

## Protecting Client Privacy in Divorce

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**D**ivorce is big news if the rich and famous are involved. The public has an insatiable appetite for gossip and scandal. Media conglomerates make a fortune feeding that appetite by exploiting broken lives. Although the Constitution guarantees freedom of the press, it does not prohibit citizens from protecting the privacy of their property settlements.

### Sealed File Precedent

California policy dictates that courtrooms and court files remain open to the public. This openness is fundamental to our legal system. It promotes public confidence in the judicial system and guards against judicial incompetence and favoritism. Many California family law departments have a procedure by which divorcing couples can keep their settlement private. Court procedure allows for two marital settlement agreements: a filed MSA and an unfiled MSA. The filed MSA is attached to the judgment that is filed with the court. Judgment Form FL-180 merges the filed MSA into the judgment by means of this provision: "Each attachment to this judgment is incorporated into this judgment, and the parties are ordered to comply with each attachment's provisions." The filed MSA usually contains custody, support agreements and other executory provisions.

The filed MSA is a public record. The unfiled MSA is lodged with the court, not filed. The court: a) incorporates the unfiled MSA into the judgment by reference; b) merges the unfiled MSA into the judgment by ordering the parties to perform its terms; and c) returns the original unfiled MSA to the parties without retaining a copy in the court file. The unfiled MSA usually contains the property division provisions. The unfiled MSA is not a public record.

The doctrine of allowing public scrutiny of the court process applies to the court's adjudicatory functions. (*NBC Subsidiary (KNBC-TV), Inc., v. Superior Court* (1999) 20 Cal.4th 1178.) A court performs no adjudicatory function when it incorporates a property division stipulation into a judgment. (*Marriage of Cream* (1993) 13 Cal. App.4th 81.) In *Flynn v. Flynn* (1954) 42 Cal.2d. 55 and *Jackson v. Jackson* (1967) 253 Cal.App.2d 1026, the court



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protected the privacy of family law litigants by approving unfiled settlement agreements.

The right of the public to witness court proceedings was best elucidated in *Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S. 555 at p. 580 where the court held that the rights of the press and the public to attend criminal proceedings are implicit in the First Amendment. The California Supreme Court held that rights of the press and the public were applicable to civil proceedings in *NBC Subsidiary (KNBC-TV), Inc., v. Superior Court, supra*, 20 Cal.4th 1178. In *NBC Subsidiary* the press wanted access to the court proceeding involving Sondra Locke and Clint Eastwood. The trial court excluded the media and the public from the courtroom whenever the jury was not present and delayed disclosure of transcripts of the closed hearings until after the trial. The court held that the closed hearings were adjudicatory in nature. The Second District Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its closure order and ordered transcripts of the previously closed proceedings to be forthwith made available to journalists and the public. The California Supreme Court affirmed the court of appeal on constitutional and statutory grounds. The Supreme Court stated its ruling, and its four-prong test, as follows:

[T]he United States Supreme Court and numerous unanimous lower courts have held that **the First Amendment of the federal Constitution generally precludes closure of substantive courtroom proceedings** in criminal cases unless a trial court provides notice to the public on the question of closure and after a hearing finds that

(i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest. Under established principles of statutory interpretation, we must construe California's long-standing "open court" statute (Code of Civil Procedure section 124, hereafter section 124) ["Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public."] consistently with these constitutional requirements, and applying section 124, as so construed, to ordinary civil proceedings, we conclude that the trial court in this case failed to comply with these requirements. Accordingly, the trial court's closure order improperly denied the public and the press access to these proceedings, in violation of section 124. (*NBC Subsidiary (KNBC-TV), Inc., v. Superior Court, supra*, 20 Cal.4th 1178 at p. 1181; *emphasis added*.)

The Supreme Court listed the three points which support giving the public access to court proceedings:

[The] public access plays an important and specific structural role in the conduct of such proceedings. Public access to civil proceedings serves to (i) demonstrate that **justice is meted out fairly, thereby promoting public confidence** in such governmental proceedings; (ii) provide a means by which **citizens** scrutinize and **check the use and possible abuse of judicial power**; and (iii) **enhance the truthfinding function of the proceeding**. (*NBC Subsidiary (KNBC-TV), Inc., v. Superior Court, supra*, 20 Cal.4th 1178 at p. 1219; *emphasis added*.)

The policies set forth by the Supreme Court in *NBC Subsidiary* do not apply to non-adjudicatory proceedings such as a court's entry of a stipulated order or stipulated judgment. Whatever information may have lead the parties to settle has no bearing on: a) a court's "basis for adjudication" (no adjudication occurs); b) whether "justice is meted out fairly" (no justice is meted out); and/

or c) the "use and possible abuse of judicial power" (no judicial power is used). Public access to information that may have lead parties to settle cannot "enhance the truth-finding function of the proceeding" (no truth is found).

*NBC Subsidiary's* holding has been codified in California Rules of Court, Rule 2.550, which prohibits court file sealing absent proof of extraordinary circumstances. The Advisory Committee Comment to Rule 2.550 states:

This rule and rule 2.551 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. **These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.** The rules do not apply to records that courts must keep confidential by law. \* \* \* **The sealed records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication.** (*Emphasis added*.)

