

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR SARASOTA COUNTY, FLORIDA  
CIVIL DIVISION

WILLIAM A. CABANA, pro se,

Plaintiff,

Case No.: 06-CA-5063 SC

vs.

JAMES ZINGALE, EXECUTIVE  
DIRECTOR, DEPARTMENT OF  
REVENUE, etc.,

Defendant.

---

DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT  
OF MOTION TO DISMISS OR, ALTERNATIVELY,  
MOTION FOR SUMMARY JUDGMENT

Defendant, James Zingale, Executive Director, Department of Revenue, by undersigned counsel, hereby submits his notice of supplemental authority in support of his Motion to Dismiss or, alternatively, Motion for Summary Judgment.

The first case is In re Commitment of Duane Edwin Sutton, 884 So. 2d 198 (Fla. 2d DCA 2004), which reiterates the principle that in order for Florida's constitutional right of privacy under Art. I, §23, Fla. Const., to attach, there must be a legitimate expectation of privacy. Plaintiff fails to cite to a single case that establishes a legitimate expectation of privacy in alimony decisions.

The second case is Barron v. Florida Freedom Newspapers, 531 So. 2d 113

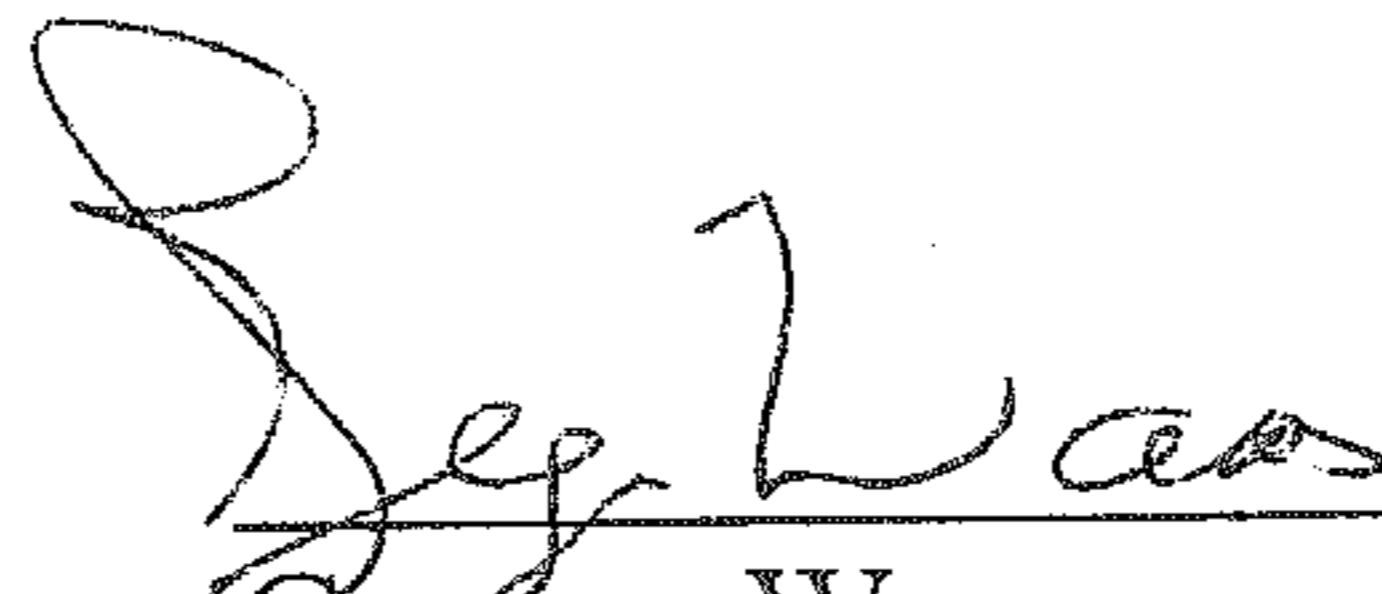
(Fla. 1988), which demonstrates that both civil and criminal court proceedings in Florida are public events; there is a well-established common law right of access to court proceedings and records; there is a strong presumption of openness for all court proceedings; and closure of court proceedings or records should occur only when necessary and, with regard to privacy, only under appropriate circumstances. Plaintiff has failed to provide a single case in which alimony considerations overcame the strong presumption of openness for court proceedings and the right of access to court proceedings and records.

Copies of both decisions are attached as Exhibits A and B, respectively.

---

Respectfully submitted,

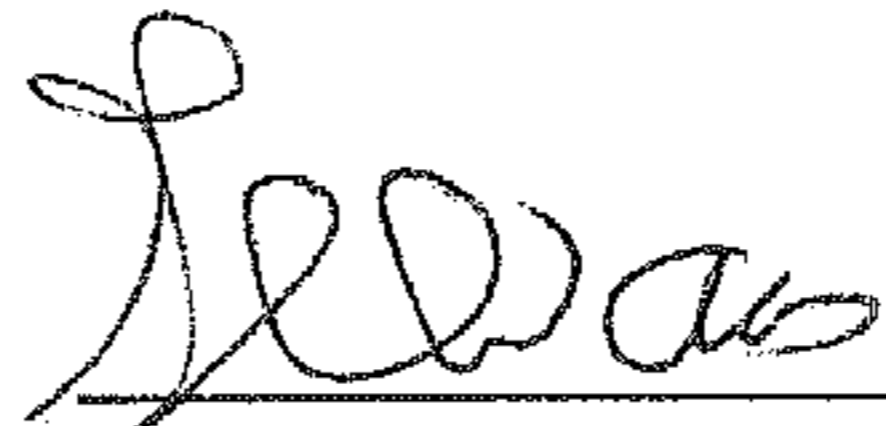
CHARLES J. CRIST, JR.  
ATTORNEY GENERAL



George Waas  
Special Counsel  
Fla. Bar No. 0129967  
Office of the Attorney General  
PL-01 The Capitol  
Tallahassee, Florida 32399-1050  
(850) 414-3662  
(850) 488-4872 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to William A. Cabana, Pro Se, 1050 Capri Isles Blvd., Apt. F-105, Venice, Florida 34992, this 31st day of October, 2006.



