FAMILY COURT FILES: POTENTIAL TREASURE TROVE FOR IDENTITY THIEVES

Published, Summer 2004, *South Carolina Law Review*, Volume 55, Number 4

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Helping Individuals
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I. INTRODUCTION

There are no statistics detailing how often identity thieves steal information from domestic case files, but the potential for identity theft from these files certainly exists. Many such files contain social security, bank account, and credit card numbers; parties' home addresses and places of employment; children's names; parties' dates of birth and many other pieces of identifying information that provide a treasure trove of information for an identity thief. South Carolina's new Civil Procedure Rule 41.1[1] has greatly restricted the use of sealed settlement agreements in our state's courts, but it does contain some allowances to help protect pertinent pieces of information involving family court matters.[2]

While having one's identity stolen is not a new phenomenon, the potential for identity theft has increased with the advent of computer technology and the Internet. Today, Americans are increasingly more aware of the potential for the loss of their identity, good name, and assets.

As the availability of online case filing grows, states should become more concerned about identity theft from their court files. States allowing substantive information to be filed and read on the Internet should revisit their policy of

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1. S.C. R. CIV. P. 41.1.

2. *Id.* at R. 41.1(c).

openness in family court proceedings and institute a mechanism to thwart identity theft. A case in point is the federal court's online filing system. While filing a case online and accessing a case file online is convenient, such a system is not without flaws. According to Marc Lane, the federal court's online system allows "[a]nyone with a computer, a modem, and the petty cash to pay a 7-cent-a-page access fee . . . [to] have the unfettered right to view just about any federal court file instantly."[3] "Personal financial information, family histories and medical information can be inexpensively searched, sorted, compiled and transmitted by computer in nanoseconds. And unregulated and unaccountable 'information vendors' are likely to create a profitable cottage industry overnight."[4]

II. STATE EFFORTS TO PROTECT PRIVACY OF FAMILY COURT LITIGANTS

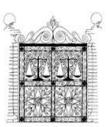
California also has an online case filing system, but it also has passed legislation to protect certain documents having recognized the threat of identity theft and misuse of information in its electronic files.[5] Many states, such as South Carolina, have not yet implemented online case filing technology because most states do not yet have the funds for this expensive endeavor.[6] However, once states

3. Marc J. Lane, *Bar Practice of Putting Civil Case Files on the Web*, *at* http://www.marcjlane.com/article/reviewingdecision.html (reprint of Nov. 12, 2001 article in CRANE'S CHICAGO BUSINESS).

4. *Id.*

5. *See, e.g.*, CAL. RULES OF COURT R. 2077 (excluding the following information from a "court's electronic calendar, index, and register of actions: (1) Social security number; (2) Any financial information; (3) Arrest warrant information; (4) Search warrant information; (5) Victim information; (6) Witness information; (7) Ethnicity; (8) Age; (9) Gender; (10) Government-issued identification card numbers (i.e., military); (11) Driver's license number; (12) and date of birth"); CAL. RULES OF COURT R. 2073 (excluding off-site electronic access to "[a]ny record in a proceeding under the Family Code"); FLA. FAM. L. R. P. 12.400 (allowing family courts to "conditionally seal the financial information required by [the Mandatory Disclosure Rule] 12.285 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"); ME. R. CIV. P. 80(c) (establishing that in cases involving "divorce, annulment, judicial separation, separate support, and determination of parental rights and responsibilities," if financial statements or child support affidavits must be filed, these documents are "kept separate from other papers in the case and shall not be available for public inspection").

6. *See, e.g.*, Deborah Eisenberg, et al., *State and Federal Policy on Electronic Access to Court Records*, http://www.courts.state.md.us/access/states7-5-01.pdf (recognizing "[a] little more than half the states . . . offer little or no electronic access to court records as a result of "technical and financial barriers").



begin using the Internet to file cases and make case files available to litigants and attorneys, legislation is necessary to protect access to certain information, particularly the typical information in family court files. Otherwise, third parties with no legitimate need or right to certain private information may access the information and abuse it.

While sealing any information in court or in court files is contrary to our nation's policy of an open court system, family court cases are clearly unique and unlike most other types of civil litigation. Much personal information such as parties' social security numbers, dates of birth, home addresses, credit card numbers, bank account numbers, and children's visitation schedules are included in court files, and it is doubtful that those who support an open court system can argue a legitimate reason why such information should be made public simply because an individual became a party in a domestic dispute.

