Public Access to Matrimonial and Family Court Proceedings
By Joel R. Brandes

There is a constitutional and statutory presumption in favor of public access to judicial proceedings. (Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973; Judiciary Law § 4.) Judicial proceedings, including matrimonial actions, are presumptively open to the public and the press unless there are compelling reasons for closure. (Matter of Herald Co. v. Weisenberg, 89 A.D.2d 224, 455 N.Y.S.2d 413, affd. 59 N.Y.2d 378, 465 N.Y.S.2d 862 (1983)).

The public's right to know ordinarily outweighs the privacy of individuals. Matrimonial actions are sealed under Domestic Relations Law §235(1). It provides that an officer of the court with whom the proceedings in a matrimonial action, agreement of separation, proceeding for custody, visitation, or maintenance of a child are filed, or before whom the testimony is taken, may not permit a copy of any of the pleadings, or papers or testimony, to be examined or taken by any other person than a party, or the attorney or counsel of a party, except by order of the court. However, there is no existing cause of action for a violation of this statutory mandate.

Over the years our courts have defined the boundary lines of Domestic Relations Law §235. In Danziger v. Hearst Corporation, (304 N.Y. 244, 107 N.E.2d 62 (1952)) where the defendant had published an illegally obtained affidavit, the Court of Appeals upheld the constitutionality of Domestic Relations Law §235. It found that the legislation was addressed only to employees of the court system. 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 it prohibit the publication of the details of a matrimonial action obtained from a source other than the court files.

The Court of Appeals expressed its view on the importance of the public's right to know in Shiles v. News Syndicate Co. (27 N.Y.2d 9, 313 N.Y.S.2d 104 (1970)). The case involved a defendant who published a series of articles in the Daily News, about 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. The Court of Appeals held that a party may publish details of a divorce or separation suit based on files obtained without a court order, but if he does, he will be held accountable and liable if those details are not truthful.

The press is afforded great leeway. In Freihofer v. Hearst Corp, (65 N.Y.2d 135, 490 N.Y.S.2d 735 (1985)), the action was brought to recover damages resulting from the publication of three newspaper articles relating to a matrimonial action between the plaintiff and his wife. The complaint alleged that the publications violated Domestic Relations Law §235(1). The publications reported some of the marital difficulties experienced by the 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, "Freihofer's Fighting Over the Dough," quoted extensively from affidavits filed in the marital suit concerning a pending application for exclusive occupancy of the marital residence. The plaintiff sought damages for invasion of privacy under Civil Rights Law §§50 and 51, for intentional infliction of emotional distress and prima facie tort. Defendant admitted having reviewed court records in connection with the preparation of the articles. Plaintiff alleged that the publications were improperly based upon examination of matrimonial court records. The Court of Appeals rejected the tort claims and held that there was no independent right to relief for invasion of privacy by the publication because the Legislature has not established a cause of action for violation of Domestic Relations Law §235.

The judiciary law provides that "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, rape, assault with intent to commit rape, criminal sexual act, 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." Judiciary Law § 4. The exclusion for divorce actions under Judiciary Law § 4 is discretionary. Neither it, nor Domestic Relations Law §235(2) requires the court to close the courtroom during a trial, even a custody trial.

Domestic Relations Law § 235 (2) contains exclusion provisions similar to those in Judiciary Law § 4 but applies to all matrimonial actions, not just divorce actions. **"**Matrimonial actions**"** are defined in CPLR 105 (p) as including" actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage."

Domestic Relations Law § 235 (2) provides, in part, that [i]f the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel, and in such case may order the evidence, when filed with the clerk, sealed up,…"

Like the Supreme Court, the Family Court is open to the public. (Judiciary Law § 4). 22 NYCRR 205.4(a) provides that members of the public, including the news media,

are entitled to have access to all courtrooms, lobbies, public waiting areas, and other common areas of the Family Court otherwise open to individuals having business before the court. The Family Court Act contains several specific sections that provide that the court "may" exclude the general public. They are Family Court Act §341.1 (juvenile delinquency), Family Court Act § 433 (support), Family Court Act § 741 (person in need of supervision), and Family Court Act § 1043 (child protective proceedings).

