



1 The following exhibits were stricken from Intervenor's' briefs on  
 2 this court's own motion pursuant to CCP §436 because the court finds  
 3 them to be irrelevant: Exhibits A, B, D, E, F to the Declaration of  
 4 Susan Seager filed December 21, 2004; Exhibit G to the Intervenor's'  
 5 Reply filed February 10, 2005.

6 The court reiterates its reasoning from the hearing on February 18,  
 7 2005, that the issue before this court has nothing to do with the  
 8 specific facts of Mr. Burkle's newsworthiness. That certain items  
 9 sought to be sealed have previously been disseminated is likewise not a  
 10 consideration. This court's analysis is limited to whether Family Code  
 11 §2024.6 is facially invalid by constitutional restraint.

12 THE COURT NOW RULES AS FOLLOWS:

13 The court is persuaded that Family Code §2024.6 violates the 1<sup>st</sup>  
 14 Amendment to the U. S. Constitution as applied through the 14<sup>th</sup>  
 15 Amendment. The court finds that while there is a compelling state  
 16 interest underpinning Family Code §2024.6, it is not narrowly tailored  
 17 to effectuate that interest and unduly burdens the competing  
 18 Constitutional right of public access to civil court proceedings and  
 19 records. The court concludes the statute is overbroad because it  
 20 mandates sealing entire pleadings to protect a limited class of  
 21 specified material. The court also observes that the defect is readily  
 22 curable by the Legislature.

23 The procedural history is that on December 21, 2004, Respondent  
 24 RONALD BURKLE brought before this court an ex parte application to seal  
 25 specified pleadings within the court's file, pursuant to Family Code  
 26 §2024.6. The ex parte notice was proper, and the application completely  
 27 conformed to statutory requirements. The court would have been obliged  
 28 to grant the application had there not been a concurrent ex parte

1 application by The Los Angeles Times Communications LLC and The  
2 Associated Press to intervene. The court granted leave to intervene for  
3 the reasons stated in the Intervenor's ex parte application. The court,  
4 presuming the statute's validity, ordered a provisional seal in  
5 compliance with §2024.6. The court did not weigh or balance any factor  
6 in ordering the provisional seal. The court set a briefing schedule and  
7 calendared oral argument for February 18, 2005. Petitioner JANET BURKLE  
8 filed a Petition for a Writ of Mandate against the provisional sealing  
9 order. The Court of Appeal denied that petition without prejudice to  
10 renewing it after the court's order today.

11 There is no dispute that Family Code §2024.6 must be presumed to be  
12 Constitutional, and all reasonable doubts and intendments must be  
13 resolved in favor of a duly enacted statute's validity. Lockyer v. City  
14 and County of San Francisco (2004) 33 Cal.4th 1055. The party  
15 challenging validity has the burden of persuasion. The court also  
16 recognizes that it must presume the existence of facts supporting  
17 legislative judgment.

18 The parties are in accord that the proper analysis is articulated  
19 in Globe Newspaper v. Superior Court for the County of Norfolk (1982)  
20 457 U.S. 596, 606-607: "Where ... the State attempts to deny the right  
21 of access in order to inhibit the disclosure of sensitive information,  
22 it must be shown that the denial is necessitated by a compelling  
23 governmental interest, and is narrowly tailored to serve that interest."  
24 (Intervenor's Brief filed December 21, 2004 7:15-8:2; Respondent's Brief  
25 filed January 26, 2005 5:6-9.)

26 NBC Subsidiary (KNBC-TV), Inc. v. The Superior Court (1999) 20  
27 Cal.4<sup>th</sup> 1178, 1222, explained in greater detail: "The United States  
28 Supreme Court and numerous unanimous lower courts have held that the

1 First Amendment of the Federal Constitution generally precludes closure  
 2 of substantive courtroom proceedings in criminal cases unless a trial  
 3 court provides notice to the public on the question of closure and after  
 4 a hearing finds that (i) there exists an overriding interest supporting  
 5 closure; (ii) there is a substantial probability that the interest will  
 6 be prejudiced absent closure; (iii) the proposed closure is narrowly  
 7 tailored to serve that overriding interest; and (iv) there is no less  
 8 restrictive means of achieving that overriding interest. Under  
 9 established principles of statutory interpretation, we must construe  
 10 California's long-standing "open court" statute (Code of Civil Procedure  
 11 section 124, hereafter "section 124") consistently with these  
 12 constitutional requirements, and applying section 124, as so construed,  
 13 to ordinary civil proceedings, we conclude that the trial court in this  
 14 case failed to comply with these requirements." The court recognizes  
 15 that these cases are distinguishable insofar as Globe Newspaper  
 16 considered criminal proceedings, and NBC Subsidiary concerned media  
 17 access to court proceedings in a civil matter, not court records. This  
 18 court nevertheless finds both cases analogous to the present issue.  
 19 Each case considered the balance between public and media access to  
 20 proceedings that had been traditionally open, and a state's interest in  
 21 protecting an individual's welfare or in preserving fairness in legal  
 22 proceedings.

