the Reporter's Transcript and the Exhibits, basing that application as well on §2024.6. Judge Paul and Judge Lachs initially granted Ronald's applications, but shortly afterward the Los Angeles Times, the Associated Press, and the California Newspaper Publishers' Association sought and were granted leave to intervene to oppose the sealing orders. Ultimately Judge Paul and Judge Lachs vacated their sealing orders. Judge Paul did so on the ground that Family Code §2024.6 was unconstitutional. Judge Lachs vacated his order, despite his announced view that §2024.6 was constitutional, because of the provisions of Rule 244(g) of the California Rules of Court, which says that a privately compensated temporary judge may not seal court records from public view. Both Judge Paul and Judge Lachs stayed the operation of their unsealing orders in order to permit Ronald to appeal. The Court of Appeal determined that its own file should remain under seal while the appeal was pending. However, on January 20, 2006, the Court of Appeal filed its Opinion in *Marriage of Burkle*, 2nd Civil No. B 181878, 135 Cal. App. 4th 1045, holding that Family Code §2024.6 was unconstitutional. The Court of Appeal has recently indicated an intention to unseal the file, based on its decision in *Marriage of Burkle.*

Yesterday, it came to my attention that a new bill bearing your name, SB 1015, has been introduced. From what I have been able to learn, the Bill was originally addressed to issues of Homeland Security, having nothing to do with sealing court files. However, it has now apparently been completely rewritten to delete all references to Homeland Security, and to provide instead for the sealing of records in Family Law cases. The new language is in most respects similar or identical to Family Code §2024.6, which has just been declared unconstitutional. The major differences are that the new law purports to authorize the sealing of public court records by privately compensated temporary judges; it defines pleadings in such broad terms that it may require even court judgments to be sealed on the ex parte application of either litigant; and it allows for redacting as well as for sealing. Otherwise, it has all of the constitutional defects of §2024.6.

While I have no way of knowing exactly how you came to the conclusion that a Homeland Security Bill should be "amended" to provide for a slightly modified version of Family Code §2024.6, there can be little question that Mr. Burkle is either directly or indirectly the sponsor of this new Bill. The modifications from former §2024.6, in whose formulation and passage he was also instrumental, have clearly been tailored to support the position he has taken and is

currently taking in the litigation. The new Bill is even less appropriate than the old one.

Aside from the specific constitutional defects noted by the Court of Appeal in *Marriage of Burkle*, the new Bill also violates the principle of separation of powers, because it purports to limit the power of the courts to control their own records, and to interfere with their constitutional power and duty to maintain and protect the public's right of access to court records. It also violates the equal protection clause, since it provides automatic and compulsory sealing and redacting powers to family law litigants, which are not also provided to other litigants who are often required to place their personal financial information before the courts.

In addition, the bill is ill-advised, because it raises a number of legal and practical problems. It provides that records may be unsealed for "good cause," but does not define what constitutes "good cause." It does not explain how the press or a member of the public can show "good cause" for unsealing, if they cannot see the court records in order to prepare an application for unsealing.

The definition of pleading is so broad that it will even include a judgment. How does a litigant in a Family Law case get a clean certified copy from the clerk in order to record it and establish title to the property which is in the hands of third parties or registered with them? For example, if a judgment awards to a litigant the contents of a bank account, or property in a storage locker, or a vehicle registered with the DMV, how does that litigant show the holder of the asset or the DMV that under the judgment he or she is the owner of the asset in question? If a judgment awards a litigant a percentage of the spouse's pension, the spouse receiving the award often needs a certified copy of the judgment or of a Qualified Domestic Relations Order to show the pension administrator so that the appropri-

ate percentage of each future payment is properly made. However, if the litigant cannot obtain a clean certified copy of the judgment or QDRO and send it to the admistrator, he or she will not be able to receive an appropriate share of the pension.

The Bill will also give a lot of comfort to tax cheats to litigate more aggressively. Currently, people who cheat on their taxes are careful about how much of the true facts about their income or their spouses income they put on the record, in case the IRS or the Franchise Tax Board should review the Court files. However if the files are sealed, they will have no such concern.