In other types of civil cases, such personal information is rarely part of the court file, while in divorce cases, the litigants' "very lifestyles are threatened. Their freedom of action, or liberty, is subject to court orders and their property is at risk."[7]

"When divorcing spouses verbally share the details of their most intimate lives, the remarks may be taken lightly. Court documents, however, somehow lend an air of credibility to the accusations, whether or not they possess any credence."[8] The mere filing of such allegations may even give the allegations an air of legitimacy.[9] As a result, otherwise strong and successful people may feel vulnerable and violated because intimate details of their lives are exposed. Such feelings are only further compounded if an individual did not believe in divorce or never wanted their marital difficulties to lead to a separation and termination of their marriage. Even third parties, such as the children of the marriage, friends, and business associates, can feel violated in family court when they become unwillingly involved in another's marital dispute.[10]

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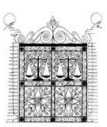
7. Gale H. Carpenter, Comment, *Protecting the Privacy of Divorcing Parties: The Move Toward Pseudonymous Filing*, 17 J. AM. ACAD. MATRIM. LAW. 105, 112 (2001) (quoting Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 16 (1985) (alterations omitted)).

8. Carpenter, *supra* note 7, at 119.

9. Carpenter, *supra* note 7, at 119.

10. W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, 17 J. AM. ACAD. MATRIM. LAW. 29, 35–36 (2001).



Thus, with the rise in identity theft, consumers' demands for privacy, and the need to protect proprietary information, our nation's policy of an open court system is ripe for change, especially with regard to the protection of information that the public has no legitimate or substantive need to access.

Some states and even the federal government already recognize the need for legislation to protect personal information from falling into the wrong hands.[11] California, the frequent forerunner of cutting edge case law and legislation, currently has a Bill pending in its state senate that sets forth, with specificity, the appropriate circumstances under which a family court file or document should be sealed.[12]

Specifically, California Senate Bill 239 permits the sealing of a trial court's file in actions dealing with divorce, separation and related family law matters upon an *ex parte* application by a concerned party when the party can make a showing of "good cause" coupled with a finding that one or more of the following circumstances exists:

> (1) The proceeding involves a minor child or children and the file contains any of the following:
> (A) A psychological evaluation; or
> (B) Reports of recommendations containing personal information about the minor child or children of the parties.
> (2) The file contains financial information of a personal nature.

11. Even the federal government recognized the need to further protect medical records by passing the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Pub. L. No. 104–91, 110 Stat. 1936.

12. S.B. 239, 2003 Leg., Reg. Sess. (Cal. 2003).

> (3) The file contains information that could facilitate the misuse of a party's identity or of a party's personal information.[13]

The "good cause" criterion proposed in Bill 239 could be satisfied by any of the following findings:

> (1) A substantial probability that a party's right to privacy will be significantly infringed.
> (2) A substantial probability that public access to the file will place a party or a person at risk . . . of physical harm.
> (3) A substantial probability that a minor child involved in the proceedings will be put at risk of physical, emotional, or psychological harm.[14]

Wisconsin also enacted a statute to protect the privacy rights of family court litigants. Specifically, Wisconsin's statute protects a party's financial information in family court cases by requiring the clerk of court to seal the financial information in a special envelope.[15] The practice, however, is not fool proof because it is possible to unseal the envelope in violation of the court rule.

The Iowa Domestic Relations statute has a similar provision that allows for the sealing of financial information upon application to the court.[16] If the records are

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13. *Id.*

14. *Id.*

15. WIS. STAT. ANN. § 767.27(3)(a) (West 2001). The section states the following: "Except as provided in par. (b), information disclosed under this section shall be confidential and may not be made available to any person for any purpose other than the adjudication, appeal, modification or enforcement of judgment of an action affecting the family of the disclosing parties. *Id.*

16. IOWA CODE ANN. § 598.26 (West 2001). Section 598.26 entitled "Record--impounding--violation indictable" states the following:

> The record and evidence in each case of marriage dissolution shall be kept pursuant to the following provisions:
>
> 1. Until a decree of dissolution has been entered, the record and evidence shall be closed to all but the court, its officers, and the child support recovery unit of the department of human services pursuant to section 252B.9. However, the payment records of a temporary support order, whether maintained by the clerk of the district court or the department of human services, are public records and may be released upon request. Payment records shall not include

sealed, unauthorized disclosure of the records is considered a crime.[17]

Maine also provides some protection for divorce and annulment proceedings. According to Steve Hayes, an attorney in Maine,

