The Case for Sealing Records in Divorce

by Tashina M. Gorgone

It has happened to many family law practitioners: a potential client comes to your office, Complaint for Divorce served upon them in hand, and the Complaint contains allegations that we will call unpleasant at best, and defamatory at worst. The potential client vehemently denies the claims, which perhaps even accuse the potential client of heinous acts against their child, and asks what can be done to prevent "the world" from seeing – and pre-judging – the allegations contained within the now-contentious dissolution of their marriage?

The immediate concern of the client is not necessarily proving the falsity of the allegations; they often understand that the litigation process takes time, discovery, and can (hopefully) lead to a resolution that satisfactorily addresses unsavory allegations. The immediate concern of the client is how to stop these allegations from taking on a life of their own outside the four walls of the courthouse. The client perceives their estranged spouse as disseminating untruths to tarnish the client's reputation and fill the record with inflammatory accusations to steer the trajectory of the case in a direction favorable to the filing party.

Now, of course, the reverse can be true, too. A party may file a Complaint for Divorce on concerning but entirely legitimate and provable allegations, and the other spouse may seek relief that essentially muzzles the valid claims of the filing party. There is no easy, or satisfying, answer for how to balance these competing concerns. Meanwhile, the judiciary has appeared increasingly reluctant to seal case files due to the presumption of openness of public records. The rationale is not even necessarily about litigants having to endure the consequences of their decision to participate in the judicial process; at least one judge has explained that it is important to keep divorce records open because our courts, "assess child support and spousal support and make important custody and visitation decisions. The public has a strong interest in seeing how the courts exercise such discretion. If a significant percentage of these files are sealed, the public would be significantly hampered in its check on its courts and judges."[1]

However, much of the reluctance to seal files is – as a threshold matter – ensnared in the question of authority. This article intends to demonstrate that there is, in fact, authority for the courts to be less conservative about sealing records at the inception of a divorce case, as well as authority for the courts to later reconsider and unseal records. A more flexible reading of Virginia Code §20-124 in conjunction with Virginia Code §17.1-208 would better balance the competing concerns of preventing inflammatory filings intended to score leverage versus those raising credible and legitimate concerns, could potentially promote settlement, and would not have to serve to diminish the check on the judiciary's role.

A review of jurisprudence on sealing case files in Virginia begins with Virginia Code §17.1-208, which states that:

> . . . B. Except as otherwise provided by law, any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person and the clerk shall, when requested, furnish copies thereof subject to any reasonable fee charged by the clerk pursuant to §17.1-275. . . .

This statute provides an exception to the prevailing presumption of access to records; if "otherwise provided by law" to restrict access, then application of this statue is unnecessary.

Enter Virginia Code §20-124 "Sequestration of record," which states:

> Upon motion of a party to any suit under this chapter, the court may order the record thereof or any agreement of the parties, filed therein, to be sealed and withheld from public inspection and thereafter the same shall only be opened to the parties, their respective attorneys, and to such

> other persons as the judge of such court at his discretion decides have a proper interest therein.

It appears at first blush that this would resolve any question of authority. Virginia Code §20-124 explicitly says the court "may" order the record sealed. Discretionary authority is clear. "Thus, while a presumption of openness exists, the General Assembly has granted judges the authority to seal in domestic relations cases."[2] What this code section does not answer, however, is what – if anything – must be established to ensure that an order to seal the record survives scrutiny on appeal.

In *Shenandoah Pub. House, Inc. v. Fanning*, the Supreme Court of Virginia was called upon to answer the question: what is required to seal a civil record?[3] As a result, *Shenandoah Pub. House, Inc.* has been cited favorably by judges when denying requests to seal records.[4] In fact, in *Burchfield*, the case was referred to as "the leading case applying the statute to issues of sealing."[5]

It is understandable that *Shenandoah Pub. House, Inc.* is so frequently relied upon; it provided a complex analysis of the history of the presumption of openness of our court records. The Supreme Court of Virginia first explored the history of the First and Fourteenth Amendments of the United States Constitution, which "implicitly guarantee the public a qualified right of access to a criminal trial."[6] In so doing, the Supreme Court of Virginia noted that the United States Supreme Court, when reviewing the history of criminal trials in England and colonial America, concluded that "'a presumption of openness inheres in the very nature of a criminal trial under our system of justice.'"[7] The Supreme Court of the United States found, however, that its holding "does not mean that the First Amendment rights of the public and representatives of the press are absolute."[8]

The Supreme Court of Virginia ultimately determined in *Shenandoah Pub. House, Inc.* that it was "unnecessary to conduct a constitutional analysis" about whether the public also has a constitutional right of access to judicial records in civil trials.[9] The Court relied instead upon the "broad sweep of" Virginia Code §17-43 (now §17.1-208), which "makes no distinction between criminal and civil proceedings."[10] Finding that the "language of the statute as it has endured for more than a century," the Court concluded that, "the General Assembly intended to recognize the generally accepted common-law rule of openness and to declare its power to make statutory exceptions to the rule."[11] The Court therefore found that:

> In light of the legislative history of Code §17-43 and its common-law underpinnings, we are of opinion that, **subject to statutory exceptions**, a **rebuttable presumption of public access applies in civil proceedings** to judicial records as we have defined that term. We further believe that, **to overcome that presumption, the moving party must bear the burden** of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order[12]

It is against this backdrop of presumption of openness – and the burden requiring that parties seeking sealing demonstrate an "'overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest'"[13] – that judges have struggled with when to seal divorce records.