22 NYCRR §205.4(b) contains the criteria for determining whether to exclude the general public or any person. It provides that the general public or any person may be excluded from a courtroom only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that exclusion is warranted in that case. In exercising this inherent and statutory discretion, the judge may consider, among other factors, whether: (1) the person is causing or is likely to cause a disruption in the proceedings; (2) the presence of the person is objected to by one of the parties, including the attorney for the child, for a compelling reason; (3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm, requires that some or all observers be excluded from the courtroom; (4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case. (22 NYCRR §205.4(b)).

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge must make findings before ordering exclusion. (22 NYCRR §205.4(b)). When necessary to preserve decorum, the judge may instruct news media representatives and others regarding other matters that may affect the proceedings' conduct and the litigants' well-being and safety. (22 NYCRR §205.4(c)).

In Sprecher v. Sprecher (NYLJ, 6-21-88, p. 21, col. 6, Sup.Ct., NY Co. (Schackman, J.)) a contested custody proceeding, the father contended that the mother resided within a cult and its child-rearing practices were inimical to his son's best interest. The Supreme Court denied the mother's motion to close the courtroom and granted Fox and CNN televisions' motion to permit television 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 public's right to information as established in Section 4 of the Judiciary Law. On appeal (Anonymous v Anonymous, 158 A.D.2d 296, 550 N.Y.S.2d 704 (1 Dept., 1990)), the Appellate Division held that the Supreme Court appropriately exercised its discretion in declining to grant the plaintiff's request to exclude all persons except the parties, their counsel and witnesses. Public access to

court proceedings is strongly favored. Plaintiff had not established sufficient grounds to warrant closing the court. However, it believed that the long-term “interests of the child” would be better served by changing the title and caption of the proceeding to reflect anonymous or fictitious names. (See also Anonymous v. Anonymous, 27 A.D.3d 356, 814 N.Y.S.2d 21 (1st Dep't 2006) (trial court should not pro forma approve an anonymous caption)).

From 1993 to 1996, the Appellate Divisions considered the “best interest” of the child in cases seeking to exclude the public, focusing on the “potential harm” to the child.

In Matter of Katherine B.(189 A.D.2d 443, 596 N.Y.S.2d 847 (2 Dept., 1993)) a Family Court article 10 proceeding the child, who was 10 years old at the time of the incident, was kidnapped by an adult family friend and imprisoned in an underground dungeon in his home for 16 days, where he sexually abused her. Shortly after her rescue, a child protective proceeding was commenced against the child’s mother on the grounds of neglect and abuse. The law guardian and the District Attorney joined in an application to close the courtroom to the public and the press, which the Family Court denied. The Appellate Division, Second Department, reversed and ordered the proceeding closed to the public and the press. It noted that the guidelines to be followed by the Family Court in determining whether to close the courtroom to the public and the press are set forth in 22 NYCRR 205.4. The nature of the proceeding and privacy rights of Katherine militated in favor of the closure of the courtroom to the public and the press. The Appellate Division turned to decisions of appellate courts in New Jersey and Ohio which emphasized the child’s best interests. Among other things, the uncontroverted affidavit of the child psychiatrist indicated that opening the courtroom to the public and press would “re-victimize” Katherine and “have a negative effect on her emotional well-being.”

Matter of Ruben R. (219 A.D.2d 117, 641 N.Y.S.2d 621 (1st Dept.,1996)) arose from the brutal murder of six-year-old Elisa Izquierdo as the result of severe trauma to the head. At the time of her death, Elisa resided with her mother, Awilda M.–L., her stepfather Carlos L., and her five half-siblings. The surviving children were subsequently removed from the custody of the parents based upon allegations of child abuse. The mother. was subsequently indicted on charges of murder in the second degree and endangering the welfare of a child. The stepfather, who was also incarcerated, was arrested five days before Elisa’s death on a parole violation. After Elisa’s death, intensive coverage of her life and the circumstances surrounding her death appeared in the print and broadcast media. The press, among other things, disclosed the identities of the surviving children. The New York Post printed the full names and ages of the two oldest children. Elisa’s death was the cover story of an issue of Time magazine, and a