> Maine has selective protection. Child support affidavits (which contain the party's names, social security numbers and dates of birth) and financial statements, (which don't contain [dates of birth] or [social security] information, but which do contain lists of property and income), are sealed by rule (Rule 80(c)) but are available to the parties, their counsel, DHS and the court.
>
> Parties are required to exchange, but not file with the court, their income tax returns. All other records, including judgments and settlement agreements merged or incorporated into the judgment, are not private.[18]

New York domestic relations law is very protective of the information contained in its family court files. New York proceedings involving a matrimonial action, written separation agreement, or child custody, visitation, or maintenance actions prohibit the following:

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address or location information. No other person shall permit a copy of any of the testimony, or pleading, or the substance thereof, to be made available to any person other than a party to the action or a party's attorney. Nothing in this subsection shall be construed to prohibit publication of the original notice as provided by the rules of civil procedure.

2. The court shall, in the absence of objection by another party, grant a motion by a party to require the sealing of an answer to an interrogatory or of a financial statement filed pursuant to section 598.13. The court may in its discretion grant a motion by a party to require the sealing of any other information, which is part of the record of the case except for court orders, decrees and any judgments. If the court grants a motion to require the sealing of information in the case, the sealed information shall not thereafter be made available to any person other than a party to the action or a party's attorney except upon order of the court for good cause shown.

Id.

17. *Id.* § 598.26(4). However, this crime is only considered as a serious misdemeanor.

18. E-mail from Stephen T. Hayes, Hayes Dispute Resolution & Legal Services, to Melissa F. Brown (Dec. 4, 2003, 5:39 pm) (on file with author) (citing ME. R. CIV. P. 80(c)).

> A copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or 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.[19]

The limitations regarding the confidentiality of these records remain in effect for 100 years after the date of filing, at which time the records finally become public.[20] In 1993, Connecticut enacted a court rule, which, among other things, requires the parties' filed, sworn financial statements to be sealed unless there is a proceeding where the parties' finances are in dispute. (Conn. Supp. Ct. Proc. in Fam. Matters § 25-59.]

New Hampshire also has pending legislation to limit access to financial affidavits, and Florida is currently trying to implement legislation to limit access to financial information.[21] Thus, several states are taking the initiative to draft and attempt to pass legislation to protect the privacy rights of family court litigants.

III. SOUTH CAROLINA RULE 41.1

The previously mentioned states have made some valiant efforts toward protecting privacy through legislation that limits public access to family court files. However, South Carolina has pursued a somewhat different path. Specifically, South Carolina implemented a rule that precludes secret settlements except in certain circumstances. As a result of the secrecy rules enacted by South Carolina's federal and state courts, South Carolina made history by becoming the first state in the Union to have specific rules addressing court ordered secrecy agreements.[22] The

19. N.Y. DOM. REL. LAW § 235 (McKinney 1999).

20. *Id.*

21. *See* H.B. 384, 2003 Leg., 158th Sess. (N.H. 2003); FLA. FAM. L. R. P. 12.400 (text of rule effective January 1, 2004).

22. The United States District Court for the District of South Carolina passed Local Rule 5.03 in August 2001 and refined the rule in 2003. Also, the Supreme Court of South Carolina recently adopted a rule addressing court ordered secrecy agreements. *See* S.C. R. CIV. P. 41.1, Sealing Documents and Settlement Agreements.

state court rule, Rule 41.1, also includes language about the specific treatment and use of this rule in South Carolina's family court cases,[23] recognizing that family courts are a unique area of this state's court system.

While the debate still rages over whether the South Carolina court system should be truly open to the public,[24] our courts have traditionally favored an open-court system "even in matrimonial cases."[25] Prior to Rule 41.1, however, the Supreme Court of South Carolina acknowledged in *Davis v. Jennings*[26] that the "need for secrecy" can "outweigh the right of access."[27] When a person is deciding whether or not to file for a divorce, one should not be forced to choose between one's right to privacy versus one's right to justice. However, in enacting Rule 41.1, the state supreme court clearly recognized the need to balance "the right of public access to court records with the need for parties to protect truly private or proprietary information from public view and to insure that rules of court are fairly applied."[28]

Rule 41.1's treatment of an individual's privacy rights in family court proceedings is a step in the right direction to protect family court litigants' children and the litigants' private financial information from individuals who might attempt to use such information for personal gain or to harm those involved in the domestic action. [29]

Nevertheless, further protection of litigants' privacy rights in South Carolina's family courts is necessary through legislation that sets forth the procedures and identifies the information that can be automatically sealed in South Carolina's court

23. *See* S.C. R. CIV. P. 41.1(b) (stating that in a family court setting the court must first consider two factors before weighing whether the private interest will be substantial enough to warrant sealing the documents). "[T]he judge shall also consider whether documents: 1) contain material which may expose private financial matters which could adversely affect the parties; and/or 2) relate to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter." *Id.*

24. S.C. CONST., art. I, § 9 ("All courts shall be public.").

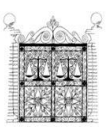
25. 24 AM. JR. 2d *Divorce and Separation* § 303 (1998) ("Public access to courtroom proceedings is strongly favored, even in matrimonial cases.").