The Bill will also facilitate transfers in fraud of creditors. Third party creditors currently can see, and therefore attack, a divorce judgment which is made in fraud of creditors, and if necessary have it set aside (see, i.e. *Mejia v. Reed* (2003) 31 Cal. 4th 657. Now if the Bill is passed, creditors will never get to see what assets were transferred from one spouse to another in a sham divorce, for the purpose of sheltering them from execution.

These are only some of the problems with the Bill. It may advance Ronald's litigations strategies and tactics, and help him to overturn or circumvent an adverse decision by the Court of Appeal in his marital litigation, but it is not in the public interest.

I urge you to withdraw the Bill. If necessary, I will be happy upon request to expand on any or all of the foregoing points, or to provide you with copies of the briefs and the Opinion in *Marriage of Burkle*.

Sincerely yours,

Hillel Chodos

cc: Senator Murray (Culver City)
Gov. Arnold Schwarzenegger
Senator Joe Dunn

Senator Bill Morrow
Assembly Member Dave Jones
Assembly Member Tom Harmon
Dennis M. Wasser, Esq.
Patricia M. Glaser, Esq.
Kelli Sager and Susan Seager, Esqq.
Tom Newton, Esq.

SB 1015

strong interest in public confidence
that court documents
are open to the public
ordinary sutton consequences
when courts are closed

→ consistent w/ effort
to open dep- proceedings

→ modify recommendation
— pass for amendment
for costs
→ but still oppose
redaction of financial
information

— Alan Slater
— shared M draw opposition
— against duty to redact
— new responsibility beyond
courts ability

- absent sealing
  - don't want that obligation
    - litigating on criminal side
      b/c of police reports

- obligation we cannot fulfill

* people we who don't have room for — tasks we can't take on

Judge Miller

J. Cooper did not participate — oppose SB 1015 unless limited to rule of court allowing parties to redact particular info → id theft

- ask for fee
  but still

* privately compensated temp judges

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

KATHLEEN T. HOWARD
Director, Office of Governmental Affairs

April 20, 2006

Dear Assembly Member Chu,

The Judicial Council has not had an opportunity to formally review the recent amendments to SB 1015, which would provide for the redaction of pleadings in marital dissolution matters under specified circumstances, but was opposed to the bill as amended on March 9, 2006, and we have very serious concerns about recently added provisions.

When SB 1015 left the Assembly Judiciary Committee, there was a commitment that it would be amended to provide discretion to the court to oversee whether redaction of financial information was appropriate under existing constitutional standards. That version of the bill, as amended on April 17, 2006, addressed the bulk of the council's opposition to SB 1015. It removed the provision allowing private judges to redact pleadings, and put in place a balancing test for determining whether redaction is appropriate in each individual case. The council acknowledges that there are cases where redaction or sealing of information in court files is appropriate, and simply wanted to ensure that those cases remain exceptional and not routine.

The April 19, 2006 amendments to SB 1015, if enacted, would again make redaction of certain information routine, and deny the court the discretion to determine whether the redaction is necessary to protect the interests of the party requesting it. These amendments provide that the court shall, upon request of a party, redact specified information regarding a party to a dissolution proceeding. In our previous letter regarding SB 1015 we highlighted the difference between information in a court file that the court needs to make its determinations, and that information which is not relevant to the court. We indicated that we are prepared to adopt a rule or court and/or develop educational materials to assist litigants in keeping the former information out of their court file entirely. We already allow for the redaction of social security numbers, and many parties already truncate their bank account numbers and residential property descriptions so that they can avoid disclosure that might lead to identity theft. To the extent that the Legislature is concerned about keeping that information out of the file, we believe that we

can instruct the parties on how to achieve that end without making it the responsibility of the court.

SB 1015 would, however, also require the court to redact financial information that the court does need in order to make property distribution and support determinations in the case, including the balances in any bank or brokerage account, the annual salary or income, and the net worth of a party. This requirement is troubling for two reasons. First, it again places the court in the position of shielding from public view that basis of its decisions. As we stated in our previous letter of opposition to SB 1015, requiring the courts to keep hidden information that was the basis for the court's decision weakens public trust and confidence in the courts, and creates the appearance that the court has something to conceal.

