



Do spouses have any privacy rights when getting divorced? *Navigating a tough situation*

BY STEPHANIE BLUMS



The Constitution of the State of California article 1, section 1 provides that people have a right to privacy. What happens to that right to privacy, however, when your spouse files for divorce? Does your constitutional right to privacy disappear into thin air? I think folks would be surprised to learn the answer to that question!

For starters, your spouse can obtain all material facts and information relevant to your finances. For example, if the husband is a minority shareholder in a corporation, the records of the corporation or partnership need to be made fully available when the wife's need for the records outweighs the company's privacy interests. These records include bank records, corporate books, business tax returns, profit and loss statements, accounts receivable and payable, ledgers, leases, credit card statements and offers to purchase the company.

That also means documents relating to other members of the company to the extent relevant to the husband's financial interests, although such information will likely be subject to a protective order so the wife cannot disclose it outside of the divorce proceedings. Spouses are also entitled to request records that pertain to expense reimbursement, perks, loans, retirement, compensation and money paid to third parties on their behalf. The law favors complete disclosure of all relevant information to allow an independent review of the marital property and financial status of the spouses.

But what about your medical records? Let's suppose that a husband sees a therapist. Now husband and wife are getting divorced and husband seeks visitation with the children. Can the wife subpoena the husband's medical and/or psychiatric records to prove that he suffers from emotional instability of such a nature that he should not be allowed visitation? Does the husband waive his privilege merely because he has asked for visitation orders?

Thankfully the answer to that question is no. The husband's medical records would be deemed privileged, which is not waived merely by seeking visitation with his children. That is because a patient has a statutory privilege to refuse to disclose, and to prevent another from disclosing, any confidential communication between the patient and a physician, or between the patient and a psychotherapist absent waiver or some statutory exception to the privilege.

However, not every therapist has a thorough understanding of what they should and should not disclose so it is important when going through a divorce to work with counsel who is competent in handling such issues. Because while the husband might have the right of privacy, if the rights are not properly invoked, they could potentially be waived.

What about your text messages, email communications or social media posts and activities? Can your spouse get his or her hands on those? In short, they are almost always fully discoverable and must be produced. Again, the exception would be if the communications are subject to a specific statutory privilege, like medical records.

Then there are copies of your credit card bills. Can spouses get copies of those bills when you are going through a divorce? Of course they can. Again, skilled counsel might be able to limit the scope of the information produced (for example, perhaps the nature of the charge is redacted but the amount of the charge is shown) but I think it would be a mistake to presume that you are going to be able to keep those billing statements (whether related to the time period during marriage or after separation) from your soon-to-be ex-spouse.

Often, in heavily contested divorce proceedings, lawyers are looking for a misuse of the marital community's assets, such as paying for a paramour's apartment or buying expensive jewelry for a lover. It is not just about lifestyle or support issues, it is about whether a spouse breached his or her fiduciary duty to the other spouse. Hotly contested divorces raise all types of issues, which means that the general right of privacy between spouses is virtually non-existent.

But what is left are specific statutory privileges: doctor/patient, lawyer/client, and clergy/penitent. Of course, these can be waived if not carefully preserved, or sometimes the privilege is joint between husband and wife, which means that between them there is no privilege at all.

Simply put, privacy and privilege issues are quite tricky in divorce, so when going through it, one should recognize that while some rights remain intact, most likely will not. Only a competent divorce professional can navigate this sticky wicket.

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