Attorney Client Privilege, Notice of Pendency[1]

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This article discusses two issues which have received short shrift in family law: the attorney-client privilege and the notice of pendency. It is often erroneously assumed that communications between attorney and client are automatically privileged and thus shielded from adversarial eyes, especially in matrimonial litigation. However, *Willis v. Willis*,[2] below, shows, that carelessness in securing communications between attorney and client, such as, when family members share a computer, can have the devastating result of not only waiving the privilege but also of compelling their disclosure.

The second issue examines the rule unique to the First and Second Departments that a notice of pendency is unavailable in matrimonial litigation notwithstanding that the statute imposes no such restriction. Matrimonial litigation, where one spouse alone holds title to real property, is rife for abuse and should most certainly be available to protect the rights, albeit inchoate, of the nontitled spouse. The newly enacted automatic stays in Domestic Relations Law (DRL) § 236B(2) provide inadequate protection.

Attorney-Client Privilege

"The attorney-client privilege, the oldest among common-law evidentiary privileges, fosters the open dialogue between lawyer and client that is deemed essential to effective representation."[3] The privilege belongs to the client.[4] In *Priest v. Hennessy*,[5] the Court of Appeals mapped out the scope of the privilege: "[t]he attorney-client privilege is a creature of statute. It exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment. The privilege, however, is not limitless. It has long been recognized that the privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose."

Priest points out that not all communications are privileged, that general principles attach: (1) there must be an attorney-client relationship where legal advice has been sought; and

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[1] N.Y.L.J., March 29, 2011.

[2] 79 A.D.3d 1029 (2nd Dept.,2010).

[3] Spectrum Systems Intern. Corp. v. Chemical Bank, 78 N.Y.2d 371 (1991).

[4] People v. Osorio, 75 N.Y.2d 80 (1989).

[5] 51 N.Y.2d 62 (1980); CPLR 4503.

(2) it must have been a "confidential communication. The scope of the privilege is to be determined on a case-by-case basis." Significantly, the burden of proof rests upon the party asserting the privilege.

Third Party Presence

Generally, communications made in the presence of third parties, whose presence is known to its maker, are not privileged from disclosure.[6] An exception exists for statements made by a client to the attorney's employees or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. Similarly, communications to counsel through an interpreter to facilitate communication are generally privileged.[7] If the presence of the third party is not necessary for the communication it cannot be deemed to have been intended to be confidential.[8] "The scope of the privilege is not defined by the third parties' employment or function, however; it depends on whether the client had a reasonable expectation of confidentiality under the circumstances."[9]

In *Baumann v. Steingester*, the Court of Appeals shed light on the rationale as to why not only the third party may testify about the communication but also the attorney:[10]

> To allow a stranger or bystander who overhears such a conversation to testify to what he heard and at the same time preclude the attorney of the client from giving his testimony as to what occurred might often result unfairly to the client for whose protection the privilege is designed. The communication not being confidential the attorney is not privileged from disclosing it. Where there is no confidence reposed, no privilege can be asserted. In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged. The privilege which exempts one from giving testimony, except in so far as it is embodied in statutory provisions, cannot be extended to cover cases not within the reason upon which the privilege rests.

> *People v. Decina* 2 N.Y.2d 133, 157 N.Y.S.2d 558 (1956):
> If [a] communication was intended to be confidential, the fact that it may have been overheard by a third person does not necessarily destroy the privilege. The true test appears to be whether in the light of all the surrounding circumstances,

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[6] People v. Harris 57 N.Y.2d 335 (1982); Doe v. Poe, 92 N.Y.2d 864 (1998).

[7] People v. Osorio 75 N.Y.2d 80 (1989).

[8] Richardson, Evidence, §§ 5-203, 204 [Farrell 11th ed].

[9] People v. Osorio, 75 N.Y.2d 80 (1989).

[10] Baumann v. Steingester 213 N.Y. 328 (1915).

and particularly the occasion for the presence of the third person, the communication was intended to be confidential and complied with the other provisions of the statute.

A party's failure to place proper safeguards around a communication may result not only in a forfeiture of the privilege but also in an order directing its disclosure to the adverse party.