Because an unfiled MSA is neither "used at trial" nor "submitted to the court as a basis for adjudication," Rule 2.550's prohibition of record sealing is inapplicable to an unfiled MSA.

The public has the right to evaluate decisions a judge makes. Because such evaluation would be impossible without knowledge of what information the judge had available, the public has the right to access all such information. Judges are accountable to the people. The reasons behind a judge's decisions are everyone's business. If divorce litigants settle their property division issues between themselves, a judge has neither the duty nor the power to reject the settlement on the ground that the judge considers the settlement unfair, or on the ground that the judge would have decided the matter differently. (*In re Marriage of Carter, supra* 19 Cal.App.3d 479; *Marriage of Cream, supra*, 13 Cal.App.4th 81.) Litigants have the right to order their own affairs and are accountable to no one. The reasons behind a litigant's decisions are nobody's business unless there has been a violation of the law.

### Family Law Sealed File Precedent

The constitutional principle of freedom of the press has been applied to family law proceedings. *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406 involved the divorce of a sitting superior court judge who wanted his case closed to the public. The trial court closed the proceedings and sealed the court files, citing Family Code section 214 as authority. Petitioner, a journalist, unsuccessfully moved the trial court to open future hearings and unseal the file. The First District Court of Appeal reversed the trial court's closure and sealing rulings:

[w]e think it plain that a [Family Code] section 214 order must pertain to the trial of one or more particular 'issue[s] of fact' and be justified by a showing of particularized need by the moving party. (*Id.* at pp. 1414-1415.)

In *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045 ("*Burkle I*"), the Second District Court of Appeal ruled that family law proceedings are generally no different than other proceedings with respect to the openness of the court to the public. The court held Family Code section 2024.6 unconstitutional because it provided for non-discretionary sealing of financial records in family law proceedings. The court considered the sealing a burden upon the public's First Amendment right to access to the courts. No basis existed for concluding that court records should be differentiated from courtroom proceedings for purposes of First Amendment access rights. Court records in divorce proceedings, like divorce proceedings themselves, are presumptively open.

Code of Civil Procedure section 124 provides:

Except as provided in section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.

Family Code section 214 provides:

Except as otherwise provided in this code or by court rule, the court may, when it considers it necessary in the interests of justice and the persons involved, direct the trial of any issue of fact joined in a proceeding under this code to be private, and may exclude all persons except the officers of the court, the parties, their witnesses, and counsel.

Most adjudicatory family law proceedings are as open to the public and press as other court proceedings. Exceptions to this rule include adoption proceedings (Fam. Code, § 8611), parentage proceedings (Fam. Code, § 7643) and proceedings to declare a child free from parental custody and control (Fam. Code, § 7884).

### The Court has No Duty to Oversee Property Settlement Agreements

In *In re Marriage of Carter* (1971) 19 Cal.App.3d 479, 494 the court held that parties have the right divide their property in any manner they see fit, and the court only has a duty to make sure the procedural requirements have been met. The court stated:

Where the parties stipulate to a division of community property satisfactory to them, the court has no duty other than to see that the [disclosure] requirements of *Vai v. Bank of America* (1961) 56 Cal.2d 329] have been met and that the agreement has been entered into voluntarily and freely. Nothing in the Family Law Act changes the pre-existing rule as laid down in *Dexter v. Dexter* (1954) 42 Cal.2d 36 [265 P.2d 873], and many later cases, to the effect that **the wife may, validly, and for reasons satisfactory to her, agree to something other than, or less than, she might have secured by judicial action** if all legal and factual issues had been submitted to a court and had been determined in her favor. (*Emphasis added.*)

In *In re Marriage of Cream, supra*, 13 Cal.App.4th at p. 91 the court held:

[T]he parties possess the exclusive authority to agree upon the disposition of their property. **The court's only role with regard to a proper stipulated disposition of marital property is to accept the stipulation** and, if requested, to incorporate the disposition into the judgment. (*Emphasis added.*)

Because the courts do not oversee property settlement agreements, they are not adjudicating those matters. Since there is no adjudication, there is no constitutional right for the press or public to view the proceedings.

Because *Cream* does not require a court to accept custody or support settlement agreements, an argument

could be made that a court's entry of a stipulated judgment regarding those matters is adjudicatory.

### ***Flynn and Jackson Authorize the Unfiled MSA***

In *Price v. Price* (1948) 85 Cal.App.2d 732 the First District Court of Appeal ruled that an unfiled MSA cannot be effective as a judgment. The court held that an MSA merely incorporated by reference into a judgment does not merge with the judgment (and, therefore, may not be judicially enforced), and that only an MSA physically attached to a judgment becomes part of the judgment:

[a]n agreement referred to in a decree and made a part thereof by reference only does not actually become a part of the decree for the purpose of enforcement as part of a judgment . . . . (*Id.* at p. 738.)