23 This court must consider the balance between a traditional access  
 24 to court files in dissolution proceedings and the right to privacy. The  
 25 court does not see this as an issue, as Respondent argues, of one right  
 26 "trumping" another. Rather, as Respondent himself implicitly  
 27 acknowledges, the court's duty is to harmonize the competing rights, if  
 28 at all possible. (Respondent's Brief filed January 26, 2005, page 4.)

1 But in this instance, the court finds that the Constitutional infirmity  
2 of §2024.6 "clearly, positively, and unmistakably appears." Barratt  
3 American, Inc. v. City of San Diego (2004) 117 Cal.App.4<sup>th</sup> 809, 817.

4 The court has no difficulty in finding a compelling governmental  
5 interest underpinning the statute. The California Constitution  
6 guarantees a right to privacy at Article I §1. The California  
7 electorate amended the Constitution effective November 3, 2004, to add  
8 subsections (b) (1) - (b) (96) to Article III (and to create a subdivision  
9 (a) for the prior portions of Article III). The new portions read:

10 " (b) (1) The people have the right of access to information  
11 concerning the conduct of the people's business, and therefore, the  
12 meetings of public bodies and the writings of public officials and  
13 agencies shall be open to public scrutiny.

14 (2) A statute, court rule, or other authority, including  
15 those in effect on the effective date of this subdivision, shall be  
16 broadly construed if it furthers the people's right of access, and  
17 narrowly construed if it limits the right of access. A statute,  
18 court rule, or other authority adopted after the effective date of  
19 this subdivision that limits the right of access shall be adopted  
20 with findings demonstrating the interest protected by the  
21 limitation and the need for protecting that interest.

22 (3) Nothing in this subdivision supersedes or modifies the  
23 right of privacy guaranteed by Section 1 or affects the  
24 construction of any statute, court rule, or other authority to the  
25 extent that it protects that right to privacy, including any  
26 statutory procedures governing discovery or disclosure of  
27 information concerning the official performance or professional  
28 qualifications of a peace officer.

1 (4) Nothing in this subdivision supersedes or modifies  
2 any provision of this Constitution, including the guarantees that a  
3 person may not be deprived of life, liberty, or property without  
4 due process of law, or denied equal protection of the laws, as  
5 provided in Section 7.

6 (5) This subdivision does not repeal or nullify, expressly or  
7 by implication, any constitutional or statutory exception to the  
8 right of access to public records or meetings of public bodies that  
9 is in effect on the effective date of this subdivision, including,  
10 but not limited to, any statute protecting the confidentiality of  
11 law enforcement and prosecution records.

12 (6) Nothing in this subdivision repeals, nullifies,  
13 supersedes, or modifies protections for the confidentiality of  
14 proceedings and records of the Legislature, the Members of the  
15 Legislature, and its employees, committees, and caucuses provided  
16 by Section 7 of Article IV, state law, or legislative rules adopted  
17 in furtherance of those provisions; nor does it affect the scope of  
18 permitted discovery in judicial or administrative proceedings  
19 regarding deliberations of the Legislature, the Members of the  
20 Legislature, and its employees, committees, and caucuses.

21 Family Code §2024.6 was enacted prior to Proposition 53  
22 establishing the Constitutional amendment. Subsection (b)(3) by its own  
23 terms provides that it does not supersede §2024.6. This further  
24 buttresses the importance of the right to privacy. The electorate  
25 obviously feels the issue of privacy (not secrecy, as the Interveners  
26 choose to characterize it) is compelling enough to qualify the new  
27 expression of a right to governmental openness. The court has read and  
28 considered the legislative background and history at Exhibits A-C of

1 Respondent's Opposition filed January 26, 2005. Among the legislative  
 2 concerns was identity theft, a burgeoning crime. Some of the specific  
 3 data protected by §2024.6, such as social security or bank account  
 4 numbers, would rarely, if ever, be of legitimate public interest.  
 5 Unlike other litigants, parties to a dissolution or nullity proceeding  
 6 are compelled to place full financial disclosure into the public record.  
 7 The State has a compelling interest in protecting such sensitive data,  
 8 particularly when it demands, as it does in a dissolution proceeding,  
 9 such information be disclosed. The right of public access is not an  
 10 absolute right.

11 The legislature also expressed an intent to make the process of  
 12 sealing confidential information more streamlined and economical for  
 13 both the public and the court system. The court takes judicial notice  
 14 that it has already in this case spent considerable resources in  
 15 balancing the factors in CRC 243.1 and ordering redactions of this court  
 16 file, and welcomes innovations that simplify the process. By  
 17 identifying the specific information that should be protected, the  
 18 legislature has certainly made the process easier. But there is no  
 19 compelling state interest in streamlining the process to the point that  
 20 the court is totally divested of discretion in all instances.

