## 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

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 (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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