color photograph of the respondents, “with three of their children,” appeared; an account of the grand jury testimony of Ruben and Kasey concerning Elisa’s death appeared in the New York Post. The parents were charged with the abuse and neglect of the surviving children. Family Court denied an application “for a blanket exclusion of the press” “[i]n spite of the court’s sympathy for the children’s feelings.” The Appellate Division reversed. It pointed out that under Family Court Act § 1043, the phrase “may be excluded” indicates that closed hearings are not required but are discretionary. However, the clear intent of this section is to safeguard the privacy of the children and the parents involved in these proceedings from the stigma of a public hearing. It found that the Family Court failed to accord due consideration to the substantial evidence of potential harm to the children by press coverage of the proceeding and the public dissemination of certain aspects of their lives. An examination of the statutory criteria set forth in 22 NYCRR 205.4 and the constitutional issues that arise when a presumably public hearing is closed compelled the exclusion of the press in this case.

In Matter of P.B. v C.C., (223 A.D.2d 294, 647 N.Y.S.2d 732 (1 Dept., 1996)) a matrimonial action, the Appellate Division shielded the child from press access. (reversing Brentrup v. Culkin, 166 Misc. 2d 870, 635 N.Y.S.2d 1016 (1995). It held that the criteria for determining whether or not there is to be press access set forth in Section 205.4 of the Uniform Rules for Trial Courts apply to this Supreme Court proceeding. (citing, 22 NYCRR 205.4) It held that the controlling consideration is the best interest of the children. The Court’s independent review of the facts, in the context of the child protective proceedings in Matter of Ruben R. and Matter of Katherine B., led it to conclude that this custody proceeding should be shielded from press access. Numerous press reports concerning this case had revealed allegations of alcohol and drug abuse and domestic violence. As in both Ruben R. and Katherine B., the emotional and educational harm which had already occurred had been explicitly documented.

However, this “best interests” approach to the exclusion of the public and press was short-lived.

In Anonymous v Anonymous, (263 A.D.2d 341, 705 N.Y.S.2d 339 (1st Dept., 2000)), a matrimonial action between “well-known public figures of great wealth and prominence [,] ... [e]ach ... covered extensively by the media,” the hearing court, granted the father's motion, pursuant to Domestic Relations Law § 235(2), to exclude all persons other than the parties, their counsel and the witnesses from the child custody and support trial. The Supreme Court concluded that the closure of the courtroom was in the “best interest” of the parties' four-year-old daughter. The Appellate Division reversed. It was not persuaded that the father had made the requisite showing for closure. The Appellate Division held that Domestic Relations Law § 235(2) authorizes closure not

because of the private interests of the litigants but only if the public interest requires it. The possibility of revelations of “specific actual details” was, at best, highly speculative. The psychiatrist's conclusion that “allowing the public and/or the press to attend [the custody] trial will be to expose [the child] to a significantly greater risk of future mental health problems, due to the increase in her exposure to the conflict in her environment,” was speculative. The possibility of some unspecified future harm does not constitute a compelling interest justifying closure. If a custody trial can be closed to the public on the showing made here, then closure of the courtroom would be the rule, not the exception, in custody cases. The argument can always be made, in any case, that it is in the child's best interest to shield her life from the public gaze. . The Appellate Divison held that neither Domestic Relations Law § 235(2) nor the Uniform Rules for the Family Court § 205.4 contemplate such a result. It is not, in the first instance, for the courts to identify the interest to be served by a public proceeding; the presumption is that courtrooms be open to public scrutiny. The burden is on the party seeking closure to show a compelling interest that justifies that relief. The Court indicated that upon a proper evidentiary showing, the trial court may consider a limited closure to balance the child's need for protection from the disclosure of certain information which might cause substantial harm to the child while keeping in mind the strong public policy favoring public access to court proceedings. (See also Kent v. Kent, 29 A.D.3d 123, 810 N.Y.S.2d 160 (1st Dep't 2006) exclusion of courtroom observers must be accomplished in accordance with 22 NYCRR 205.4 (b))

Conclusion

Judicial proceedings in the Supreme Court and Family Court are presumptively open to the public and the press unless there are compelling reasons for closure. Closing the courtroom in a “matrimonial action” is authorized only “[i]f the evidence ... be such that public interest requires closure”. Domestic Relations Law §235 does not authorize the closing of proceedings in matrimonial actions because of the private interests of the litigants.

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