George Waas

LEXSEE 884 SO. 2D 198

**In re Commitment of Duane Edwin Sutton, Keith Norwood Smith, John R. Beikirich, Edward Allen Singleton, Jerry Wade Rhoades, and George Samuel Demarco.; DUANE EDWIN SUTTON, KEITH NORWOOD SMITH, JOHN R. BEIKIRICH, EDWARD ALLEN SINGLETON, JERRY WADE RHOADES, and GEORGE SAMUEL DEMARCO, Petitioners, v. STATE OF FLORIDA, Respondent.**

Case Nos. 2D03-2780, 2D03-2973, 2D03-2984, 2D03-2988, 2D03-2993, 2D03-3327  
CONSOLIDATED

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

884 So. 2d 198; 2004 Fla. App. LEXIS 11221; 29 Fla. L. Weekly D 1721

July 28, 2004, Opinion Filed

**SUBSEQUENT HISTORY:** Review granted by Sutton v. State, 889 So. 2d 72, 2004 Fla. LEXIS 2408 (Fla., Dec. 17, 2004)

**PRIOR HISTORY:** [\*\*1] Petitions for Writ of Certiorari to the Circuit Court for Sarasota County; Robert B. Bennett, Jr., Judge. Sutton v. State (In re Sutton), 828 So. 2d 1081, 2002 Fla. App. LEXIS 15523 (Fla. Dist. Ct. App. 2d Dist., 2002)  
Singleton v. State (In re Singleton), 829 So. 2d 402, 2002 Fla. App. LEXIS 16160 (Fla. Dist. Ct. App. 2d Dist., 2002)  
Beikirich v. State, 828 So. 2d 421, 2002 Fla. App. LEXIS 14538 (Fla. Dist. Ct. App. 2d Dist., 2002)  
Demarco v. State, 781 So. 2d 367, 2000 Fla. App. LEXIS 16310 (Fla. Dist. Ct. App. 2d Dist., 2000)  
Rhoades v. State, 818 So. 2d 514, 2002 Fla. App. LEXIS 7865 (Fla. Dist. Ct. App. 2d Dist., 2002)  
Smith v. State, 827 So. 2d 1026, 2002 Fla. App. LEXIS 13169 (Fla. Dist. Ct. App. 2d Dist., 2002)

**DISPOSITION:** Writ of certiorari denied.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioners, prisoners, sought a writ of certiorari to the Circuit Court for Sarasota County (Florida), seeking review of orders requiring them to submit to depositions in sexually

violent predator commitment proceedings. In the alternative, the prisoners sought prohibition to prevent or limit the scope of the State's depositions.

**OVERVIEW:** The State sought to have the prisoners involuntarily committed as sexually violent predators under the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, Fla. Stat. ch. 394.910-.931 (2002). During the proceedings, the State attempted to depose the prisoners. The prisoners objected, claiming the depositions violated their right to privacy and their Fifth Amendment privilege against self-incrimination. The appellate court held that Jimmy Ryce detainees in civil commitment proceeding did not have any absolute privilege to avoid the discovery process. In essence, the prisoners did nothing more than raise a blanket assertion of their Fifth Amendment privilege, an act which was not available because of the civil nature of these proceedings. As to the privacy claims, the appellate court held that the prisoners did not demonstrate that they had a legitimate expectation of privacy with respect to their familial relationship with the victim and witnesses. Any right the prisoners may have had to keep their thoughts about their offenses private was outweighed by the State's interest in obtaining the information.

**OUTCOME:** The certiorari petitions were denied.

LexisNexis(R) Headnotes



*Civil Procedure > Discovery > Methods > Oral Depositions*

*Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders*

*Criminal Law & Procedure > Appeals > Remands & Remittiturs*

[HN1] In Florida, a respondent in a sexually violent predator commitment proceeding cannot assert a blanket right of privacy or the right against self-incrimination to avoid being deposed. Instead, he must appear and make a good faith assertion of the privileges to particular questions when necessary.

*Civil Procedure > Discovery > Methods > Oral Depositions*

*Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders*

[HN2] Detainees in civil commitment proceedings under the Jimmy Ryce Act, Fla. Stat. ch. 394.910-.931 (2002), do not have any absolute privilege to avoid the discovery process.

*Civil Procedure > Discovery > General Overview*

*Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders*

*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

[HN3] In Florida, certiorari is an "extraordinary remedy" that should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders. While orders granting discovery have traditionally been reviewed by certiorari, not every erroneous discovery order creates certiorari jurisdiction in an appellate court. A nonfinal order granting discovery will be reviewed by certiorari only when the order departs from the essential requirements of the law and causes irreparable injury to the petitioner throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal.

*Civil Rights Law > Prisoner Rights > Self-Incrimination Privilege*

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege*

*Evidence > Privileges > Self-Incrimination Privilege > Elements*

[HN4] A witness is generally entitled to invoke the Fifth

Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal prosecution will be brought or that the witness's answer will be introduced in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial.

*Civil Rights Law > Prisoner Rights > Self-Incrimination Privilege*

*Evidence > Privileges > Self-Incrimination Privilege > Exceptions*

[HN5] The Fifth Amendment privilege is inapplicable only if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness.

*Criminal Law & Procedure > Trials > Judicial Discretion*

*Evidence > Privileges > Self-Incrimination Privilege > Elements*

*Evidence > Privileges > Self-Incrimination Privilege > Scope*

[HN6] If the self-incriminating nature of a question is not clear from the face of the question, the party claiming the Fifth Amendment privilege may be required to provide sufficient information on which a trial court may find that a reasonable danger of incrimination exists. The trial court has the ultimate responsibility to determine whether the witness's refusal to answer questions is in fact justifiable under the privilege. The trial court has broad discretion to determine what answers provided in discovery may incriminate or tend to incriminate a litigant.

*Civil Procedure > Discovery > Relevance*

*Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review*

[HN7] In Florida, certiorari generally does not lie to review the relevance of discovery, since the disclosure of information that is merely irrelevant is not likely to cause irreparable harm.

*Civil Procedure > Discovery > Undue Burdens*

[HN8] An objection claiming an undue burden in responding to discovery requests must be supported by record evidence, such as an affidavit detailing the basis for claiming that the onus of supplying the information or documents is inordinate.

*Constitutional Law > Substantive Due Process > Privacy > Personal Decisions*

[HN9] The right to privacy under federal law protects areas such as marriage, procreation, family relationships, and the rearing and education of children.

*Constitutional Law > Substantive Due Process > Privacy > General Overview*

[HN10] See Fla. Const. art. I, § 23.

*Constitutional Law > Substantive Due Process > Privacy > General Overview**Criminal Law & Procedure > Search & Seizure > Expectation of Privacy*

[HN11] Florida's right to privacy is broader than the federal right to privacy. Before the right to privacy attaches, there must be a legitimate expectation of privacy. Determining whether an individual has a legitimate expectation of privacy must be made by considering all the circumstances, especially objective manifestations of that expectation.

*Constitutional Law > Substantive Due Process > Privacy > General Overview**Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities*

[HN12] In Florida, the right of privacy demands that individuals be free from uninvited interference into their thoughts and actions unless the intrusion is warranted by a compelling state interest.

*Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview**Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview*

[HN13] Although it is impossible to give a precise definition of "attorney work product" that can be applied to all situations, it can be generally defined as personal views of the attorneys as to how and when to present

evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence.

*Civil Procedure > Counsel > General Overview**Evidence > Privileges > Attorney-Client Privilege > Scope**Legal Ethics > Client Relations > Confidentiality of Information*

[HN14] The Florida attorney-client privilege protects confidential communications between a lawyer and client. The burden to establish the existence of a privilege is on the party asserting the privilege, Fla. R. Civ. P. 1.280(b)(5).

