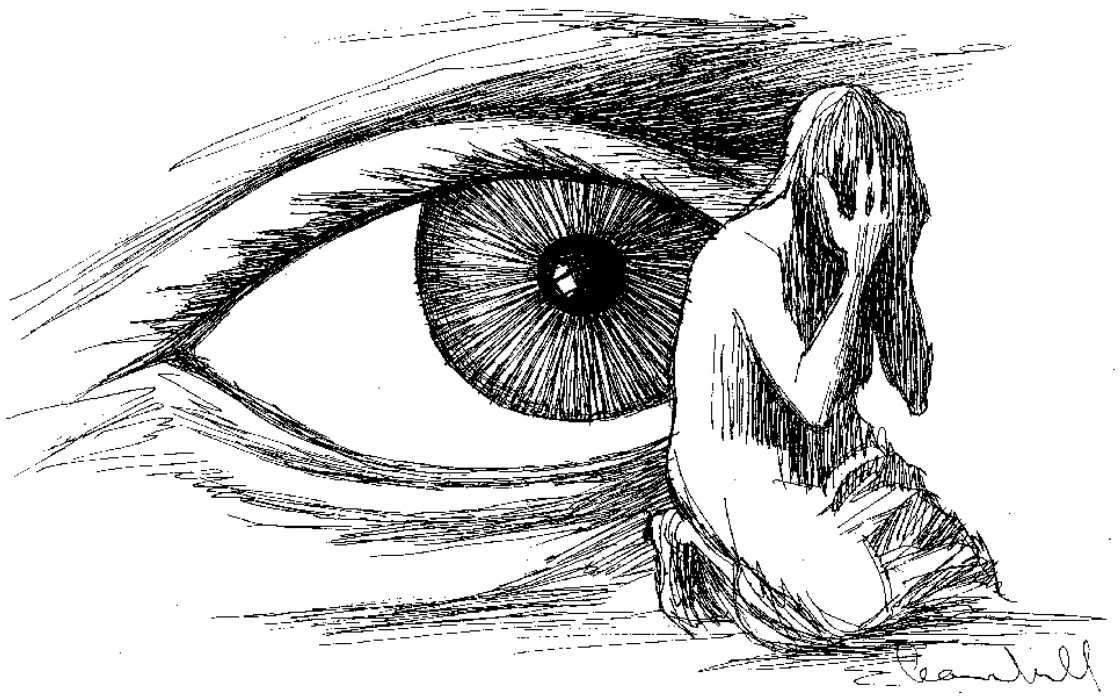
Politics Bastardizes Divorce-Privacy Bill Into Tool for Wiliest, Wealthiest

By Fred Silberberg



It is not typical to write this column in the first person, but the topic is a bit different and there is no other way to address it. As those who read this column regularly know, I have long advocated that divorce litigants should have their rights to privacy respected. I do not believe that because someone is forced to use the legal system in California, their private information should become public. Privacy is a right purportedly guaranteed to Californians by our state constitution. Not only is this an infringement on the personal right of privacy, but also it is harmful to children. In fact, I have written on this topic several times in the past.

At the beginning of the year, I decided to sponsor a bill that is now pending in the Legislature. The bill, SB 1015, was intended to recognize the right to privacy, purportedly guaranteed by the California Constitution, of divorce litigants after the Court of Appeal struck down an existing statute that offered some protection of privacy rights in the case known as *Marriage of Burkle*, 525 N.W.2d 439, 442 (Iowa Ct. App. 1994). It would have allowed certain information of a financial nature to be kept out of the publicly viewable portions of the court file. It did not affect the court proceedings themselves, nor keep the public out of same. It simply prevented non-parties from accessing such things as bank account information, balances or details on other such assets.

Upon presenting the bill in the Legislature, I received numerous telephone calls from people who claimed to be representing organizations opposed to the bill. It appeared as though these people had not read the text as their arguments against the bill made it clear they were ignorant of its terms. For example, one opponent who claimed to represent a large women's organization contended that the proposed legislation was harmful to women because it allowed legal proceedings to take place behind closed doors to the exclusion of the public. The bill did no such thing. Others complained that it gave judges too much power by keeping their decisions private, when it also did no such thing.

Aside from the stream of calls that opposed the bill on behalf of various organizations, there was an onslaught by the media, probably the largest group opposing the legislation. I received calls from all over the state, and was interviewed by the press at length as to the impact of the proposed legislation. One reporter calling on behalf of the Los Angeles Times claimed to be doing a neutral piece on the bill and wanted more information on why I proposed the legislation and how it compared with laws in other states. I gave him substantial time and answered his questions. A few days later he wrote an article that not only bashed the proposed legislation, but also made it appear that it was part of some greater scheme being orchestrated by Mr. Burkle himself, whom I had nothing to do with.