In addition, the language added to SB 1015 has the potential to create a significant new workload for the courts in family law matters. Annually there are approximately 150,000 marital dissolution cases filed. With two parties in each case, the number of requests for redaction that courts could be faced with is substantial. Thus court staff may be required to review and redact tens of thousands of court files, and then be certain to maintain two court files in each of these cases. One file that would be available to the public, and one file that would be the working file for the court, because the redacted information would need to be accessible to the judicial officer hearing the case. Finally there are significant problems with the language regarding the redaction of any residence address. While parties who are represented will typically use their attorney's office address as their address for service of process, self-represented parties often use their home address. Redaction of the service of process address raises both practical and legal obstacles.

Given these significant workload burdens, we strongly urge the committee, if it is inclined to pass SB 1015, to amend subdivision (e), which provides the council with the authority to adopt a rule of court setting forth the procedures for redaction of files, to include the authority for the council to impose a fee upon any party that requests the mandatory redaction in subdivision (d). That amendment would not address our fundamental policy objections to SB 1015, but it might mitigate the negative impact on our already overburdened courts of this new and significant workload.

For these reasons, we urge that you vote "no" on SB 1015.

AMENDED IN ASSEMBLY APRIL 19, 2006

AMENDED IN ASSEMBLY APRIL 17, 2006

AMENDED IN ASSEMBLY MARCH 9, 2006

AMENDED IN ASSEMBLY FEBRUARY 16, 2006

AMENDED IN SENATE AUGUST 30, 2005

AMENDED IN SENATE AUGUST 17, 2005

AMENDED IN SENATE AUGUST 15, 2005

AMENDED IN SENATE JULY 1, 2005

SENATE BILL No. 1015

Introduced by Senator Murray

February 22, 2005

An act to amend Section 2024.6 of the Family Code, relating to dissolution of marriage, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1015, as amended, Murray. Dissolution of marriage: financial declarations.

Existing law permits a party to request that documents listing or identifying the parties' assets and liabilities be sealed in specified family law proceedings, including dissolution of marriage.

This bill would revise those provisions to include documents listing or identifying the parties' income or expenses, permit specified portions of those records to be redacted, subject to a finding by the court, and make related changes. ~~The~~ *This bill would additionally*

require the court, upon request of a party, to redact the social security number, residence address, and certain financial information of a party, as specified. This bill would require the Judicial Council to adopt rules governing procedures for redacting and restoring those records. This bill would make legislative findings and declarations relating to dissolution of marriage and financial information.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) The fundamental right of privacy protects against unwarranted intrusion into private financial affairs, including those affairs disclosed in a dissolution of marriage, nullity of marriage, or legal separation proceeding.

(b) The law of this state requires any party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose fully in documents that are filed with the court hearing that proceeding, thereby becoming a matter of public record, detailed and sensitive financial information, including the nature, extent, and location of the party's assets, liabilities, income or expenses, and information, such as social security numbers and bank account numbers, that can be used to identify and locate the party's assets, liabilities, income or expenses.

(c) The sensitive financial information that the law compels a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation to disclose into the public record is subject to use for improper purposes, particularly including but not limited to, the burgeoning crime of identity theft.

(d) Much of existing law concerning the redaction and sealing of court records was enacted or otherwise promulgated prior to the current epidemic of identity theft and the widespread use of electronic databases, containing sensitive financial and other personal information, which data is vulnerable to misuse. Recently enacted federal legislation protects and guards against the misuse of personal information, including the risk of child abduction, stalking, kidnapping, and harassment by third parties.

Existing state law is inadequate to protect these widespread privacy concerns.

(e) Local court rules regarding the disclosure of sensitive financial information vary from county to county. This act is intended to provide uniformity with respect thereto.

(f) For these reasons, the Legislature finds that existing law concerning the redaction and sealing of court records does not adequately protect the right of privacy in financial and marital matters to which parties to a proceeding for dissolution of marriage, nullity of marriage, or legal separation are entitled. It is the intent of the Legislature to protect more fully their right of privacy while acknowledging and balancing the public's right of access to public records and judicial proceedings. Accordingly, in proceedings for dissolution of marriage, nullity of marriage, or legal separation, the Legislature finds that unnecessary public disclosure of financial assets, liabilities, income, expenses and residential addresses raises a substantial probability of prejudice to a financial privacy interest that overrides the public's right of access to court records. The Legislature further finds that the redaction of documents containing the above information is the least restrictive means of protecting the financial privacy interest of the parties while recognizing the public's right of access to court records.

