

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 28 SUFFOLK COUNTY**

**PRESENT:**

**Honorable Mark D. Cohen**

**Motion No: 07/Motd  
Submit Date: 06/20/08**

CLB

Plaintiff

- against -

PHC

Defendant

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Upon the papers submitted (Order to Show Cause, Plaintiff's Memorandum of Law in Opposition to Motion For Closed Courtroom, Memorandum of Law in Support of Motion to Close Courtroom; Affirmation of David A. Schulz [amicus for Newsday], Affirmation in Opposition, Affirmation in Support and Reply Affirmation) and on the record colloquy dated June 19, 2008, it is hereby

ORDERED that the part of the motion seeking to close the courtroom during parts of the trial is denied; and it is further

ORDERED that the part of the motion seeking to seal the files pursuant to DRL 235 is granted.

The Attorney for the Children has moved that the courtroom be closed to the public during the parts of the trial of this action relating to grounds and custody/parenting time,<sup>1</sup> pursuant to section 235 of the Domestic Relation Law.<sup>2</sup> As outlined by the Court on the record, this action has been pending for approximately two (2) years and it had been previously directed that any application for courtroom closure be made in a timely fashion, well in advance of trial. The within application was presented on June 13, 2008, nineteen (19) days prior to the date of the scheduled month-long trial, July 2, 2008. By Order dated June 13, 2008, the Court directed that such motion should be made in open Court, pursuant to *Matter of Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, to allow any interested party to be heard, on June 19, 2008. The Plaintiff opposes the application and argues that case and statutory law requires that the application be denied. The Defendant supports the motion, indicating that there is potential negative effect that media attention will have on his children and their relationship with him. On June 19, 2008, an on the record application by Newsday to appear as an intervener was granted to the extent that it was permitted to appear as amicus curiae. Newsday opposes the application on both Constitutional and statutory grounds.

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<sup>1</sup>

In order to facilitate the orderly presentation of evidence, the Court previously directed that the trial, while unified, be conducted in three phases: grounds, custody/parenting time and equitable distribution.

<sup>2</sup> DRL 235 provides, inter alia:

2. If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or someone interested, on Order of the court...
5. The limitations of subdivisions one, two and three of this section in relation to confidentiality, shall cease to apply one hundred years after date of filing, and such records shall thereupon be public records available to public inspection.

DRL 235 provides that there is a “public interest” that may require the courtroom to be closed. Such “public interest” has been said to include protection of the children from the anticipated collateral consequences of trial testimony. (Practice Commentaries DRL §235, C235:2, p. 175).<sup>3</sup> However, the First Department has strongly indicated that closing of the courtroom under this section is the rare exception. *Anonymous v. Anonymous*, 263 A.D.2d 341. “The burden is on the party seeking closure to show a compelling interest which justifies that relief.” *Id.* at 345; *Kent v. Kent*, 29 A.D.3d 123. The reason is clear; there is a Constitutional and statutory presumption against a closure of the courtroom. *Richmond Newspapers v. Virginia*, 448 U.S. 555; Judiciary Law §4.<sup>4</sup> “Open hearings are more conducive to the ascertainment of truth.” *Anonymous v. Anonymous*, *supra*. The Appellate Division also noted that in a high profile action “which will inevitably attract public attention whether the proceedings be open or closed, it is even more important that the trial be held in an open forum.” *Id.* at 346 [emphasis supplied]. “Judicial discretion must be exercised against a strong presumption of openness.” *Id.* at 343 [quoting *Matter of M.S.*, 173 Misc.2d 656. 659].<sup>5</sup> In making its determination, the court should consider these factors along with those outlined in 22 N.Y.C.R.R. 205.4. *Anonymous v. Anonymous*, *supra*.<sup>6</sup>

Both the Attorney for the Children and the Defendant claim that the best interest of the children would be protected by closing the courtroom to, in effect, isolate them from information. They both argue that “new age” of the media, i.e. the bloggersphere, requires this Court, sitting as *parens patrie*, to be more attuned to the rapid dissemination of potentially damaging information.

