

Sealing Divorce Records for the Sake of ... Corporations

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The nation's courts are getting hit with a growing number of requests to seal divorce records, but not by squabbling couples.

Divorce lawyers say corporations -- along with the rich and powerful -- are increasingly asking judges to seal the divorce records of top executives to protect trade secrets or crucial financial information from leaking out, or simply to avoid embarrassment.

Attorneys note that while the courts have long protected children in divorce cases by sealing records, they are now doing the same for companies, treating trade secrets, assets, stock values and executive salaries as valuable, sensitive information that needs special protection.

And with state court records now available on the Internet in 30 states, fears of data theft or data leaks are at an all-time high among businesses.

"This has become an increasingly prevalent issue," said attorney James Feldman, head of the family law practice at Chicago's Jenner & Block, who in recent years has seen a notable increase in companies intervening in divorce cases. "This year alone I've represented several key executives in divorce cases where a protective order or a confidentiality agreement had to be obtained in order to prevent information from getting out."

Feldman noted that companies fighting disclosure of financial data in divorce cases has become more popular in recent years.

"It seems like in the old days, it wasn't done that often. And in the new days, it happens all the time," Feldman said, adding that judges have become more sensitive to corporate concerns, especially "if you can show that disclosure will harm the business."

Meanwhile, attempts to restrict or limit access to divorce records have kept divorce lawyers and corporate counsel busy in the courtroom.

Most recently in California, on Oct. 17, investment giant Capital Group Cos. convinced a California judge to limit access and seal secret company information in the divorce trial of one of its executives.

Also in California, billionaire investor Ron Burkle is seeking to keep his financial records sealed in his divorce, and is appealing a March court ruling that struck down a California law allowing financial data in divorce records to be sealed. A group of newspapers is challenging that year-old law on constitutional grounds.

In New Hampshire, a new law that seals financial statements in divorce and child support cases is being challenged before the state Supreme Court by five newspapers. *Associated Press v. State of New Hampshire*, No. 2004-0830 (N.H.).

In Connecticut, the sealing of divorce records triggered a major controversy in 2003 when *The Connecticut Law Tribune*, a sister publication of *The National Law Journal*, discovered a "super-secret docketing system" that allowed special treatment for prominent divorce cases and other civil matters. The Connecticut judiciary passed new rules that set standards for the closing of courtrooms and sealing of materials, among them a rule requiring a judge to articulate the reasons for the closure or sealing and why they override the right of access.

FAMILY LAWYERS IRKED

On the legislative front, several states have introduced legislation in recent years to restrict public access to divorce records. California, New Hampshire and Virginia successfully passed bills limiting access. Colorado and Kentucky tried but failed to pass similar laws. And Utah and South Dakota are considering measures to limit access.

Such attempts to restrict public access to divorce documents have irked First Amendment lawyers and many family law practitioners, who argue that the proceedings are too secretive and foster the perception that the rich and powerful get special treatment in the courts.

"The desire for corporate secrecy is outweighing the public's right to know," said First Amendment attorney Susan Seager, who argued against the sealing of records in the recent California case involving Capital Group Cos. *Armour v. Ritter*, No. BD 390510 (Los Angeles Co., Calif., Super. Ct.). "When courts conduct private proceedings behind closed doors it creates public mistrust and suspicion."

That is what she claims happened in the divorce trial of 45-year-old Timothy Armour, an executive with Capital Group, which last month convinced a judge to partially close the divorce trial to the public and seal various exhibits and transcripts. According to court documents, attorneys for Capital Group argued that certain information, such as executive pay levels and stock awards, would hurt the company if made public.

"CGC strongly believes that it is absolutely vital to its competitive position and business

interests, as well as the privacy interests of its associates and employees, that its confidential information be protected from disclosure to the public," attorney Pamela Palmer of Latham & Watkins' Los Angeles office, who is representing Capital Group, stated in court documents.

Palmer declined to comment.

Philip De Toledo, chief financial officer for Capital Group, stated in court records that disclosure of his company's financial position, stock ownership and employee compensation "would be an informational windfall" to competitors. He also argued that disclosure "would be very harmful to CGC's corporate culture and the morale of its employees."

