LAW AND THE FAMILY

Privacy: Whose Right Is It, Anyway?

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HIGH-PROFILE CASES are fueling a lot of local newspapers these days and, in the process, creating irresistible opportunities for sensational reporting. The woes of those ``victimized'' has triggered new interest in the right to privacy and the ongoing debate as to just how much the public has a right to know. This issue has seen battle before, but never has there been quite so much attention devoted to the subject. When all is said and done, the public's right to know ordinarily outweighs the privacy of individuals. While matrimonial suits are sealed in accordance with Domestic Relations Law (DRL) Sec.235(1) there is no existing cause of action for a violation of the statutory mandate.

DRL Sec.235(1) provides that an officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, testimony or any examination or perusal thereof to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court.

Subdivision (2) provides, that if the evidence on the trial of the action is such that public interest requires that the examination of the witnesses should not be public, the court may exclude all persons from the room except the parties to the action and their counsel. In such case the court may order the evidence, when filed with the clerk, sealed, to be exhibited only to the parties to the action or someone interested, on order of the court.

This statute is founded on the premise that idle curiosity falls short of a basis to examine or obtain copies of public records. Likewise, creating public scandal as a reason just will not do. Publication of the personal, painful and sometimes lurid details of a divorce action fails to serve a useful purpose and tends to the demoralization and corruption of society, by catering to a morbid craving for sensationalism.*1

Inherently Personal Nature

The privilege generally accorded to reports of judicial proceedings is unavailable to reports of matrimonial actions.*2 The

privacy accorded matrimonial matters is a recognition of the inherently personal nature of these proceedings. Ill motivated spouses are prevented from coercing the other spouse into a settlement by threatening disclosure and publication of the accusations contained in the pleadings or affidavits in the matrimonial action.

Through the years our courts have well defined the boundary lines of DRL Sec.235. In Danziger v. Hearst Corp., where the defendant had published an illegally obtained affidavit, the Court of Appeals in upholding the constitutionality of DRL Sec.235, observed that the legislation was addressed only to employees of the court system and is limited in that regard. It does not prohibit access to the minutes of the clerk of the court and thus does not interfere with the right of any person to obtain information in respect of the pendency or result of any matrimonial action. Nor does the rule prohibit publication of the details of a matrimonial action that are obtained from a source other than the files of the court. The court did however, caution that ``such a publication is actionable if defamatory.''*3

Believing it worthy of repeating, the Court of Appeals again expressed its view on the importance of the public's right to know disavowing the individual's right to privacy under ordinary circumstances. In Shiles v. News Syndicate Co.*4 the case involved a defendant that had published a series of articles in The Daily News, centering around allegations in a separation action, including the wife's accusation that her husband had used his position as an airline executive to entice applicants for jobs as stewardesses to become ``women for his private harem,'' with the company footing the bill, references to his ``sexual habits'' and encounters with other women.

The husband sought to recover for libel and invasion of privacy. Defendant interposed affirmative defenses that the articles were ``fair and true reports of judicial proceedings,'' privileged under Civil Rights Law 74, and that the reports were true.

Liability for Defamation

In reversing an order denying a motion to dismiss those defenses, the Court of Appeals held that one who had published and disseminated the contents of the records of matrimonial proceedings could not rely upon a defense of statutory privilege that the articles were fair and true reports of judicial proceedings. It recognized the constitutional right of the press to publish allegations in a matrimonial suit, obtained from court files without permission, but it warned that liability would be imposed for defamatory publication.*5 Chief Judge Fuld observed in Shiles:This does not mean that a party may not publish details of a divorce or separation suit based on files obtained without a court order, or that the courts would interfere with the constitutional right of any one to publish such details, but it does mean that, if he does, he will be held accountable and liable if those details are not truthful.*6

Great leeway has been afforded the press. This, coupled with the void that exists in legislative redress for a violation of DRL Sec.235, gave rise to a prominent case surrounding this subject. In Freihofer v. Hearst Corp.*7 the Court of Appeals held, among other

things, that the publication of a newspaper article relating to the details of confidential court files in matrimonial proceedings, does not create a cause of action for invasion of privacy under Civil Rights Law Sec.Sec.50 and 51.

The action was brought to recover damages resulting from the publication of three newspaper articles relating to a matrimonial action between plaintiff and his wife. The complaint alleged that the publications were in violation of DRL Sec.235 (1). The publications reported some of the marital difficulties experienced by plaintiff, one of the principals of a well-known company engaged in the sale of baked goods. It was undisputed that the factual content of the articles was obtained from confidential court records.

One article captioned ``Freihofer's Fighting Over the Dough,'' quoted extensively from affidavits filed in the marital suit in connection with a pending application for exclusive occupancy of the marital residence. Defendant admitted having reviewed court records in connection with the preparation of the articles.

In so doing, however, it denied any violation of DRL Sec.235, contending that papers and pleadings in court actions, including matrimonial suits, are readily available for inspection at the county clerk's office and the Appellate Division; such an examination is ``not an uncommon practice'' in the preparation of a news story; and the news media ``regularly'' report with respect to matrimonial proceedings that affect the public interest.