SEC. 2. Section 2024.6 of the Family Code is amended to read:

2024.6. (a) Notwithstanding any other provision of law *and except as described in subdivision (d)*, upon request by a party to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court shall order redacted the specified portion of a pleading filed with the court that lists the parties' financial assets, liabilities, income, or expenses, or provides the location of, including a residential address, or identifying information about, those assets, liabilities, income, or expenses, if the court expressly finds facts that establish all of the following:

(1) There exists an overriding interest that overcomes the public's right of access to public records.

(2) The overriding interest supports redaction of the pleading or portion of a pleading.

(3) A substantial probability exists that the overriding interest will be prejudiced if the pleading is not redacted.

(4) The proposed redaction is narrowly tailored.

(5) No less restrictive means exist to achieve the overriding interest.

(b) In making the determination described in subdivision (a), the court shall balance a particularized showing of the public interest in open access to judicial proceedings against the asserted privacy rights of spouses, children, and other interested parties.

(c) ~~Subject~~ *Except as described in subdivision (d) and subject* to the direction of the court, no more of any pleading shall be redacted than is necessary to protect the parties' overriding right to privacy. The request under this section shall be made by noticed motion. Nothing redacted pursuant to this section may be restored except upon petition to the court and a showing of good cause.

(d) *Upon the request of a party, the court shall order redacted from a pleading all of the following information regarding a party to the proceeding:*

(1) A social security number.

(2) The address of a residence, unless it is the address provide for service of papers

(3) The name on, and account number and balance of, a bank account, brokerage account, or an account at any other financial institution.

(4) Annual salary or income.

(5) Net worth.

(e) Commencing not later than July 1, 2007, the Judicial Council form used to declare assets and liabilities and income and expenses of the parties in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties shall require the party filing the form to state whether the declaration contains identifying information on the assets, liabilities, income, or expenses listed therein. If the party making the request pursuant to subdivision (a) uses a pleading other than the Judicial Council form, the pleading shall exhibit a notice on the front page, in bold capital letters, that the pleading lists or identifies financial information and is therefore subject to this section. By the same date, the Judicial Council shall also adopt

rules setting forth the procedures to be used for redacting and restoring pleadings pursuant to this section. The Judicial Council may

~~(e)~~

(f) For purposes of this section, "pleading" means a document filed with the court that sets forth or declares the assets, liabilities, income, or expenses of one or both of the parties, including, but not limited to, a marital settlement agreement exhibit, schedule, transcript, or any document incidental to a declaration or marital settlement agreement that lists or identifies financial information.

~~(f)~~

(g) The party requesting redaction of a pleading pursuant to subdivision (a) shall serve a copy of the unredacted pleading, a proposed redacted pleading and the request for redaction on the other party or parties to the proceeding and file the proof of service with the request for redaction with the court.

~~(g)~~

(h) Nothing in this section precludes a party to a proceeding described in this section from using any document or information contained in a pleading redacted pursuant to this section in any manner that is not otherwise prohibited by law.

~~(h)~~

(i) Nothing in this section precludes a law enforcement or government regulatory agency that is otherwise authorized to access public records from accessing unredacted pleadings.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

Because of the imminent threat of identity theft posed by current law and to protect the right of privacy guaranteed by the federal and state constitutions, with respect to dissolution proceedings, it is necessary that this act take effect immediately.

O

Kenny, Tracy

From: Krinsky, Miriam [KrinskyM@clcla.org]
Sent: Friday, April 21, 2006 9:13 PM
To: Hershkowitz, Donna
Cc: Howard, Kathleen; Kenny, Tracy; Nunn, Diane; Morhar, Lee; Alecia Sanchez (E-mail); Curtis L. Child (E-mail); Heimov, Leslie; Estep, David; Krinsky, Miriam
Subject: RE: AB 2480

Kate, Tracy, Diane, Lee, Donna:

We've attempted to recraft a bit the compromise proposal in a way that we're all comfortable with and that we hope might work for all of you. This isn't intended to be final statutory-perfect language, but we thought we'd throw this out for us all to peruse before we bat it around on our call on Monday at 9 am. One other issue we wanted to kick around is the issue of whether we should be applying this to writs as well as appeals; as crafted below it's more appeal focused.

