IN THE CHANCERY COURT OF FAULKNER COUNTY, ARKANSAS
4TH DIVISION

JANE DILLS MORGAN PLAINTIFF

VS. NO.E-95-957

CHARLES D. MORGAN, JR. DEFENDANT

ORDER

This cause is brought before the court upon the petition of Max Brantley, public citizen, to open the record in this case, which was previously sealed by order of the Court.

Findings of Fact

1. It is stipulated that the plaintiff and defendant agreed to settle their divorce action and requested the Court seal the record.
2. The divorce proceeding was uncontested.
3. The property settlement agreement of the parties was not merged with the Court's Decree. The property settlement agreement was a private settlement contract between the parties.
4. The court has no continuing jurisdiction for enforcement of the settlement agreement because it was never merged with the Court's Decree.
5. The order sealing a record was signed by Judge Clawson at the time the Divorce Decree was entered. That order directed the clerk to deliver all pleadings which had been filed in the case, other than and the Complaint, Answer and Decree to counsel for the plaintiff. The clerk delivered the pleadings the same day.

6. The clerk no longer maintains any records in this case other than the Complaint, the Answer the Decree, and any subsequent pleadings filed by Mr. Brantley and the responses thereto.
7. The Court's Decree contains matters of marital delicacy, including grounds for divorce, which do not involve a public interest and have no bearing on the private settlement agreement of the parties in which Mr. Brantley, as a member of the public, claims an interest.

Conclusions of Law

1. Ark. Code Ann. 16-13-318 states that upon application of all of the litigants, the chancery court shall hear the matters in privacy. It would be of little value for the Court to hear the matter in private if the written memorial of the hearing, i.e. the Court's order, were then opened to public scrutiny.
2. Mr. Brantley cites Ark. Dept. of Human Services v. Hardy although the ruling in that case was based upon the proposition that there was no legislative authority for sealing the record. Clearly, such authority exists in cases of divorce.
3. Mr. Brantley also relies on Arkansas Best v. General Elec. which states:

> If the parties to a lawsuit wish to enter an agreement and keep it secret, they may do so. All they need to do is file a motion to dismiss litigation between them once the settlement of it is agreed upon. It remains their private business.

4. The parties in this matter settled the property issues in their divorce by private settlement agreement. That agreement was a private contract between the parties and at their specific request was not merged with the Court's decree.
5. The remaining pleadings in the Court's records do not concern any public interest and at the request of all litigants should remain private.

Conclusion

The motion filed by Max Brantley for the forgoing reasons should be denied. The record in this case shall remain sealed.

IT IS SO ORDERED, this 12 day of June, 1998.

Hon. Karen R. Baker
Circuit/Chancery Judge

IN THE CHANCERY COURT OF FAULKNER COUNTY, ARKANSAS
FIRST DIVISION

JANE DILLS MORGAN PLAINTIFF

VS. NO. E-95-957

CHARLES D. MORGAN, JR. DEFENDANT

MEMORANDUM IN SUPPORT OF REPLY TO DEFENDANT'S RESPONSE TO MAX BRANTLEY'S MOTION TO OPEN COURT RECORD

STATEMENT OF FACTS

On Oct. 20, 1997, defendant Charles D. Morgan filed a motion for a protective order in his divorce case. Within the next few days, Max Brantley, a resident of Little Rock, Ark., notified the judge's office by telephone of his intention to object to the motion. Oct. 29, 1997, Brantley filed a motion to intervene to oppose defendant's motion. On information and belief, Brantley states that a settlement was reached in the case before trial and approved by Chancellor Charles E. Clawson Jr. Nov. 7. The judge also apparently placed the record of the case under seal, on application of the plaintiff and defendant, without considering Brantley's motion to intervene. Nov. 14, Chancellor Karen Baker denied Brantley's motion to intervene, stating it was moot. By motion in a letter Nov. 19 to Chancellor Karen Baker, also served on the parties, Brantley asked for reconsideration of the Nov. 14 ruling. Because he received no reply, he renewed the earlier arguments and moved to open the court record Jan. 23, 1998. The plaintiff and defendant have objected to Brantley's motion.

ARGUMENTS

THE COURT IMPROPERLY SEALED THE RECORD

Defendant argues that the record was properly sealed pursuant to Ark. Code Ann. 16-13-318. The statute says that, on application of all litigants, the chancery court shall *hear* the case or matter in privacy. (Emphasis supplied.) The statute does not provide, nor do relevant

court rulings provide, for mandatory sealing of the *record* of a divorce case, particularly the *final orders* in such a case. (Emphasis supplied.)

THE RECORD WAS NOT PROPERLY SEALED PURSUANT TO RULE 26(C)

Defendant argues that the record was properly sealed pursuant to Rule 26(c) of the Arkansas Rules of Civil Procedure because the record contains confidential information which, if released to the general public, could result in an adverse impact on the parties' business holdings.

On available evidence, the showing is to the contrary. When Brantley's motion to intervene was filed, he had examined much of the public record of the case and supervised production of a newspaper article about that record. To Brantley's knowledge, none of the information released about defendant's business caused competitive disadvantage to the defendant. Much of the business information about the defendant's primary holding, in Acxiom Corp., a publicly held corporation, is required to be filed in various public records.

Indeed, when defendant filed his motion to seal the hearing and for a protective order Oct. 20, the motion said it was "anticipated witnesses will testify about trade secrets and other confidential information which if released to the general public could result in an adverse impact on the parties' business holdings." To Brantley's knowledge, no such testimony was entered in the record because the case was settled before trial.