Willis

The plaintiff brought an action to recover damages for defamation based upon the conduct, her former husband and his current wife, in sending an e-mail to the plaintiff, which contained defamatory statements, and which was read by one of her children who was also the child of her former husband. Although the e-mail was addressed solely to the plaintiff, she alleged that the mere act of sending the message to an e-mail account which was regularly used by the children constituted publication for purposes of establishing defamation. Even after commencing her defamation action, plaintiff continued to use the same e-mail account to communicate with her attorneys. Defendants ingeniously moved to compel plaintiff to produce the e-mails sent to her attorneys, contending that they were not privileged communications. The Appellate Division affirmed the order directing plaintiff to produce the e-mails because she failed to meet her burden that the emails were made in confidence. Significantly, not only did the plaintiff's children know the password to that e-mail account but they, too, regularly used the e-mail account as well. Furthermore, plaintiff had not even asked the children to keep the communications confidential. Plaintiff was thus held not to have had "a reasonable expectation of confidentiality" in the e-mail communications because she allowed free access to them.

Willis can be analogized to *People v. Mitchell,*[11] where the defendant, while in the attorney's office for legal advice, made inculpatory statements in the common area of the office. *Willis* treated the shared use of and access to the email account like a common area and imputed constructive knowledge of third party presence whose presence should have been known.

A shared family computer with unfettered access to one another's email is a minefield of attorney-client privilege waiver. Since the burden of proof rests on the party asserting the privilege, it is incumbent upon that party to show that precautions were implemented, such as, pass protection, to secure confidentiality. Plainly, the best method is to get one's own computer and to password protect it.

Notice of Pendency

CPLR 6501 provides that "a notice of pendency may be filed *in any action* in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property." "The notice of pendency, the descendent of the lis pendens, is anchored in jurisprudence dating back to rule 12 of Lord Chancellor Bacon's

[11] People v. Mitchell, 58 N.Y.2d 368 (1983).

Ordinances for the Government of the Courts of Chancery in 1618, and includes its formal recognition in New York in 1815."[12]

The function of the notice "is to carry out the public policy that a plaintiff's action shall not be defeated by an alienation of the property during the course of the lawsuit."[13] "If a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end of litigation; for, as soon as a new party was brought in, he might transfer to another, and render it necessary to bring that other before the court, so that a suit might be interminable."[14]

"A notice of pendency [is] an 'extraordinary' privilege because of the relative ease by which it can be obtained and its powerful effect on the alienability of real property. The notice of pendency is a unique provisional remedy, in that 'the statutory scheme permits a party to effectively retard the alienability of real property without any prior judicial review.' "[15] Unlike earlier times when, under the common law, a lis pendens automatically attached to real property immediately upon the filing of the action, without the showing of merit, the successor statute provides that constructive notice is given to future buyers upon the filing of the notice thereby eliminating the possibility of innocent-purchaser-for-value status.[16]

Although the Legislature permits a notice of pendency "in any action" the First and Second Departments have, without explanation, rejected its availability in actions seeking equitable distribution:[17]

> The filing of a notice of pendency is an extraordinary privilege available only if the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property...The fact that plaintiff may be entitled to an equitable distribution with regards to the residence does not give rise to such a privilege. Plaintiff's remedy to prevent any alleged fraudulent transfers was to seek an

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[12] In re Sakow 97 N.Y.2d 436 (2002).

[13] Mechanics Exchange Sav. Bank v. Chesterfield 34 A.D.2d 111 (3rd Dept.,1970).

[14] Hailey v. Ano 136 N.Y. 569 (1893).

[15] In re Sakow 97 N.Y.2d 436 (2002).

[16] Id, at 436.

[17] Gross v. Gross, 114 A.D.2d 1002 (2nd Dept.,1985); Fakiris v. Fakiris, 177 A.D.2d 540 (2nd Dept., 1991); Sehgal v. Sehgal, 220 A.D.2d 201 (1st Dept.,1995); Diaz v. Paterson, 547 F.3d 88 (2nd Cir.,2008); Ricca v. Ricca, 15 Misc.3d 1115(A) (N.Y.Sup. Suffolk Co. 2007), aff'd, 57 A.D.3d 868 (2nd Dept.,2008); Craig v. Craig, 17 Misc.3d 1139(A), 856 N.Y.S.2d 23 (N.Y.Sup. Kings. Co. 2007); Discovery in matrimonial actions is another example of judicial abridgment of statutory language: CPLR 3101; Howard S. v. Lillian S., 14 N.Y.3d 431 (2010).

injunction against any further transfers of the disputed property.