Talk to you all Monday morning; it's my understanding that the call in number we should use is 800 427 5454; if that's not accurate can you reply to all with the correct number!

Revised draft:

1. Trial counsel shall be served with and and review the briefs filed by the parties on appeal and ~~shall~~ may inform the appellate court within 15 days of receipt of those briefs if trial counsel determines that (a) it is in the child's best interest to have counsel on appeal, or (b) there is a conflict in the interests of the child and ~~county counsel~~, or (c) or the appellate court would otherwise benefit from representation of the child on appeal;

2. The appellate court shall appoint counsel if it determines that any one of the following factors exist: (a) the child is an appellant, or (b) it would be in the child's best interest to be represented by counsel on appeal, or (c) there is a conflict in the interests of the child and county counsel, or (d) the appellate court otherwise believes that the proceedings would benefit from representation of the child on appeal. In making this determination, the appellate court shall consider any request for counsel make by trial counsel and the reasons identified in that request.

3. *[NOTE: THIS IS A SLIGHT MODIFICATION OF WHAT DONNA PREVIOUSLY DRAFTED, WITH CHANGES WE DISCUSSED DURING OUR CALL THIS PAST WEEK]* The Judicial Council shall consider the findings and recommendations of the Blue Ribbon Commission with regard to this issue and take appropriate action. The Judicial Council shall, by January 1, 2008 report to the Legislature on the actions taken in response to the recommendations of the Blue Ribbon Commission, and any recommendations for statutory changes needed that would further expand on and refine the need for appellate representation for children on appeal. The Judicial Council shall also evaluate and take appropriate action as necessary to change rules of court or take other action to comply with CAPTA. The Judicial Council ~~shall finally evaluate the implementation of this legislation during 2007 [would need language making clear rulemaking to implement legislation to happen and leg. to become effective as of 7/1/08]~~ and the status of appellate representation of children in the state. The Judicial Council shall, by ~~January~~ July 1, 2008, report to the Legislature on all of these issues, including actions taken or legislative changes needed to comply with CAPTA, its response to the recommendations of the Blue Ribbon Commission, and steps taken to implement and the results of implementation of this legislation.

-----Original Message-----
From: Hershkowitz, Donna [mailto:Donna.Hershkowitz@jud.ca.gov]
Sent: Tuesday, April 18, 2006 7:04 PM

Draft

- More than report back desired
  - → don't want to be @ square one on Jan. 1, 2008
- take into account good practice – not weaken
  - → give appellate court discretion

(1) Responsibility on trial counsel – appeal v. writ?
- — get the brief
- — let court know ~~that~~ if issues arise

(2) Broaden when counsel apptd.
- require court to consider request

(3) add in evaluation

- hard to know
  what knowing
  who does it?

Qs – differs across the state

(1) current practice
not significant (2) cost? – new how much?
(3) delay?
(4) "conflict of interests"
- – appeal
- – outcome @ trial level

LA
get more briefs – not 100% 96%
– already doing this

Sacto
not consistency

Diane
notice of appeal + briefs

compromise recommendation
— time for greater consensus in branch

Mary C. cost
governance

Rule:

To: Krinsky, Miriam
Cc: Howard, Kathleen; Kenny, Tracy; Nunn, Diane; Morhar, Lee
Subject: AB 2480

Miriam - Thanks for taking the time to discuss this today, yesterday and - hopefully -- tomorrow. I wanted to lay out the 4 part proposal we presented to you today (to be considered in lieu of the options we discussed yesterday).

1. Counsel shall be appointed for the child whenever the child is the appellant.
2. Trial counsel shall provide a recommendation to the appellate court if trial counsel believes that counsel in the appellate proceeding would be in the best interest of the child, and the reasons for that determination (in the alternative, trial counsel could be obligated to provide a recommendation to the court yay or nay whether the appointment of counsel in the appellate proceeding would be in the best interest of the child, and the reasons for that determination.)