**COUNSEL:** Elliott C. Metcalfe, Jr., Public Defender, and Christopher E. Cosden, Assistant Public Defender, Sarasota, for Petitioners.

Charles J. Crist, Jr., Attorney General, and Janet McDonald, Assistant Attorney General, Tampa, for Respondent.

**JUDGES:** KELLY, Judge. STRINGER and COVINGTON, JJ., Concur.

**OPINION BY:** KELLY

**OPINION:** [\*201] KELLY, Judge.

In these consolidated cases, the petitioners seek certiorari review of the trial court's orders requiring them to submit to depositions in sexually violent predator commitment proceedings. In the alternative, they seek prohibition to prevent or limit the scope of the State's depositions. Because the petitioners have failed to demonstrate that the trial court departed from the essential requirements of law resulting in irreparable harm, we deny the petitions.

In each case, the petitioners pleaded nolo contendere to sexual offenses, were adjudicated and sentenced, and were serving their sentences when the State sought to have them involuntarily [\*\*2] committed as sexually violent predators under the Jimmy Ryce Involuntary Civil Commitment for Sexually Violent Predators' Treatment and Care Act, sections 394.910-.931, Florida Statutes

(2002). During the commitment proceedings, the State attempted to depose some of the petitioners. The petitioners objected claiming that the depositions violated their right to privacy and their Fifth Amendment privilege against self-incrimination.

When the court ordered the petitioners to submit to depositions, they sought certiorari review, requesting this court to prohibit the State from deposing them. n1 In *In re Commitment of Smith*, 827 So. 2d 1026 (Fla. 2d DCA 2002), this court held that [HN1] a respondent in a sexually violent predator commitment proceeding cannot assert a blanket right of privacy or the right against self-incrimination to avoid being deposed. Instead, he must appear and make a good faith assertion of the privileges to particular questions when necessary. We remanded for a hearing on the petitioner's objections to proposed deposition questions. *Id.* at 1031; see *In re Commitment of Sutton*, 828 So. 2d 1081 (Fla. 2d DCA 2002). [\*\*3]

n1 *In re Commitment of Singleton*, 829 So. 2d 402 (Fla. 2d DCA 2002); *In re Commitment of Sutton*, 828 So. 2d 1081 (Fla. 2d DCA 2002); *In re Commitment of Beikirich*, 828 So. 2d 421 (Fla. 2d DCA 2002); *In re Commitment of Smith*, 827 So. 2d 1026 (Fla. 2d DCA 2002).

Thereafter, the petitioners in these consolidated cases filed with the trial court copies of the proposed deposition questions, together with written objections to each question. Again, following hearings on the contested questions, the court ordered each petitioner to submit to a deposition and to answer the State's questions, with some limitations. The trial court stayed the orders pending review in this court.

The petitioners again ask this court to quash the orders allowing their depositions to be taken or alternatively, to issue a writ of prohibition to the State Attorney of the Twelfth Judicial Circuit of Florida to prevent the State from deposing them. This court has previously [\*\*4] held that [HN2] Jimmy Ryce detainees in this type of civil commitment proceeding do "not have any absolute privilege to avoid the discovery process." *Sutton*, 828 So. 2d at 1082. Accordingly, this aspect of the petitioners' arguments has no merit.

The petitioners also seek certiorari relief from the trial court's rulings on their objections to the questions proposed by the State. In *Martin-Johnson, Inc. v. [\*\*202] Savage*, 509 So. 2d 1097 (Fla. 1987), the court explained the limits on the use of petitions for writs of certiorari to obtain review of an order granting discovery. The court emphasized that [HN3] certiorari is an "extraordinary remedy" that "should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." *Id.* at 1098. The court noted that while orders granting discovery had traditionally been reviewed by certiorari, not every erroneous discovery order creates certiorari jurisdiction in an appellate court. *Id.* at 1100. A nonfinal order granting discovery will be reviewed by certiorari only when the order departs from the essential requirements of the law and causes [\*\*5] irreparable injury to the petitioner throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal. *Id.* at 1099. As explained below, the petitioners have failed to show either.

The petitioners have objected to every question posed to them, including questions as innocuous as those requesting their date of birth, on the ground that the information sought is protected by the Fifth Amendment. In essence, the petitioners have done nothing more than raise a blanket assertion of their Fifth Amendment privilege, something we have previously held is not available to these petitioners because of the civil nature of these proceedings. See *Smith*, 827 So. 2d at 1029. Nevertheless, the trial court did make individual determinations regarding whether certain questions sought privileged information, and the petitioners have challenged those determinations in their petitions.

[HN4] A witness is generally entitled to invoke the Fifth Amendment privilege against self-incrimination whenever there is a realistic possibility that his answer to a question can be used in any way to convict him of a crime. It need not be probable that a criminal [\*\*6] prosecution will be brought or that the witness's answer will be introduced in a later prosecution; the witness need only show a realistic possibility that his answer will be used against him. Moreover, the Fifth Amendment forbids not only the compulsion of testimony that would itself

be admissible in a criminal prosecution, but also the compulsion of testimony, whether or not itself admissible, that may aid in the development of other incriminating evidence that can be used at trial.

[HN5] The privilege is inapplicable only "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness."

*DeLisi v. Bankers Ins. Co.*, 436 So. 2d 1099, 1101 (Fla. 4th DCA 1983) (quoting *Pillsbury Co. v. Conboy*, 459 U.S. 248, 266 n.1, 74 L. Ed. 2d 430, 103 S. Ct. 608 (1983) (Marshall, J. concurring)) (internal citations omitted). [HN6] If the self-incriminating nature of the question is not clear from the face of the question, the party claiming the privilege may be required to provide sufficient information on which a trial court may find that a reasonable danger of incrimination exists. *M.S.S. v. DeMaio*, 503 So. 2d 1384 (Fla. 5th DCA 1987). [\*\*7] The trial court has the ultimate responsibility to determine whether the witness's refusal to answer questions is in fact justifiable under the privilege. *Id.* at 1386. The trial court has broad discretion to determine what answers provided in discovery may incriminate or tend to incriminate a litigant. *DeLisi v. Smith*, 423 So. 2d 934 (Fla. 2d DCA 1982).

The petitioners have failed to demonstrate that the trial court departed from the essential requirements of law in its rulings on their Fifth Amendment claims. The record reflects that the petitioners [\*\*203] presented no argument to the trial court regarding most of their Fifth Amendment objections. With respect to the objections that they did argue, the trial court properly limited the scope of inquiry where the questions on their face appeared to call for a potentially incriminating response. To the extent that the trial court did not sustain the petitioners' objections, it was with respect to questions that on their face did not appear to call for an incriminating response. The petitioners' conclusory argument that the responses to those questions "may well include" or "could easily include" incriminating [\*\*8] information is not adequate to meet their burden to demonstrate that there is a realistic possibility that the answer to those questions could be used to convict them of a crime. See *Smith*, 827 So. 2d at 1029.