None of the responses I received were shocking or unexpected. The political system can at times be a free-for-all, and it was obvious that the press would be opposed to anything that might result in a curtailment of the ability to promulgate tabloid journalism. What is shocking, however, is what has happened to the bill as it has wound its way through the Legislature.

The bill has gone through so many amendments and modifications in order to please various constituencies (including some of those who called to tell me why it shouldn't be proposed), that it no longer does what I intended it to accomplish. In my view, the bill as it now reads is useless. It sets forth a legal bar that must be jumped over, which is both virtually unintelligible and impossible to overcome.

In other words, in the end the political system has failed to protect the rights to privacy of Californians. What is happening with this bill is yet another example of the right to privacy being given lip service by our legislators.

With the bill in its present form, I wonder why anyone up there in Sacramento is even bothering to continue to try and have it enacted. It seems as though those that contacted me to oppose the bill and that had no understanding of what it provided have now prevailed. It also seems as though certain people in the Legislature continue to push the bill solely to get credit for having implemented the legislation, and certainly not because they are trying to protect the constitutional right to privacy.

There was a point in this process where I was told that the bill had to be modified from its original form if it were to be given consideration, so as to placate certain interest groups. Some changes were made to the language that kept the initial purpose and import of the bill clear. A bit more tweaking, and the bill now had the support needed to pass, or so a staff member in the office of state Sen. Kevin Murray, D-Los Angeles, the gentleman who is carrying the bill, told me. As the bill made its way through the committee, however, further revisions were required if the bill was to survive.

The problem is that while the bill continued to get rewritten to placate the concerns of certain groups or members of the Legislature, it no longer provided the protection that was intended. While the earlier version of the bill provided that specific financial information could be redacted from pleadings to prevent public disclosure (while keeping the rest of a document or documents in the court file public), the latest version only allows that upon various conditions being met. Those conditions require a case-by-case analysis of each request to redact that serves to expand the scope of litigation and how much time a judge will have to spend on a case, which was not the intent of the bill as originally written.

As it now sits in draft form, the court can only grant a request to redact if certain findings are made which include a finding that "there exists an overriding interest that overcomes the public's right of access to public records," and that a "substantial probability exists that the overriding interest will be prejudiced if the pleading is not redacted." The court also has to find that there is no lesser "restrictive means to achieve the overriding interest." And most astonishingly, in making the determination as to whether the overriding interest will be prejudiced, the court is to "balance a particularized showing of the public interest in open access to judicial proceedings against the asserted privacy rights of spouses, children, and other interested parties." Note the use of the word "asserted." Clearly the constitutional right to privacy is rendered meaningless when the Legislature does not even believe that the right actually exists.

From a practical standpoint, I don't see how anyone is going to convince a court that there is an overriding interest in keeping specific bank account information or asset information private. Even assuming that some very creative lawyers are able to make that first hurdle, there will be no way to convince a court to balance that against the purported public interest in access to judicial proceedings. While certain critics of the original legislation claimed it invoked a procedure that would be available only to wealthy litigants, the truth is that the original draft of the bill required nothing more than the use of a Judicial Council form, making it accessible to anyone in the court system. The response to these critics by our Legislature is to enact a procedure that is so obscure and has so many steps involved in it, that no one but the wealthiest of litigants will be able to even initiate the paperwork and legal arguments required to get something redacted from the publicly viewable file.

Somehow the critics have shot themselves in the foot.

As the sponsor of the bill, I have attempted to communicate with Sen. Murray's office to see whether there isn't some way to pull what is now pending and try this again in the hope that we can actually implement something that will protect privacy. It doesn't appear that this is going to happen.

If our state constitution guarantees a right to privacy, why is it that our Legislature refuses to honor that? If there is a right to privacy, it should be respected. This bill does not do that; in fact, it does exactly the opposite. It relegates privacy to a new low. Family law litigants in California should be prepared to continue to have themselves publicly exposed. I am all for freedom of the press, but that does not mean freedom to broadcast a citizen's private information to which no one would have access but for the family law proceedings. It appears now that the only way to avoid this is to move to New York or Hawaii, two states where litigants' rights to privacy are both respected and protected.

Fred Silberberg is a certified family law specialist and a partner at Silberberg & Ross in Brentwood. The firm specializes in family law.