3. The appellate court shall appoint counsel for the child upon a finding by the appellate court that it would be in the best interest of the child. (This finding would, of course, be informed by the recommendation of trial counsel).

4. The Judicial Council shall consider the findings and recommendations of the Blue Ribbon Commission with regard to this issue and take appropriate action. The Judicial Council shall, by January 1, 2008 report to the Legislature on the actions taken in response to the recommendations of the Blue Ribbon Commission, and any recommendations for statutory changes needed. The Judicial Council shall also evaluate and take appropriate action as necessary to change rules of court or take other action to comply with CAPTA. The Judicial Council shall, by January 1, 2008, report to the Legislature on actions taken or legislative changes needed to comply with CAPTA.

Obviously the language would need to finessed somewhat to put it into traditional legislative language, but I didn't have that much brain power remaining this evening.

I know you understand the time constraints we are currently under. It would be wonderful if you could share this proposal with your co-sponsors, and maybe we can all discuss on a conference call tomorrow so you don't have to continue to act as the go-between. How about 2:30 - 3:30. We have a conference call line that folks can dial in to. For those in the Sacramento area, the local number is 657-4115. For those outside Sacramento, the call-in number is 800-427-5454. (Note: if you are the first person to dial in the phone will just keep ringing until another person joins the call).

Please let me know if you have any questions or concerns.

Thanks.
Donna

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TALKING POINTS: SB 1015 (Murray), as amended April 25th, 2006

- There is a critical distinction between information in a court file that is not relevant to the outcome of the case, and that information upon which the court relies to make its determinations.
- Social security numbers, bank account numbers, and residential addresses are not relevant to the court. Parties can be authorized to redact that information from documents filed with the court without implicating any public or court interest, and thereby protect themselves from the threat of identity theft.
- Account balances, salary and income information, and information regarding net worth, are all *very* relevant to the outcome in the case, and must be considered by the court when it makes decisions about child and spousal support, and distribution of marital property.
- SB 1015 would require the court, upon request of any party, to redact all of that highly relevant information from the court file that is available to the public.
- That requires the court to shield from public view the very facts upon which the court makes its determinations.
- Judges are elected officials exercising significant discretion in these cases. The facts underlying their decisions should be presumptively available to the public in order to enhance public trust and confidence, and ensure accountability.
- Existing law provides a remedy for those cases in which there are unique interests at stake that outweigh the public's presumptive right of access. California Rule of Court 243.1 sets forth a careful balancing test intended to ensure that public access is compromised only where necessary and in the most narrowly tailored fashion [note that Mr. Burkle was successful in obtaining a court order to redact information in his file in order to protect the safety of his son under that test.]
- Senator Murray has repeatedly suggested that if the parties agree, they can seal their records voluntarily. This is not accurate, nor relevant. If parties agree on a settlement in a marital dissolution case, they can file a settlement agreement with the court that does not disclose as much information as might be disclosed in a contested case, but there is no authority to seal court records pursuant to a stipulation of the parties. Furthermore, in a case where the parties agree on the outcome, the court is not exercising its discretion, but rather, is formalizing the agreement of the parties. As a result, there is not a governmental action involved that requires significant public scrutiny.
- Finally, there are significant administrative burdens associated with SB 1015. It would require the careful maintenance of two files in each case where redaction was requested – one for the court to use, and one for the public. In addition, court staff would need to manage the redaction process, which could involve almost every page in the court file. There is authority in SB 1015 to charge a fee for this, but if the policy objective is problematic, then why create a significant new workload for the courts, and a fee to go with it, to enshrine a practice that undermines public access and trust and confidence in the courts.
- Courts should be focusing their energy and resources on providing meaningful access to justice for litigants in family law matters, and not on blacking out account balances, and managing complicated court files.

Metropolitan News-Enterprise

Friday, June 16, 2006

Page 1

Assembly Rejects Bid to Ease Passage of Bill on Divorce Records

By STEVEN CISCHKE, Staff Writer

The state Assembly yesterday rejected a proposal to allow a bill that would permit financial records in divorce proceedings to be "redacted" upon request of either party to pass with a simple majority, rather than as an urgency measure requiring a two-thirds vote..