The petitioners also objected to each question posed by the State on the grounds that the questions sought information that was "irrelevant and immaterial to this action, cumulative, and multiplicitous" and that "the information requested is already known to the State, and is thus intended only to annoy, embarrass, oppress, and create undue burden and expense." [HN7] Certiorari generally does not lie to review the relevance of discovery, since the disclosure of information that is merely irrelevant is not likely to cause irreparable harm. *Wal-Mart Stores, Inc. v. Cumming*, 736 So. 2d 1248 (Fla. 4th DCA 1999). The petitioners have failed to demonstrate that any irreparable harm will come to them from disclosure of the information they contend is irrelevant. Nor have the petitioners met their burden to demonstrate that they will be harmed by the discovery they claim is burdensome. [HN8] An objection claiming an undue burden in responding to discovery requests [\*\*9] must be supported by record evidence, such as an affidavit detailing the basis for claiming that the onus of supplying the information or documents is inordinate. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197 (Fla. 4th DCA 2000). The petitioners did not make such a showing; instead, they relied on unsupported and conclusory claims of undue burden and expense.

Singleton, Rhoades, Beikirich, DeMarco, and Smith objected to every question posed by the State on the grounds that the questions sought information which was protected by the right to privacy in the United States Constitution and in article I, section 23 of the Florida Constitution; Sutton objected to all but a few. At the hearings on their objections, the petitioners presented no argument to the trial court regarding many of their privacy objections, and in their petitions, they have abandoned all but a few of the objections that were argued.

The threshold question we must address is whether the petitioners have established that those questions seek information that is within the scope of the protection offered under either the United States or the Florida Constitutions. [HN9] The right to privacy under federal [\*\*10] law protects areas such as marriage, procreation, family relationships, and the rearing and education of children. *Bd. of County Comm'rs v. D.B.*, 784 So. 2d 585 (Fla. 4th DCA 2001). The petitioners have failed to demonstrate that the challenged questions touch on areas protected by the federal right to privacy.

The Florida Constitution sets forth a right to privacy in article I, section 23, which provides:

[HN10] Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

[HN11] [\*204] Florida's right to privacy is broader than the federal right to privacy. Before the right to privacy attaches, there must be a legitimate expectation of privacy. *City of N. Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). Determining whether an individual has a legitimate expectation of privacy must be made by considering all the circumstances, especially objective manifestations of that expectation. *Id.* at 1028. Thus, we must [\*\*11] first decide whether an inmate detained under the Jimmy Ryce Act has a reasonable expectation of privacy in the areas inquired into by the State.

The petitioners objected to a question that asked them to state their familial relationship with the victim and witnesses in the cases in which they had been convicted. The petitioners have not demonstrated that they have a legitimate expectation of privacy with respect to this information. In apparent recognition of this fact, the petitioners have attempted to argue that the question could be interpreted as seeking information that "may be internal to the family." We find no merit in this contention because the trial court limited the State's inquiry to whether the petitioners are related by blood or marriage to the victims or witnesses. Given this limitation, there is no possibility that the question might seek information that is "internal to the family."

The petitioners also objected to a series of questions regarding their physical health and their "psychological and psychiatric health and treatment." With the exception of one question, each question regarding their mental health pertained to whether the petitioners may have sought, [\*\*12] been offered, or received psychiatric or psychological treatment while incarcerated or while detained, or if they had ever been ordered by a court to seek such treatment. The petitioners have not offered any explanation regarding how these questions intrude into an area in which they have a legitimate expectation of

privacy, nor have we been able to deduce one in light of the fact that section 394.921, Florida Statutes (2002), allows the disclosure of this type of information to, among others, the state attorney.

The one question that did not pertain to the petitioners' treatment or lack thereof while in custody sought information regarding any mental health treatment or diagnosis the petitioners may have received at any time. While it appears that this question may touch on matters to which the petitioners might have a legitimate expectation of privacy, given the nature of the proceedings, that expectation is clearly outweighed by the State's compelling interest in the long-term control, care, and treatment of sexually violent predators. *See Jackson v. State*, 833 So. 2d 243 (Fla. 4th DCA 2002) (holding that the court should balance the defendant's [\*\*13] right to privacy with the State's legitimate access to medical and psychological records of sexually violent predators). To the extent that any of the questions pertaining to their physical health may seek information that is protected as private, we conclude that the trial court did not abuse its discretion when it found that the State successfully demonstrated that its need for the information outweighed the petitioners' right to privacy, which, given the petitioners' status as Jimmy Ryce detainees, is minimal. *See id.* at 245; *see also State v. Johnson*, 814 So. 2d 390 (Fla. 2002) (stating that although a patient's medical records enjoy a confidential status by virtue of the state constitutional right to privacy, the right to privacy will yield to compelling governmental interests).

The petitioners also objected to a question that sought information regarding their thoughts and feelings about the offenses for which they have been convicted. [\*205] Although a person's thoughts may be protected as private, in the context of these proceedings, any right these petitioners may have to keep their thoughts private is likewise outweighed by the State's interest [\*\*14] in obtaining the information sought by this question. *See Shaktman v. State*, 553 So. 2d 148 (Fla. 1989) (noting that [HN12] the right of privacy demands that individuals be free from uninvited interference into their thoughts and actions unless the intrusion is warranted by a compelling state interest).

The petitioners also assert that information pertaining to their mental and physical health is protected by a variety of statutes that protect the confidentiality of medical records. On their face, the questions do not

appear to implicate the statutory provisions on which the petitioners have relied. Nor have the petitioners' arguments demonstrated that those provisions are applicable to the questions the State has posed. The petitioners claim that some of the questions seek information protected by both the work product and attorney-client privilege.

[HN13] Although it is impossible to give a precise definition of "attorney work product" that can be applied to all situations, it can be generally defined as "[p]ersonal views of the attorneys as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, [\*\*15] personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his convenience, but not to be used as evidence."

2004) (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970)). [HN14] The attorney-client privilege protects confidential communications between a lawyer and client. *Jenney v. Airdata Wiman, Inc.*, 846 So. 2d 664 (Fla. 2d DCA 2003). The burden to establish the existence of a privilege is on the party asserting the privilege. Fla. R. Civ. P. 1.280(b)(5); *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997).

On their face, the questions the petitioners find objectionable do not appear to call for information protected by the work product or attorney-client privileges, and the petitioners have not presented any argument that would lead us to conclude that they in fact seek privileged information. Thus, the petitioners have not met their burden to demonstrate that the trial court departed from the essential requirements of law in ordering [\*\*16] them to answer the questions. See *Wal-Mart*, 696 So. 2d at 856.

The petitions are denied.  
STRINGER and COVINGTON, JJ., Concur.

LEXSEE 531 SO. 2D 113

**DEMPSEY J. BARRON, Petitioner, v. FLORIDA FREEDOM NEWSPAPERS,  
INC., Respondent**

No. 70,910

Supreme Court of Florida

531 So. 2d 113; 1988 Fla. LEXIS 893; 57 U.S.L.W. 2180; 15 Media L. Rep. 1901;  
13 Fla. L. Weekly 497

August 25, 1988

**SUBSEQUENT HISTORY:**

[\*\*1] Rehearing Denied September 28, 1988.