Arteaga v. Martinez[18] recently repeated this holding.

Amended DRL § 236B(2), effective Sept. 1, 2009, now imposes an immediate stay on all transfers, encumbrances, etc., of all categories of marital assets upon the filing of the matrimonial action by the plaintiff and upon the defendant immediately following service, thereby rendering motions for judicial injunctions moot. However, when marital real property is titled in one party the stay is only as effective as that party's integrity. If the titled party is uncontainable or vengeful the automatic stay will have achieved nothing.

Inchoate Rights

As noted above, a notice of pendency is only available "if the judgment demanded would affect the title to, or the possession, use or enjoyment of real property." Matrimonial actions, where inchoate and as yet unfixed rights abound, logically fall under that rubric.

Since its inception, the Equitable Distribution Law (EDL) has embodied two key inextricably interwoven themes borrowed from community property theory: inchoateness and economic partnership.[19] The respective legislative and judicial terms "marital property" and "economic partnership" are compelling in the expanse of their protection. "'Marital property' is the most crucial term in [the EDL] for the power it gives the court is the centerpiece of the equitable distribution revolution: it may disregard the form in which legal title has been held."[20] Clearly, "marital property" has meaning (Statutes § 98) throughout the marriage, even though it cannot be distributed until the marital status has not been altered. It is akin to two business partners whose respective shares are not calculated until the termination of their venture and only then pursuant to an imprecise methodology (DRL § 236B(5)) rather than by way of a periodic calculus.

That EDL recognizes inchoate rights as real rights is evidenced by the concept of dissipation of marital assets. Inherent in the notion of dissipation is the trampling on the rights of another. It is, plainly, inconsistent to simultaneously charge a party with dissipation if the other did not hold some cognizable right in the asset – these diverse concepts clash and cannot coexist. It must, therefore, be that, under EDL, the non-titled partner has acquired a right, however thin,

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[18] 79 A.D.3d 951 (2nd Dept.,2010).

[19] Benson v. Benson 108 Misc.2d 892 (N.Y.Sup.,1981); Rodgers v. Rodgers, 98 A.D.2d 386 (2nd Dept., 1983).

[20] McDermott v. McDermott 119 A.D.2d 370 (2nd Dept.,1986); see Sinha v. Sinha 285 A.D.2d 801 (3rd Dept.,2001).

vested or not,[21] upon the accretion of assets. *McDermott*: "economic partnership has nurtured ['marital property'] until the fateful moment of process service has permitted its revelation":

> The pension grew and appreciated for the benefit of the economic partnership by virtue of the equitable distribution statute ... that created property interests wholly unknown at common law ... under the doctrine [the wife] began acquiring an interest in the pension from the moment her husband joined the plan. That interest, unenforceable and unallocated as it may have been prior to the divorce action, constituted the seed from which an *inchoate interest* in the pension emerged as a marital asset when the divorce action began...and matured into a true ownership interest when the equitable distribution judgment terminated the action. Equitable distribution altered traditional property-right concepts.[22]

Accordingly, like DRL § 236(B)(2), which imposed broadened protection over marital assets upon the commencement of the action, a notice of pendency should similarly attach automatically to marital real property, except in the ordinary course of business, (such as, where a party is a land developer, builder, etc.). Barring such legislative amendment, courts should apply the legislative intent set forth in CPLR 6501 that "a notice of pendency may be filed *in any action.*"

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[21] D'Amato v. D'Amato, 96 A.D.2d 849 (2nd Dept.,1983); Bizzarro v. Bizzarro, 106 A.D.2d 690 (3rd Dept., 1984).

[22] Cf. *Perkins v. Perkins* 226 A.D.2d 610 (2nd Dept.,1996), decided after *Peterson v. Goldberg*:

> ... a third-party creditor cannot seize property belonging to the debtor's spouse. The question of whether the [farm] constituted "marital" property under DRL § 236(B) was irrelevant to the third-party creditor, since the former husband could only have had *an inchoate right* to such property, which could only mature "into a true ownership interest when the equitable distribution judgment terminated the action."