The bill, SB 1015, had been on the Assembly inactive file but was revived earlier this week at the request of its author, Sen. Kevin Murray, D-Los Angeles. Yesterday's amendment, also authored by Murray, would have removed from the bill an urgency clause which allows the bill to take effect immediately upon passage but requires a two-thirds majority vote for the bill to pass.

Without the clause, the bill could pass with a simple majority, but will not take effect until Jan. 1.

Voice Vote

The amendment was declared to have passed after a voice vote, but then a roll call vote was requested and resulted in a deadlock with 31 votes being cast in favor and 31 against.

Murray did not return a MetNews phone call.

Tom Newton, general counsel for the California Newspaper Publishers Association, which opposes the bill, commented to the MetNews that lines in the Assembly seem to have been drawn along gender lines, with female members opposing the bill.

Newton said proponents offered the amendment because they knew they did not have the two-thirds majority required for the bill's passage in its present form. He also said that majority Democrats plan to meet next Tuesday to discuss the future of the bill.

CNPA Unenthusiastic

CNPA is unenthusiastic about a proposal to give a judge some discretion in deciding whether such documents should be "redacted," Newton explained. "Our advice is just kill [SB 1015]."

The bill is similar to one passed two years ago which was declared unconstitutional in the divorce case of billionaire Ron Burkle. In that case, this district's Court of Appeal upheld Los Angeles Superior Court Judge Roy Paul's ruling that the prior act violated the First Amendment.

The state Supreme Court declined to hear the case last month.

Burkle, former owner of the Ralphs supermarket chain, has lavished

contributions on political figures in both parties, and is backing the current bill, Newton said. Burkle's attorney told the Sacramento Bee last month that Burkle supports the bill's purpose, but would not personally benefit from it because the press has already obtained his financial information.

CapitolTrack™ BACK

SB 1015 Murray Dissolution of marriage: financial declarations.

Status: 8/30/2006 Placed on inactive file on request of Assembly Member Bass.

Current Location: 8/30/2006 A-INACTIVE FILE

Dead/2YR | 1st Desk | 1st Policy | 1st Fiscal | 1st Floor | 2nd Desk | 2nd Policy | 2nd Fiscal | 2nd Floor | Conf./Conc. | Enrolled | Vetoed | Chaptered

Status History Short Summary Long Summary User Summary Digest

Calendar

Manage Bills add notification
unarchive
edit

//W/Sardo, Ray
Family_Law//P/Kenny, Tracy

delete
archive

Bill Text

Amended - 4/25/2006	html pdf word
Amended - 4/19/2006	html pdf word
Amended - 4/17/2006	html pdf word
Amended - 3/9/2006	html pdf word
Amended - 2/16/2006	html pdf word
Amended - 8/30/2005	html pdf word
Amended - 8/17/2005	html pdf word
Amended - 8/15/2005	html pdf word
Amended - 7/1/2005	html pdf word
Introduced - 2/22/2005	html pdf word

Analyses

SENATE THIRD READING 5/3/2006html
ASSEMBLY COMMITTEE ON APPROPRIATIONS 4/25/2006html
ASSEMBLY COMMITTEE ON APPROPRIATIONS 4/18/2006html
ASSEMBLY COMMITTEE ON JUDICIARY 4/7/2006html
ASSEMBLY COMMITTEE ON JUDICIARY 3/30/2006html
ASSEMBLY COMMITTEE ON JUDICIARY 3/22/2006html
ASSEMBLY COMMITTEE ON JUDICIARY 3/16/2006html
SENATE RULES COMMITTEE 8/30/2005html
PUBLIC SAFETY 8/12/2005html
PUBLIC SAFETY 7/8/2005html

Votes

ASM. APPR. - 4/26/2006 (Y:12 N:3 A:3)html
ASM. JUD. - 4/4/2006 (Y:7 N:0 A:2)html
SEN. FLOOR - 8/31/2005 (Y:35 N:0 A:5)html
SEN. PUB. S. - 8/16/2005 (Y:4 N:0 A:3)html