**PRIOR HISTORY:** Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions, First District - Case No. BQ-113.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Application was made for review of the decision of the First District Court of Appeal (Florida), which reversed a trial court order sealing a substantial portion of the court file in petitioner's dissolution proceeding despite respondent newspaper's opposition on the basis of a direct conflict of decisions.

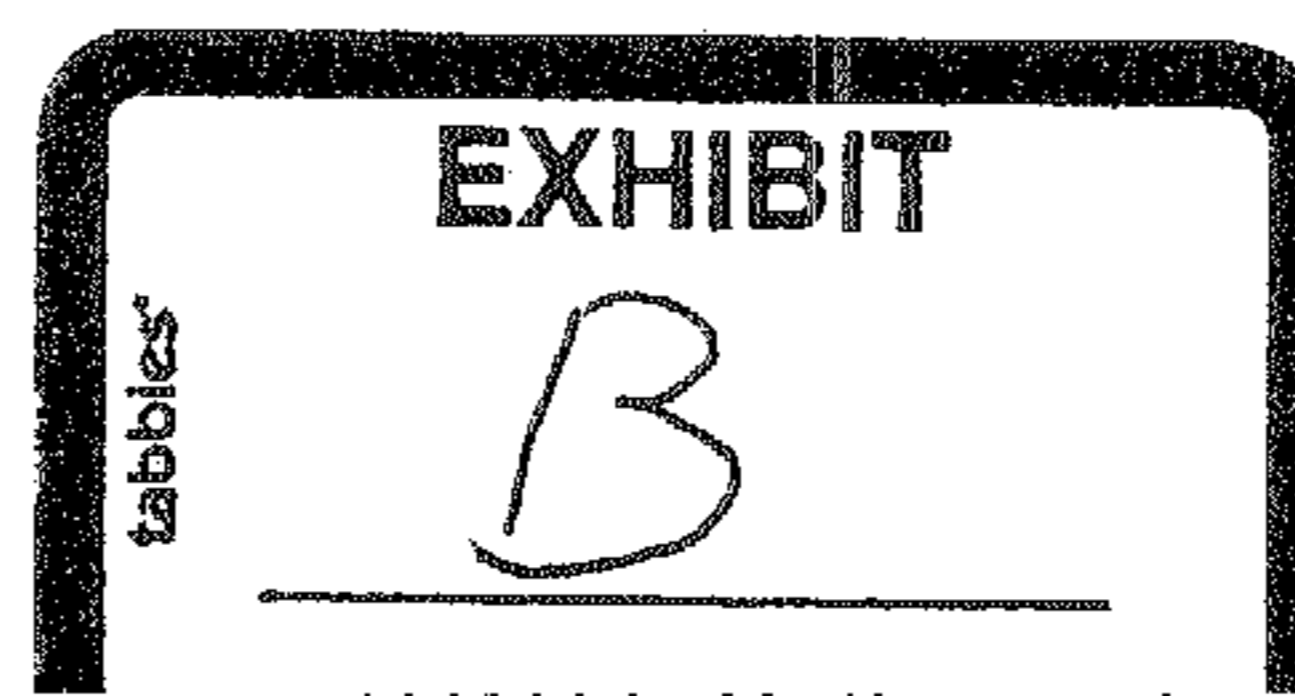
**OVERVIEW:** The lower court reversed the trial court's decision approving sealing of a portion of the record in a dissolution proceeding and review was sought on the basis of a direct conflict of decisions. The court affirmed although disagreeing in part with the district court's reasoning and the order sealing the file was vacated. There was a strong presumption of public access to civil as well as criminal court proceedings and records and, because of that presumption, a closure order had to be drawn with particularity and narrowly applied. The standards applied to closure in criminal cases were not drawn to address closure in civil proceedings. The medical information ordered sealed did not fall within any of the exceptions to openness the court set forth for the lower courts' guidance. Dissolution proceedings were to be treated the same as other civil proceedings as to the

presumption of openness and the burden of proof was on the party requesting closure. A party's medical condition was relevant in determining appropriate alimony, child support, and property disposition and, therefore, was an inherent part of the proceedings and not an appropriate basis for closure.

**OUTCOME:** The decision of the lower court reversing the trial court's order of closure of certain medical information in a dissolution proceeding was affirmed and the order closing portions of the record was vacated. The strong presumption of openness in civil proceedings was not overcome where the medical information the trial court had sealed was information inherent to the disposition of the proceedings.

**LexisNexis(R) Headnotes**

*Constitutional Law > Bill of Rights > General Overview*  
[HN1] Both civil and criminal court proceedings in Florida are public events and there is a well-established common law right of access to court proceedings and records. There is no special perquisite of the judiciary that enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events that transpire in proceedings before it. U.S. Const. amend. I and XIV clearly give the press and public a right of access to trials themselves, civil as well as criminal. The reason for openness is basic to the U.S. form of government. Public trials are essential to the judicial system's credibility in a free society.



*Constitutional Law > Bill of Rights > General Overview*

[HN2] While a strong presumption of openness in judicial proceedings exists, the law has established numerous exceptions to protect competing interests. These exceptions fall into two categories: the first includes those necessary to ensure order and dignity in the courtroom and the second deals with the content of the information. Because of the strong openness presumption, a closure order must be drawn with particularity and narrowly applied.

*Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Impartial Jury**Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions**Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Bias & Prejudice > Right to an Unbiased Jury*

[HN3] Trial judges must apply the following three-pronged test when considering closure of criminal court proceedings: 1. Whether closure is necessary to prevent a serious and imminent threat to the administration of justice; 2. If no alternatives are available, other than a change of venue, which would protect defendant's right to a fair trial; and 3. If closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose. This test, derived primarily because of U.S. Const. amend. I contentions, was designed to address the problems of prejudicial pretrial publicity and the competing constitutional rights to a fair trial by an impartial jury for criminal defendants. The test was not conceived or drawn to address closure in civil proceedings.

*Constitutional Law > Bill of Rights > General Overview Governments > Courts > Authority to Adjudicate*

[HN4] The court, under its inherent power, may for cogent reasons exclude the public and press from any judicial proceeding to protect the rights of the litigants and to otherwise further the administration of justice. In determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation with those of the public and press. The type of civil proceeding, the nature of the subject matter, and the status of the participants are factors to be considered when evaluating the cogent reasons for excluding the public and press from access to the courts.

*Constitutional Law > Bill of Rights > General Overview Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures**Family Law > Paternity & Surrogacy > General Overview*

[HN5] Dissolution proceedings are regulated by statute and are unique because the state is considered an interested third party to protect the public welfare. While Florida, as a matter of public policy, has expressly made certain civil proceedings confidential, such as adoptions, paternity, and juvenile proceedings, and some states have enacted legislation limiting public access to divorce proceedings, the Florida Legislature has chosen not to do so.