Plaintiff alleged that the publications were improperly based upon examination of matrimonial court records. As a result, he claimed he suffered extreme emotional and physical distress, which affected his business and private relationships, diminished his standing in the community, subjected him to public scorn and ridicule and impaired his social life. The plaintiff sought damages for invasion of privacy under Civil Rights Law Sec.Sec.50 and 51, for intentional infliction of emotional distress and prima facie tort. There was no claim for defamation or that the content of the articles was untruthful.

No Independent Right

The Court of Appeals rejected the tort claims and held that there is no independent right to relief for invasion of privacy by such publication because the Legislature has not established a cause of action for violation of DRL Sec.235. DRL Sec.235 does not provide for an independent cause of action against those who publish or disseminate matter relating to a matrimonial action obtained in violation of the statute.*8

Section 4 of the Judiciary Law provides that the ``sittings of every court within this state shall be public, and every citizen may freely attend the same, except that, in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.'' Neither it nor DRL Sec.235(2) require the court to close the courtroom during a trial, even a custody trial.

In Sprecher v. Sprecher,*9 a contested custody proceeding, the father contended that the mother resided within a cult and that its child-rearing practices were inimical to his son's best interest.

Although DRL Sec.235(2) authorized the court to close the courtroom to the public in a custody proceeding, the court denied the mother's motion to do so and granted a motion by Fox and CNN television networks to permit TV in the courtroom for videotape coverage. The court declined to restrain the parties or their counsel from discussing the proceedings with representatives of the media. The court balanced the best interest of the child with the publics right to information as established in Judiciary Law Sec.4.

In contrast, in Olesh v. Olesh,*10 an action for divorce where the pleadings were ``replete with details'' involving alleged sexual misconduct as well as cruel and inhuman treatment, the court denied applications by Fox TV and Newsday for video coverage and still photography. In drawing its conclusion, the court considered the type of case, the age of the children and the type of testimony to be elicited. Considerable attention was given to the factors in 22 NYCRR 131.4(c), an examination of DRL Sec.235(2) and Judiciary Law Sec.4.

In Anonymous v. Anonymous,*11 the Appellate Division affirmed an order of the Supreme Court, which declined to grant plaintiff's motion for an order excluding all persons from the hearing of the custody matter but modified to change the caption to fictitious names. It held that public access to court proceedings is strongly favored, unless one establishes sufficient grounds to warrant closing the court.

In what promised to be a rough ride, the wife of producer David Merrick sought complete anonymity in her divorce proceedings. In Merrick v. Merrick,*12 she asked for an order sealing the court file, closing the courtroom in all proceedings, directing that the caption of the action be amended to Anonymous v. Anonymous and restraining the husband and his attorneys or agents from discussing the case with the media or disclosing case documents to third persons.

The Supreme Court held that the file in the action is considered sealed pursuant to DRL Sec.235(1) and that it need not issue an order directing compliance with the statute. It refused to issue an order giving broader protection than does the statute. The case revealed the generally recognized policy tilted in favor of public access to the court, which has long plagued public figures. The wife's emotional response to media coverage of the action could not alone form the basis for closure of the courtroom. A prior order, which constituted the law of the case, prohibited the husband's attorneys from disclosing and discussing with the media any documents submitted in the proceedings.

The Supreme Court held that there was no public interest favoring the presumption of an anonymous caption while a strong public interest was present that tipped the balance to the presumption of openness in judicial proceedings.

In the supercharged atmosphere of matrimonial cases, the parties are an easy mark for the press. This is especially true of the children of those embroiled in the emotional wars often associated with divorce. These children, along with their parents, wear the scars of the scandal long after the battle is ended and the news is history. A new era of concern should take a no-nonsense approach toward protecting the rights of these individuals. Our legislators need to stand up, take notice and act.

notes

(1) See Matter of Caswell, 18 R. I. 835, 836 cited in Stevenson v. News Syndicate Co., 276 App. Div. 614, 618, 96 NYS2d 751, affd 302 NY 81, 96 NE2d 187.

(2) See, e.g., Danziger v. Hearst Corp., 304 N. Y. 244, 248; Stevenson v. News Syndicate Co., supra.

(3) 304 NY 244, 248.

(4) Shiles v. News Syndicate Co., 27 NY2d 9, cert denied 400 US 999.

(5) Id., 27 NY2d, at p 15; see also Danziger v. Hearst Corp., 304 NY 142, 244, 248-249.

(6) See Danziger v. Hearst Corp., supra; see, also, Matter of United Press Assns. v. Valente, 308 N.Y. 71, 77.

(7) 65 NY2d 35 (1985)

(8) See, Shiles v. News Syndicate Co., supra; Danziger v. Hearst Corp., supra.

(9) New York Law Journal, June 21, 1988, p. 21, col. 6, Sup.Ct., NY Co. (Schackman, J);

(10) (1986, Sup) 143 Misc2d 299, 540 NYS2d 123.

(11) (1990, 1st Dept) 158 AD2d 296, 18 Media LR 1560.

(12) (1992, Sup) 154 Misc2d 559, 585 NYS2d 989, affd Merrick v. Merrick (1993, 1st Dept.) 190 AD2d 516, 593 NYS2d 192.

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