26. 304 S.C. 502, 405 S.E.2d 601 (1991).

27. *Id.* at 506, 405 S.E.2d at 604.

28. S.C. R. CIV. P. 41.1(a).

29. Certain family court proceedings are sealed by statute in South Carolina. *See, e.g.*, S.C. CODE ANN. § 20-7-1780 (West 2003) (adoptions); *id.* § 20-7-8505 (juvenile proceedings).



system, particularly the family court.[30]

The most egregious violation of family court litigants' privacy rights is set forth in South Carolina's Family Court Rule 20.[31] Rule 20 states that "[i]n any domestic relations action in which the financial condition of a party is relevant or is an issue to be considered by the court, a current financial declaration in the form prescribed by the Supreme Court shall be served and filed by all parties."[32] The Rule mandates that parties must swear under oath that the declaration includes their income, home address, employer's name, employer's address, social security number, living expenses, names of and amounts owed to creditors, and an accounting of their assets.[33] The accounting must also include the assets' fair market value, the date the assets were purchased, and the debt owed on the assets.[34] The financial declaration is essentially a mandatory welcome mat to any thief interested in a gold mine of information in the family court clerk's file.

South Carolina's court secrecy rule, Rule 41.1, also addresses settlement agreements between the parties. If a party wants their agreement sealed, the rule requires the family court judges to "consider whether the settlement: 1) contains material which may expose private financial matters which could adversely affect the parties; and/or 2) relates to sensitive custody issues, and [to] specifically balance the special interests of the child or children involved in the family court matter."[35] Thus, after consideration of the above factors, a family court judge may seal certain documents by Court order to protect litigants' private information. While Rule 41.1 is a step in the right direction, additional measures are needed to *ensure* the protection of sensitive personal information from potential exploitation.

30. This Article only addresses those issues relating to South Carolina's family courts and leaves the issue of protecting litigants' privacy rights in other forums for other authors to address at a future date.

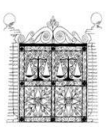
31. S.C. R. FAM. CT. 20.

32. *Id.*

33. Letter from Melissa F. Brown, Esq., to Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina (Jan. 8, 2003) (on file with author).

34. *Id.*; *see also* S.C. R. FAM. CT. 20 (requiring parties to submit personal information).

35. S.C. R. CIV. P. 41.1.



IV. CONCLUSION

The answer to privacy in the family court system lies with the proper balance. Combining portions of Maine's selective protection Rule 80(c), New York's Domestic Relations Law § 235, and California's pending Senate Judiciary Bill 239 might serve as the most comprehensive method of protecting family court litigants' private, proprietary information without violating the basic premise behind our nation's, and particularly South Carolina's, desire for an open court system. Such a rule could automatically require the sealing of certain documents, such as sworn financial declarations; business valuations; tax returns; financial statements; psychological and mental health evaluations and reports; Guardian Ad Litem (GAL) reports; custody evaluations; and Department of Health and Environmental Control forms, while also setting forth the method under which such information could later be unsealed and retrieved.

Until new rules or legislation are passed, attorneys should consider using alternate methods to protect their client's private information such as limiting (where appropriate) information filed with the court; identifying personal financial information in a manner only the parties recognize or can identify; drafting confidentiality agreements to protect business valuations, especially in the event the case settles; or filing a motion to seal only certain documents.

With the onslaught of identity and financial theft, the need to protect certain information in family court files is greater than ever. Thus, states must enact rules and legislation to balance the rights of family court litigants who expect a fair hearing without subjecting their personal lives to abuse by third parties, with the need to maintain an open court system, which also protects these same litigants from abuse induced by a closed system of justice. South Carolina has taken a step in the right direction with the adoption of secret settlement rules that seek to balance privacy rights with the perils accompanied by a closed system of justice, yet additional measures are needed to ensure the protection and security of personal information.