Those claims outraged Seager, who in arguing against Capital Group on behalf of The Los Angeles Times, The Associated Press and a newspaper group, claimed that the company had no grounds to close the trial.

"An executive salary is a trade secret? I've never heard of that before. And they argued that [disclosure] would hurt company morale. That doesn't seem to be a basis for shutting down a trial," Seager said. "It's one thing to ask that part of a deposition be sealed, or a part of a record that reveals an honest-to-God trade secret ... but that doesn't mean that the guts of the trial -- the testimony, the opening statements -- are done behind closed doors."

ONLY FOR THE RICH?

Several divorce attorneys across the country echoed Seager's sentiments, maintaining that the public's right to know how divorce proceedings are conducted outweighs privacy rights. Several also expressed concern that public access to divorce records is increasingly becoming threatened.

"I think that perhaps we're seeing a lot more of this coming to light now. I also think that more people are becoming aware that divorce records are public records. And people are much more sensitive to wanting more records sealed," said divorce attorney Sharyn Sooho, founder of DivorceNet, a 10-year-old divorce consulting Web site.

Sooho believes that the public is best served with open divorce records, not closed ones.

"It should be well known to the litigants that the records are not sealed. It begins that slippery slope: 'What's too private? What's not?' We don't have to tell everything to the public to be discreet," Sooho said.

Albert Momjian of Philadelphia's Schnader Harrison Segal & Lewis said that his concern with sealing divorce records is that only the rich and powerful who can afford attorneys will have access to such privileges.

"[W]hen they're sealed, they're going to be sealed for the high-profile cases. And I don't think it's fair when people who don't have that kind of wealth can have their smut exposed," Momjian said. "Why should wealthy people get the protection that other people should get?"

Momjian noted, however, that the courts aren't always willing to help the rich. Ten years ago, when he handled the divorce of Larry King, he requested that court proceedings remain closed. The judge said no and allowed 16 reporters to come in.

"The judge said, 'This is a public forum and a public courtroom. There's no reason to do that,'" recalled Momjian.

FASTER SETTLEMENTS

From a strategic standpoint, divorce attorney Steven Lake of Chicago's Lake, Toback & D'Arco believes that an open-records policy helps divorce lawyers secure settlements faster.

He noted that when company executives know that information in court proceedings could be made public, they're more likely to settle with a spouse than risk possible embarrassment or disclosure of sensitive company information.

"I've got a woman whose husband's family is worth a billion dollars. And the fact that we're going after them and that some of this stuff may become uncomfortable is exactly the leverage I need for them to sit down at the table with us and settle the case instead of screwing around with it," Lake said.

On the other hand, Lake, who also represents companies that get tangled in divorce cases, acknowledges that not everything should be made public in divorce litigation. He said that there are ways for attorneys to get around open-records laws so that sensitive corporate material remains out of the court file.

For example, he said, divorce settlements can be drafted in a way that they don't have to be filed with the court.

"We strongly recommend that when a company receives a subpoena in a divorce case that they maintain their own counsel and come in and try to protect themselves. And I think the judges are sensitive to that," Lake said.

"I don't think it should be a secret system, but you should have the opportunity to protect children and protect people from needless public exposure, companies too," he said.

Atlanta divorce attorney John Mayoue, who has handled the divorce cases of Jane Fonda, Newt Gingrich and Halle Berry, believes that there should be a limit on the public's right to know.

Given the rise of the Internet and the looming threat of identity theft, he said that open divorce-records policies should be limited to facts of public interest, and not include any personal finances or personal matters.

"I think it's stretching the First Amendment to say that the public needs to know the balance 'John Q' has on his MasterCard," said Mayoue of Warner, Mayoue, Bates & Nolen in Atlanta.

Mayoue is currently handling several divorce cases in which he is seeking to have financial information sealed.

"My biggest concern is having persons with access to personal information that they will misuse," Mayoue said.

"A lot of courts don't like to seal. But courts will find ways to provide protection for confidential information," he added.