The California Supreme Court disapproved of *Price* in *Flynn v. Flynn* (1954) 42 Cal.2d 55, which addressed the unfiled MSA of Errol and Liliane Flynn. The trial court: a) received the MSA into evidence; b) incorporated the MSA by reference into the divorce decree; c) ordered the parties to perform the MSA's obligations; and d) returned the original MSA to the parties without retaining a copy for the court file.

Nine years later, Errol moved to reduce support on the ground of changed circumstance. The trial court denied his motion on the ground that the court lacked jurisdiction to modify the decree because the MSA had been incorporated into the judgment by reference only, and had not been physically placed in the court file. The California Supreme Court disagreed, having no difficulty with the fact that the MSA was physically separated from the file. The court held:

It is settled that a document may be incorporated either expressly or by apt reference into a judgment or decree so as to make it an operative part of the order of the court. (*Id.* at p. 59.)

Thus in this case, the decree may be given its intended effect by referring to the adequately identified document, and the fact that the document is not a part of the permanent records of the court does not vitiate the decree. [Citations omitted.] *Price v. Price*, 85 Cal.App.2d 732 [194 P.2d 101], is contrary to the foregoing authorities and is disapproved. (*Id.* at p. 60.)

*Flynn* held incorporation by reference sufficient to merge an unfiled MSA into a judgment for purposes of subsequent modification but expressed no opinion regarding whether such incorporation would suffice for purposes of subsequent enforcement by contempt.

In *Jackson v. Jackson* (1967) 253 Cal.App.2d 1026 the dissolution judgment referred to the MSA, ordering the parties to comply with its terms, but the MSA was never filed with the court. When wife subsequently sought to enforce the MSA, husband contended that it was unenforceable because it had never been merged with the judgment. The First District Court of Appeal rejected husband's contention:

An examination of cases dealing with the question of merger (*supra*, fn. 4), reveals that the **courts, in determining the intent of the parties and the intent of the court rendering the decree** (see *Flynn v. Flynn* (1954) 42 Cal.2d 55, 58 [265 P.2d 865]) **have considered** the following factors: . . . (2) the physical incorporation of the words of the agreement in either the body of the decree or as an exhibit attached thereto; (3) **if not so attached . . . the extent to which the agreement so incorporated can be identified from the terms of the decree** . . . . (*Id.* at p. 1034; *emphasis added.*)

The *Jackson* court rejected husband's contention that a court cannot countenance an unfiled MSA:

It has been suggested that the merger of an agreement which has merely been introduced in evidence, and which is not otherwise a part of the record, should not be countenanced because "it could be withdrawn or destroyed and interested parties could not, by searching the records of the court 'construct a complete picture of the rights and obligations of the parties' [Citations omitted.] The majority in *Flynn* rejected this contention, disapproved *Price v. Price*, *supra*, and stated, "Thus in this case, the decree may be given its intended effect by referring to the adequately identified document, and the fact that the document is not a part of the permanent records of the court does not vitiate the decree. [Citations omitted.]" (*Id.* at p. 1035.)



The *Jackson* court acknowledged the unfiled MSA's usefulness in satisfying litigants' natural desire for privacy:

It is obvious that there is a tendency to refrain from making such an agreement, which involves the personal financial affairs of the parties, a matter of public record. If the agreement, as presented to the court, can be readily identified without controversy, there is no reason for not indulging this normal propensity. (*Id.* at p. 1034.)

### Privacy is an Important Right

The right of privacy is guaranteed by Article I, section 1, of the California Constitution and by the First Amendment to the United States Constitution. When the freedom of the press and the right of privacy conflict, freedom of the press usually prevails over the right to pri-

vacuity. But when no right to court access exists (e.g., when no adjudicatory court action has occurred) courts should vigilantly protect a litigant's right to privacy.

When divorcing spouses require public adjudication of their disputes, a family law court has no choice but to make their private details available to the press or any person that wants to exam the files. But when the parties reach an agreement and do not require the court to adjudicate the matter, a family law court should make every effort to accommodate divorcing spouses' privacy concerns. ■

### Endnote

1 For a discussion regarding merger of an MSA into a judgment, go to [www.legalspan.com/calbar/onlinecle.asp](http://www.legalspan.com/calbar/onlinecle.asp), select "Family Law," then select "Marital Settlement Agreements: The Nuts and Bolts of Sealing the Deal."

## Larry Doyle Named FLEXCOM's "Distinguished Person of 2008"



*Distinguished Person: Larry Doyle was honored as FLEXCOM's "Distinguished Person of 2008" at the State Bar Convention in Monterey in September. The award, commonly called the "Diane", after its first recipient, Diane Wasznicky of Sacramento, acknowledges outstanding contributions and service to FLEXCOM. Larry was formerly Chief Legislative Counsel to the State Bar and was FLEXCOM's Legislative Representative for many years. His sage counsel, years of experience and depth of knowledge about the legislative process enhanced FLEXCOM's effectiveness and reputation in Sacramento. After receiving the award, Larry is pictured with several of his FLEXCOM colleagues, from left to right, Mary Molinaro, Jill Barr, Diane Wasznicky, Elizabeth Harrison, Michele Brown, Dianne Fetzer, and Claire Buckey.*