21 As stated in Globe Newspaper Co. v. Superior Court for the County  
 22 of Norfolk (1982) 457 U.S. 596, 608: ". . . as compelling as that  
 23 interest is, it does not justify a mandatory closure rule, for it is  
 24 clear that the circumstances of the particular case may affect the  
 25 significance of the interest. A trial court can determine on a case-by-  
 26 case basis whether closure is necessary to protect the welfare of a  
 27 minor victim."

28 Respondent argues that, consistent with the rule that all

1 reasonable doubts must be resolved in favor of Constitutionality, this  
2 court should imply such discretion, citing People v. Connor (2004) 115  
3 Cal.App.4<sup>th</sup> 669. That decision, however, rested upon an implication that  
4 the Legislature intended court discretion, even though it failed to  
5 expressly provide for it. In the present case, there is not even a  
6 glimmer of such legislative intent, certainly not in the materials  
7 Respondent has supplied. The plain language of Family Code §2024.6 is  
8 abundantly clear that the court has only a ministerial function in the  
9 sealing process contemplated by §2024.6. This, of course, streamlines  
10 the process, but it does so with an unnecessary burden to the right of  
11 public access.

12 Respondent argues that the legislature provides for court  
13 discretion in unsealing the file, but this does not save the statute.  
14 First, it is troubling that the statute authorizes relief by *ex parte*  
15 application - a non-party would be unlikely to be able to show good  
16 cause for unsealing the pleadings because it will never have knowledge  
17 of what will be sealed along with the confidential information. The  
18 discretion to unseal does not change the fact that Family Code §2024.6  
19 constitutes a mandatory sealing of an entire pleading, not just a  
20 portion. Neither of the competing rights are absolute, and neither can  
21 be unnecessarily burdened. As suggested by the case of Globe Newspaper  
22 these competing rights are not in a fixed relationship, but a flexible  
23 one. On occasion, narrow tailing requires an adjustable waistline.  
24 Protection of the competing right of public access requires some  
25 discretion on a case-by-case basis before entire pleadings are sealed on  
26 behalf of some small portion within them.

27 The court takes judicial notice of the fact that California Rule of  
28 Court 243.1 provides that on an application for a sealing order, a

1 provisional seal of the file is required until the court completes its  
 2 analysis of the various balancing factors. The protection of §2024.6  
 3 does not protect confidential information any faster than the prior  
 4 rules did, but it is much more specific in defining which information is  
 5 presumptively confidential. The statute is not unconstitutional merely  
 6 because it deprives the court of discretion as to what should be sealed,  
 7 but because as enacted it seals the entirety of a pleading if any of the  
 8 specified materials are included in it. Thus, a 100 page pleading  
 9 filled with legal argument of genuine public interest must be sealed if  
 10 a party's home address appears even in a footnote. Absent judicial  
 11 scrutiny prior to such sealing, §2024.6 could indeed become an  
 12 instrument of gamesmanship. The statute cannot be deemed "narrowly  
 13 tailored" because it necessarily will seal material in which there is no  
 14 overriding right to privacy.

15 Having decided that the statute is not narrowly tailored to  
 16 effectuate its compelling state interest, this court does not reach the  
 17 issues as to whether §2024.6 offends the separation of powers doctrine  
 18 or the right to equal protection under the law.

19 Contrary to Respondent's contention, this ruling will not deprive  
 20 him of his constitutionally protected privacy rights. The court  
 21 emphasizes that it makes no finding as to whether the documents  
 22 specified for sealing in Mr. Burkle's *ex parte* application might  
 23 otherwise be entitled to a sealing order under existing law.

24 Although this court vacates its provisional sealing order of  
 25 December 21, 2004, made under Family Code §2024.6, it stays this order,  
 26 and the file shall remain sealed for 60 days to permit Respondent to


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1 seek a sealing order under CRC 243.1 or to seek higher review of this  
2 decision.

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DATED: February 28, 2005

  
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ROY L. PAUL  
Judge of the Superior Court

DECLARATION OF SERVICE BY MAIL

The undersigned is over the age of eighteen, not a party to the within action, whose business address is 415 W. Ocean Boulevard, Long beach, California 90802, and on February 28, 2005, served the STATEMENT OF DECISION in the within action, by placing a true copy thereof, enclosed in separate sealed envelopes with the postage thereon fully prepaid, in the United States mail at Long Beach, County of Los Angeles, State of California, addressed as follows, and by facsimile to the same individuals using the numbers indicated as follows:

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Executed on February 28, 2005, at Long Beach, California.

I declare under penalty of perjury that the foregoing is true and correct.

*Carolyn Willis*  
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