*Constitutional Law > Bill of Rights > General Overview**Criminal Law & Procedure > Juvenile Offenders > Records**Family Law > Marital Termination & Spousal Support > General Overview*

[HN6] In *Sentinel Communications Co. v. Smith*, 439 So. 2d 1048 (1986), the Fifth District Court of Appeal held that parents and children in a dissolution proceeding had privacy rights that justified closure of the court file. That decision is disproved to the extent it implies that parties to all dissolution proceedings involving minor children have an absolute privacy right to seal the file. That portion placing the burden of proof on the challenging party rather than the party seeking closure is also disproved.

**COUNSEL:**

Sharon Lee Stedman of Rumberger, Kirk, Caldwell, Cabaniss, Burke & Wechsler, Orlando, Florida, for Petitioner.

Franklin R. Harrison and William A. Lewis of Sale, Brown & Smoak, Chartered, Panama City, Florida, for Respondent.

C. Gary Williams, Michael J. Glazer and Timothy B. Elliott of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Florida, Amicus Curiae, for Tallahassee Democrat, Inc.

William G. Mateer, David L. Evans and Clay H. Coward of Mateer, Harbert & Bates, P.A., Orlando, Florida, Amicus Curiae, for Sentinel Communications Company.

Gerald B. Cope, Jr. and Laura Besvinick of Greer, Homer, Cope & Bonner, P.A., Miami, Florida, and Richard J. Ovelmen, The Miami Herald Publishing Company, Miami, Florida, Amicus Curiae, for The Miami Herald Publishing Company.

George K. Rahdert and Bonita M. Riggins of Rahdert, Acosta & Dickson, P.A., St. Petersburg, Florida, Amicus Curiae, for The Times Publishing Company.

#### JUDGES:

Overton, J., Shaw, Grimes and Kogan, JJ., concur. Ehrlich, C.J., concurs in the result [\*\*2] only with an opinion. Barkett, J., concurs specially with an opinion. McDonald, J., dissents with an opinion.

#### OPINION BY:

OVERTON

#### OPINION:

[\*114] This is a petition to review *Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d 462 (Fla. 1st DCA 1987), which reversed a trial court order sealing a substantial portion of the court file in a dissolution proceeding between Dempsey J. Barron, a state senator, and Louverne Barron. The district court acknowledged conflict with *Sentinel Communications Co. v. Smith*, 493 So. 2d 1048 (Fla. 5th DCA 1986), review denied, 503 So. 2d 328 (Fla. 1987). We find the district court expressly construed article I, section 23, of the Florida Constitution, agree there is conflict, and accept jurisdiction. \*

\* Art. V, § 3(b)(3), Fla. Const.

We hold that *all* trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions. We have articulated principles that govern these exceptions and, after applying them to this case, we find no basis to seal the file. Although we disagree in part [\*\*3] with the district court's reasoning, we approve the result.

On January 28, 1986, Louverne Barron filed a petition for dissolution of marriage in the Bay County Circuit Court against her husband, Dempsey Barron. In early September, after an answer was filed, the wife

sought to amend her petition and add Terri Jo Kennedy, the executive director of the rules committee of the Florida Senate, as a party defendant. The husband immediately filed a motion to seal the file. The trial court granted the wife's motion to add Kennedy as a party defendant and entered a summary order sealing the file.

Approximately three weeks later, the respondent, Florida Freedom Newspapers, Inc., filed motions to intervene in the proceeding and to set aside the closure order. The trial judge permitted intervention but denied the motion to set aside the closure [\*115] order with an explanatory order expressly relying on *Sentinel Communications* and *State ex rel. Gore Newspaper, Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th DCA 1975), overruled on other grounds, *English v. McCrary*, 348 So. 2d 293 (Fla. 1977). [\*\*4] The judge explained that the court, through its inherent power, may exclude the public and press from any judicial proceedings to protect the litigants' rights if "cogent reasons" exist. He found that a "cogent reason" for closure was presented but stated that any expression of that reason in the court's order would have "then in fact . . . done away with the reason to keep the file sealed." Further, the court held that the information was "uniquely private to the individual involved" and "the public records act does not apply to this information."

Florida Freedom Newspapers, Inc., sought appellate review under rule 9.100(d), Florida Rules of Appellate Procedure, asserting that the order excluded the press and public from access to judicial records, and requested a stay of the dissolution proceeding pending resolution of the closure issue. The district court granted the stay. Subsequently, the wife sought to vacate the stay explaining that this collateral issue was causing her hardship by preventing the continuation of the dissolution proceeding. The district court vacated the stay, summarily affirmed the order sealing the records, and stated that an opinion would follow.

Within a [\*\*5] month, the trial court held a final hearing and entered a final judgment, part of which was sealed. The unsealed portion dissolved the marriage; made equitable distribution of the property; ordered the husband to allow the wife to continue as a beneficiary under his insurance policy until May 31, 1990; ordered the husband to pay \$500 a month periodic alimony; determined that Dempsey Barron's conveyance to Terri Jo Kennedy of a life estate in real property in Wyoming was fraudulent and ordered it set aside; and ordered the

531 So. 2d 113, \*115; 1988 Fla. LEXIS 893, \*\*5;  
57 U.S.L.W. 2180; 15 Media L. Rep. 1901

husband to pay one-half of the wife's attorney's fees. The public part of the judgment referred to the sealed portion and stated:

2. This court's order setting forth findings of fact shall be incorporated into and made part of this final judgment, but due to this court's order sealing the file, that order will remain a part of the sealed court file. This final judgment however shall not be part of the sealed court file if either the husband or the wife need to present certified copies of the judgment for whatever purposes they may deem appropriate.

The sealed order containing the findings of fact is ten pages in length, while the unsealed portion is three pages. [\*\*6] Neither party appealed this final judgment.

Subsequently, on June 1, 1987, the district court rendered an opinion overruling its prior order and directed that the file be opened. In explaining its changed position, the court expressed its inability to accept the principles set forth in *Sentinel Communications* and rejected the trial court's finding that a cogent reason existed for closing the proceeding. The court stated:

We do not find the facts upon which the trial court based this finding to be sufficiently compelling to require the proceedings be conducted in private, thereby denying the public, including the press, the right to attend these proceedings and the right to examine the court file. In essence, one of the parties wished to conduct the proceedings in private to prevent the disclosure of certain information the party would otherwise prefer not be made public. The information is of a somewhat general nature and not specifically tied to a domestic relations case. The information is not related to the marital relationship nor its breakup, to the welfare of the children, nor to the marital property. The party affected suggests it is related to present and future financial [\*\*7] support. This may be so, but we do not find this reason

to be sufficiently compelling, rising to the level that would deny the party an opportunity to receive a fair trial, to justify closing these proceedings.