Because of the judge's order to seal, Brantley obviously can only conjecture about material filed since that time, if any. But, even if the judge has reviewed the record and concluded that subsequently-filed material includes information of a nature subject to seal for reasons of business protection, this is not a justification for sealing of the entire record. The judge may simply seal those portions of the record that meet the test of Rule 26(c).

If, however, the defendant argues that Rule 26(c) material has been incorporated in the final decree in this case, I refer the court to *Arkansas Best v. General Elec.*

> If the parties to a lawsuit wish to enter an agreement and keep it secret, they may do so. All they need to do is file a motion to dismiss litigation between them once the settlement of it is agreed upon. It remains their private business. If, however,

> they wish to make the settlement a court record and seek the imprimatur of a court, as was done in this case, it becomes the public's business.

In *Department of Human Services vs. Hardy,* referenced by the defendant, the Arkansas Supreme Court provided further guidance when it said "there is no rule providing for secret final orders." The chancellor had no authority to seal this decree. Even if convinced that a portion of the decree contains trade secrets or other such clearly privileged information, the chancellor could read the decree into the record, but omit protected material.

THE MOTION IS NOT MOOT

The issue is not moot, as both defendant and plaintiff argue. Brantley, as a member of the public, has a right of access to public court files under Arkansas common law, the Arkansas Constitution and the First Amendment to the United States Constitution. (See *Republican Party of Arkansas v. State,* 240 Ark. 545, 549, 400 S.W. 2d 660, 661 (1966). Furthermore, the court retains jurisdiction as to enforcement of the decree. It also has subject matter jurisdiction to reconsider an order sealing its own records.

THE MOTION IS TIMELY

A post-judgment motion to intervene for the purpose of unsealing all or part of the record is both timely, because the court has jurisdiction to reconsider such an order, and because unusual and compelling circumstances exist. The compelling circumstances are twofold. Paramount is the Arkansas Supreme Court's clear preference for open court records, particularly the final orders of a case at bar. See *Hardy*. Also compelling and unusual is the manner in which Brantley was deprived of an opportunity--despite a timely and properly filed motion to intervene--to argue for a balanced application of court secrecy rules. Instead, a sweeping privacy order was dictated by the parties, rather than by the primary judge, without judicial consideration of the content of the record or the timely motion to intervene. The resulting order, approved by the court, exceeds anything contemplated by guiding legal authorities.

INTERVENOR HAS STANDING

Defendant argues that Max Brantley lacks standing to intervene. Any member of the public has standing to challenge an order sealing court records. "The right of access belongs to the public, not just the parties to a lawsuit." *Arkansas Best Corp.; Ivy v. State of Arkansas,* 52 Ark. App. 256, 258, 917 S.W.2d 179 (1996). The court articulates an unconditional right of public access to the courts. But even if it did not, Rule 24 confers a conditional right to intervene, as defendant notes, when the applicant claims an interest relating to the transaction. Brantley's ability to perform as a journalist, and report on activities of publicly elected and financed courts and the outcome of cases therein, is impaired by the court secrecy order.

CONCLUSION

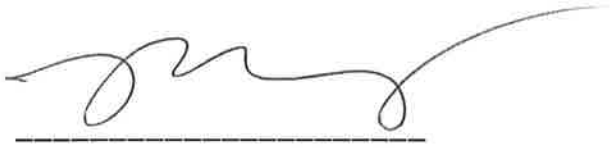
As a member of the public Brantley had standing to intervene. His motion to intervene was timely and should not have been defeated by the court's inattention to the filing or the attorneys' inattention to the motion at the settlement hearing. However, the Supreme Court allows intervention for postjudgment relief on orders to seal.

The court has the power to seal hearings (emphasis supplied) in domestic matters and, by inference, certain matters in the record of a domestic case where compelling interests dictate secrecy--custody issues, for example. But the law does not dictate sealing of all court records in domestic relations cases and is significantly silent--indeed the case law speaks eloquently to the contrary--on sealing final orders.

Defendant argues that, because he and plaintiff have agreed the court's order should be secret, it should be so. The defendant argues, in effect, that a) all divorce records, including decrees, may be sealed on simple application of the parties or b) that his wealth creates a special circumstance--i.e., rich people have more right to secrecy in their affairs than poor people. Neither proposition finds support in the case law nor in the oath lawyers take to seek justice for both rich and poor alike.

Court decrees amount to a record of performance by public officials. When litigants seek the public's court facilities and employees for resolution of their disputes, they should expect the public to be able to see an accounting of their investment. The ledger book is the court record. In this case, for example, the public might well like to read an accounting of the court's handling of a contested request for secrecy,

for now sealed from view. I pray respectfully that the record of this case, or at least the final orders and other portions of the record not clearly excepted by law, be open to the public.



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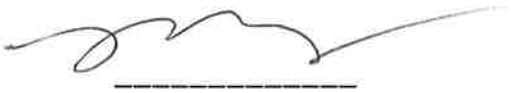
Feb. 10, 1998

CERTIFICATE OF SERVICE

I, Max Brantley, hereby state that a copy of the foregoing pleading was served on plaintiff's attorney, Stephen Engstrom, at Wilson, Engstrom, Corum & Coulter, and on defendant's attorneys, W. Michael Reif at Dover & Dixon and Jerry C. Jones at the Rose Law Firm, all by facsimile, on Feb. 10, 1998.



Max Brantley