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It has been argued that thus “public interest” does not include the private interests of the particular litigants. *Merrick v. Merrick*, 154 Misc.2d 559. For discussion of different interests in general, see *Karla Sanchez*, “*Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?*”, 46 *Buffalo L. Rev.* 217 (1998).

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It has been noted, that the “Supreme Court decided that public access to at least some types of judicial proceedings is constitutionally mandated. It is high time that the courts reached consensus on which proceedings.” *Raleigh Levine*, *Toward A New Public Access Doctrine*, 27 *Cardozo L. Rev.* 1739, 1791 (2006)

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It has been argued that there is a historical tradition of open divorce proceedings in the United States. *Samuel Sokol*, “*Trying Dependency Cases in Public: A First Amendment Inquiry*”, 45 *UCLA L. Rev.* 881(1998); *Mary Gofen*, “*Right of Access to Child Custody and Dependency Cases*”, 62 *U. Chicago L. Rev.* 857 (1995) .

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As relevant , Rule 205.4 includes consideration of:

- (3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm requires that some or all observers be excluded from the courtroom;[and whether]
- (4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case.

A proper evidentiary showing establishing the need for protection from the disclosure of certain information that might cause substantial harm to the children, may provide the predicate to a limited closure of the public courtroom. See e.g. *P.B. v. C.C.*, 223 A.D.2d 294, lv. denied, 89 N.Y.2d 808.<sup>7</sup> Such a record requires evidence of harm “explicitly documented” from persons or entities with sustained and meaningful contact with the children. *Id.* at 297. The fact that information may be transferred at a press of a key cannot alter the analysis. Here, the submissions in support of closure wholly fail to provide any evidentiary showing, but rely simply upon conjecture of harm to the children. *Anonymous v Anonymous*, supra; *P.B. v. C.C.*, supra.<sup>8</sup> As the Court observed in *Anonymous*, “[i]f a custody trial can be closed to the public on the showing made here, then closure of the courtroom would be the rule, not the exception, in custody cases. The argument can always be made-in any case-that it is in the child's best interest to shield her life from public gaze.” *Id.* at 342.

Open courtrooms, in general and in divorce actions, may provide a basis for societal education. “The presence of the public ‘historically has been thought to enhance the integrity and quality of what takes place.’” Indeed, ‘public access is an indispensable element of the trial itself. Litigants, and the public as well, must be secure in the knowledge that all who seek the court’s protection will be treated evenhandedly.’” *Anonymous v. Anonymous*, supra at 342-343 [cites omitted].<sup>9</sup>

Consequently, after balancing all the factors, the required high burden of compelling reasons to close the courtroom has not been met.<sup>10</sup>

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The Plaintiff argues that *P.B.* has been “superceded” by the promulgation of the rule [22 NYCRR 205.4]. However, the First Department specifically cited *P.B.* in *Anonymous v. Anonymous*, supra., without overruling it. Consequently, at this juncture it must be afforded proper stare decisis effect.

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Notwithstanding the Attorney for the Children’s conclusory allegations that her clients have already been “harmed” by prior media reports in this case, there is nothing in the record to connect this alleged harm with such reports. In making this determination, the Court is mindful of its limited in camera examination of the children on an unrelated issue.

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All parties essentially agree that this case, open or closed, will generate large-scale public and media interest. A weighing of the criteria outlined above in connection with this application tips decidedly in favor of an open courtroom in order to facilitate a transparent process, rather than reporting based on speculation or hearsay.

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The part of the motion seeking to seal the files is granted pursuant to DRL 235 without opposition, to the extent that the mandate of this statute will continue to be operative.

The foregoing constitutes the decision and Order of the Court.

Dated: June 20, 2008  
Central Islip, NY

  
HON. MARK D. COHEN, J.S.C.