*Florida Freedom Newspapers, Inc. v. Sirmons*, 508 So. 2d at 464-65 (footnotes omitted). The court also concluded that there was "no reason why the three-pronged test [\*116] set forth in *Miami Herald Publishing Company v. State*, 363 So. 2d 603 (Fla. 4th DCA 1978), [would] not work as well in civil cases." *Id.* at 464 (footnote omitted). Further, the court held that the privacy provision in article I, section 23, of the Florida Constitution, providing that citizens of this state shall have the "right to be let alone from government intrusion," is inapplicable to this type of proceeding. *Id.* at 463. In a concurring opinion, Judge Nimmons expressed the view that this constitutional provision must "be taken into consideration by trial courts in the determination of whether access to a civil court proceeding by the public and the press should be limited or denied," *id.* at 465 (footnote omitted), but agreed with the majority [\*\*8] that the "grounds for closure presented by Barron and relied upon by the trial court were insufficient to overcome the heavy *common law* presumption in favor of access." *Id.* at 466.

In this review, Dempsey Barron argues that the trial court properly found a cogent reason for closure and that, upon that determination, an appellate court must limit an inquiry to whether or not the trial court abused its discretion. Further, he argues that since dissolution proceedings do not involve the state and are private in nature, the parties involved have a fundamental statutory and constitutional right of privacy to have their files sealed regardless of their public-figure status. We reject these arguments for the reasons expressed below.

#### *Public Access to Civil Court Proceedings*

At the outset, we hold that [HN1] both civil and criminal court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and records. In *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 1546 (1947), the United States Supreme Court held: "A trial is a public event. What transpires in the court room is [\*\*9] public property. . . . There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic

531 So. 2d 113, \*116; 1988 Fla. LEXIS 893, \*\*9;  
57 U.S.L.W. 2180; 15 Media L. Rep. 1901

government, to suppress, edit, or censor events which transpire in proceedings before it." In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980), Chief Justice Burger stated: "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." In a concurring opinion, Justice Stewart expressed that "the first and fourteenth amendments clearly give the press and public a right of access to trials themselves, civil as well as criminal." *Id.* at 599. See also *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), cert. denied, 465 U.S. 1100, 104 S. Ct. 1595, 80 L. Ed. 2d 127 (1984); *In re Astri Investment, Management & Securities Corp.*, 88 Bankr. 730 (D. Md. 1988). [\*\*10]

While this Court has recognized the common law right of access to criminal proceedings in *Bundy v. State*, 455 So. 2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986), and *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982), we have not expressly done so in civil proceedings. The reason for openness is basic to our form of government. Public trials are essential to the judicial system's credibility in a free society. The Supreme Court of California, in *In re Shortridge*, 99 Cal. 526, 530-31, 34 P. 227, 228-29 (1893), justified the public's right to know what transpires in both civil and criminal courtrooms and stated:

In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong, and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions, in which the sovereign will of the people is the paramount idea; and the [\*\*11] greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is [\*117] consistent with truth and decency, are regarded as essential to the public welfare. Therefore, when it is claimed that

this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred.

Wigmore also articulated reasons for public access to all court proceedings, explaining:

The publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony . . . . Nevertheless, it plays an important part as a security for testimonial trustworthiness . . . .

(1) Its operation in tending to *improve the quality of testimony* is twofold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated [\*\*12] liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.

...

(2) The other reasons . . . for requiring publicity are of three distinct sorts:

(a) Subjectively, a wholesome effect is produced, analogous to that secured for witnesses, upon all the officers of the court, in particular, upon judge, jury, and counsel. In acting under the public gaze, they are more strongly moved to a strict conscientiousness in the performance of

duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public.

(b) Persons not called as parties to the suits before the court may nevertheless be affected, or think themselves likely to be affected, by pending litigation. They should have the opportunity of learning whether they are thus affected, and of protecting themselves accordingly; they have [\*\*13] "a right to be present for the purpose of hearing what is going on."

(c) The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy . . . .

the defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

[\*118] 426 So. 2d at 6. This test, derived primarily because of first amendment contentions, was designed to address the problems of prejudicial pretrial publicity and the competing constitutional rights to a fair trial by an impartial jury for criminal defendants. The test was not conceived or drawn to address closure in civil proceedings.

In *State ex rel. Gore Newspaper Co. v. Tyson*, the Fourth District addressed the closure of a dissolution proceeding. The court reversed a closure order and stated that it could not permit closure "solely upon the wishes of the parties to the litigation, absent cogent reasons." 313 So. 2d at 788. The court recognized the trial court's authority to close civil proceedings, stating:

6 Wigmore, Evidence § 1834 (Chadbourn rev. 1976)(emphasis in original; footnotes omitted). We fully approve the reasoning of *Shortridge* and Wigmore.

[HN2] While a strong presumption of openness in judicial proceedings exists, the law has established numerous exceptions to protect competing interests. These exceptions fall into two categories: the first includes those necessary to ensure order and dignity in the courtroom and the second deals with the content of the information. We address only the second category in this case. Because of the strong openness presumption, a closure order must be drawn with particularity and narrowly applied.

In *Miami Herald Publishing Co. v. Lewis*, we modified the Fourth District's test regarding closure of criminal proceedings. We directed that [HN3] trial judges apply the following three-pronged [\*\*14] test when considering closure of criminal court proceedings:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
2. No alternatives are available, other than a change of venue, which would protect

[HN4] The court, [\*\*15] under its inherent power, may for cogent reasons exclude the public and press from any judicial proceeding to protect the rights of the litigants and to otherwise further the administration of justice;

In determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation with those of the public and press;

The type of civil proceeding, the nature of the subject matter and the status of the participants are factors to be considered when evaluating the cogent reasons for excluding the public and press from access to the courts.

*Id.* at 787. We are in general agreement with this holding, recognizing that trial courts may exercise their power to close all or part of a proceeding in limited circumstances. In this regard, we feel that a definitive

statement by this Court is necessary to assist judicial officers in this sensitive area. We conclude that the following factors must be considered to determine a request for closure of a civil proceeding.

First, a strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court [\*\*16] proceedings are public records available for public examination.

Second, both the public and news media shall have standing to challenge any closure order. The burden of proof in these proceedings shall always be on the party seeking closure.

Third, closure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. We find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f). In this [\*\*17] regard, we disagree with the district court in the instant case. Further, we note that it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted. However, a privacy claim may be negated if the content of the subject matter directly concerns a position of public trust held by the individual seeking closure.

Fourth, before entering a closure order, the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose.

Fifth, the presumption of openness continues through the appellate review process, and the party seeking closure continues to have the burden to justify closure. This heavy burden is placed on the party seeking closure

not only because of the strong presumption of openness but also because those challenging the order will [\*119] generally have little or no knowledge of the specific grounds requiring closure.

We find no justification to give dissolution proceedings special consideration, as advocated by Dempsey [\*\*18] Barron. The parties seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system. [HN5] Dissolution proceedings are regulated by statute and are unique because the state is considered an interested third party to protect the public welfare. See e.g., *Perez v. Perez*, 164 So. 2d 561 (Fla. 3d DCA 1964); *Harman v. Harman*, 128 So. 2d 164 (Fla. 3d DCA 1961). While Florida, as a matter of public policy, has expressly made certain civil proceedings confidential (adoptions, § 63.162, Fla. Stat. (1987); paternity, § 742.031, Fla. Stat. (1987); juvenile proceedings, § 39.09 and 39.408, Fla. Stat. (1987)) and some states have enacted legislation limiting public access to divorce proceedings (Cal. [Civ.] Code § 4360 (Deering 1984); Del. Code Ann. tit. 13, § 1516 (1981)), the Florida Legislature has chosen not to do so. We conclude that dissolution proceedings must be treated similar to other civil proceedings, and thus the presumption of openness applies.

[HN6] In *Sentinel Communications*, the Fifth District held that parents and children in a dissolution proceeding had privacy rights [\*\*19] that justified closure of the court file. We disapprove that decision to the extent it implies that parties to *all* dissolution proceedings involving minor children have an absolute privacy right to seal the file. We also disapprove that portion placing the burden of proof on the challenging party rather than the party seeking closure. We agree with the closure in *Sentinel Communications* because of the express finding of injury to an innocent third party. In that proceeding, the trial judge determined that a minor child had been adversely affected by the litigation and that continued publicity would in all likelihood be "highly detrimental" to that child. That factual finding makes it distinguishable from the instant case.

#### *The Instant Case*

After thoroughly reviewing the sealed and unsealed portions of the instant case and applying the principles outlined above, we conclude that the sealed portion of this file does not contain protected information. The

531 So. 2d 113, \*119; 1988 Fla. LEXIS 893, \*\*19;  
57 U.S.L.W. 2180; 15 Media L. Rep. 1901

undisclosed matter primarily concerns medical reports regarding one party's physical condition. That party asserted the condition to justify certain actions and conduct. Although generally protected by one's privacy right, medical [\*\*20] reports and history are no longer protected when the medical condition becomes an integral part of the civil proceeding, particularly when the condition is asserted as an issue by the party seeking closure. The sealed findings of fact here clearly establish that the medical records were an integral part of this case. This medical information is similar to that presented in personal injury actions, workers' compensation proceedings, and other dissolution of marriage proceedings. In dissolution proceedings, it is not unusual for a party's medical condition to be relevant in determining appropriate alimony, child support, or property disposition. Accordingly, we conclude that the medical information is an inherent part of these proceedings and cannot be utilized as a proper basis for closure. In view of this holding, it is unnecessary to determine whether the public positions held by Dempsey Barron and Terri Jo Kennedy create an additional basis to open these proceedings.

For the reasons expressed, we agree with the district court that there was no justifiable basis for closure. Upon this opinion's becoming final, [\*\*21] the order sealing the file will be vacated and the entire file will be open and available for examination in the same manner as any other court file.

It is so ordered.

Shaw, Grimes and Kogan, JJ., concur. Ehrlich, C.J., concurs in the result only with an opinion. Barkett, J., concurs specially with an opinion. McDonald, J., dissents with an opinion.

CONCUR BY:

EHRlich; BARKETT

CONCUR:

[\*120] EHRlich, C.J., concurring in result only with opinion.

I would approve the district court's decision reversing the trial court's order closing the court file. I agree with the majority that the three-prong test set forth in *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1

(Fla. 1982), applicable to closure of pretrial criminal proceedings was not designed to address factors to be considered when closing civil proceedings. I also concur with all aspects of the test for closure adopted by the majority with the exception of reason (f) which is based on a litigant's right of privacy. Because I do not believe that article I, section 23, of the Florida Constitution is implicated in judicial proceedings, the privacy interests of civil litigants should not be a consideration.

This Court has recognized that before the right of privacy attaches a legitimate expectation of privacy must exist. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985). We have [\*\*22] also recognized that "the potential for invasion of privacy is inherent in the litigation process." *Rasmussen v. South Florida Blood Service*, 500 So.2d 533, 535 (Fla. 1987). While civil litigants may have a legitimate expectation of privacy in pretrial depositions and interrogatories which are not filed with the court, see *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (pretrial depositions and interrogatories are not public components of a civil trial); *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 382 (Fla. 1987), cert. denied, 484 U.S. 953, 108 S. Ct. 346, 98 L. Ed. 2d 372 (1987) (deposition proceedings are not public component of a trial unless made so by the parties), no such expectation exists in connection with civil proceedings and court files which historically have been open to the public. See *Forsberg v. Housing Authority*, 455 So.2d 373, 375 (Fla. 1984)(Overton, J., concurring) (there is traditionally no expectation of privacy in court files). Therefore, I can not accept the majority's [\*\*23] conclusion that "under appropriate circumstances, the constitutional right of privacy . . . could form a constitutional basis for closure." 531 So.2d at 118. I agree with the district court below that article I, section 23 does not create a right to private judicial proceedings.

BARKETT, J., specially concurring.

I write to express my deep concern over the competing interests involved in this case. I agree wholeheartedly with the majority's analysis and concern for open courts in our democratic society. I cannot agree, however, that dissolution proceedings are not entitled to some special considerations.

It seems to me that the public interest in access is diminished when the issue does not involve government or questions affecting the general public. Looking purely

at the issues to be decided in dissolution of marriage cases, the public usually will not learn any information useful in assessing governmental functioning. Nor will it obtain information important in making informed decisions about matters affecting the public at large. Simultaneously, there may be grave danger that the litigants' personal rights or those of third parties will be harmed by scandalmongering, the sole effect [\*\*24] of which is to undermine reputation, privacy or justice.

I agree with the United States Supreme Court's observation that access can be denied where it would be "used to gratify private spite or promote public scandal' through the publication of 'painful and sometimes disgusting details of a divorce case'." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (quoting *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893)).

By their very nature, dissolution cases always involve significant privacy rights. Thus, the privacy interests in those cases must be given greater consideration than, perhaps, in other kinds of civil litigation.

**DISSENT BY:**

McDONALD

**DISSENT:**

[\*121] McDONALD, J., dissenting.

In my opinion, the rights of the public to information contained in a domestic relations lawsuit is minimal, if existent at all. \* At the very least, a trial judge has the discretion to weigh the public's desire to satisfy its curiosity against the litigant's right to keep private matters peculiarly private to him or her. Otherwise a litigant may be faced with the decision of whether or not to present [\*\*25] relevant or vital evidence because of fear that the disclosure would harm one party or another.

\* I fully agree that the public has access to the evidence in criminal trials, because the public, in effect, is a party to criminal cases. Such a situation may exist in some types of civil cases. On the other hand, I feel that domestic relations controversies are basically private and access to the facts in such cases can more readily be limited.

In this case, the trial judge weighed the public's access rights against potential private harm. Mr. Barron relied on the ruling of closure in presenting his evidence. Had he known that the evidence would be subject to the eyes of third parties, he may not have presented it. In any event, I fail to see where the trial judge's discretion in closing the file was abused, and his actions should therefore be affirmed.