Based on the factors and findings of *Shenandoah Pub. House, Inc*., courts have tried to create lists of non-dispositive circumstances under which it would not – or could be – appropriate to seal a divorce file.[14] The courts tasked with doing so all seem to rely on *Shenandoah Pub. House*, *Inc.* or its progeny in support of the requirement that the moving party must rebut the presumption of openness to obtain sealing.[15]

It need not be this complicated. Even when relying on *Shenandoah Pub. House, Inc.*, the rebuttable presumption of public access need not apply when faced with "statutory exceptions." And it is only when one needs to rebut the presumption of openness that the moving party must bear the burden of demonstrating sufficient interest justifying the sealing of the records. We can then read Virginia Code §20-124 and Virginia Code §17.1-208 as complements to one another, which relaxes the burden on parties requesting sealed records.

Where did it become confusing? In 1978, at the time that Virginia Code §20-124 was passed into law, Virginia Code §17.1-208 (then Virignia Code §17-43) was not as permissive as it is today. Prior to 2002, the statue read, "[t]he records and papers of every circuit court shall be open to inspection by any person and the clerk shall, when required, furnish copies thereof, except in cases in which it is otherwise specially provided. . . ." (emphasis added). <u>The statute notably did not yet contain the language "except as otherwise provided by law."</u>

Therefore, at the time that Virginia Code §20-124 was codified, it would have been necessary for a judge attempting to apply this provision to reconcile it with the presumptive openness of §17-43 (now §17.1-208), which had no exceptions or carve outs. Similarly, when the Supreme Court of Virginia decided *Shenandoah Pub. House, Inc. v. Fanning* in 1988, there was no statutory language permitting a judge in a divorce matter to do anything <u>but</u> determine that the burden of proof was on the moving party to rebut the presumption public access to their proceedings. It was not until 2002 that the courts were provided statutory authority from the General Assembly via the amendment to

Virginia Code §17.1-208 to facilitate the exercise of their discretion.

Therefore, I submit that, as of 2002, Virginia Code §20-124 operates as an "exception" as defined in Va. Code §17.1-208. Several courts in Virginia have agreed without reservation that it does.[16] This is not a universally accepted opinion: *Burchfield* found that Va. Code §20-124 is not an exception to the presumption of openness because of the holding in *Shiembob v. Shiembob*, 55 Va. App. 234 (2009), which arose out of a divorce. However, *Shiembob* is inapposite. In *Sheimbob*, the trial court had first sealed the case records; it thereafter unsealed the records.[17] The husband appealed, claiming that the trial court abused its discretion in unsealing the records. In affirming the trial court, the Court of Appeals of Virginia quoted *Shenandoah Pub. House, Inc.* for the principle that "'the desire of the litigants [to seal the record of the trial court proceedings] is not sufficient reason to override the presumption of openness.'"[18]

However, *Shiembob* did not at all address that – subsequent to the ruling in *Shenandoah Pub. House*, *Inc.*, Virginia Code – §17.1-208 was amended. *Shiembob* therefore made no overt comment on the relationship between Virginia Code §17.1-208 and §20-124; it only determined that the husband's reasons for wanting to seal were insufficient to demonstrate that the trial court abused its discretion when unsealing the records. This is far different than saying that Virginia Code §20-124 is not an exception to §17.1-208. The Court of Appeals was not asked – nor did it do so on its own initiative – to answer the question of whether keeping the file sealed, when asked by a party in accordance with Virginia Code §20-124, would have amounted to an abuse of discretion.

It's unlikely that the General Assembly added the words "[e]xcept as otherwise provided by law" to Virginia Code §17.1-208 in 2002 to immediately render those words superfluous. It is more likely that the statute was amended specifically to address the difficulties courts were having reconciling other statutory provisions that addressed sealing records with the holdings of cases such as *Shenandoah Pub. House, Inc*. It is as the Supreme Court of Virginia said in *Shenandoah Pub. House, Inc.* itself: the General Assembly can "declare its power to make statutory exceptions to the rule."[19] It did so, here.

"The General Assembly has not handcuffed the courts when faced with a strong rebuttal against the presumption of openness. Indeed, Virginia Code §20-124 expressly grants the courts discretion to seal where appropriate."[20] However, like in *Shiembob* and *Burchfield*, the court in *Falkoff* then went on to compare the burden of proof to that outlined in *Shenandoah Pub. House, Inc*., despite the fact that post-*Shenandoah*, Virginia Code §17.1-208 was amended to insert exceptions such as Virginia Code §20-124 into the reading of the statute. As such, the General Assembly not only removed "handcuff[s]" from the courts; it removed the need to demonstrate a "strong rebuttal" against the presumption of openness. The amendment of Virginia Code §17.1-208 was surely intended to relax the burden for the moving party, and allow the court greater breadth in exercising discretion without having to make its paramount concern the openness of records.

"When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way. That the legislature mandated that judicial records be open to public scrutiny and carved out exceptions in only specific and limited cases evinces the legislature's intent to not authorize judicial records to be sealed in cases falling outside those exceptions."[21] Conversely, the explicit amendment of Virginia Code §17.1-208 to permit sealing when otherwise provided by law demonstrates that the legislature knowingly, and deliberately, authorized judicial record to be sealed in cases falling within those exceptions. Those cases include those affiliated with divorce, affirmation, and annulment, per Virginia Code §20-124.

This becomes even clearer when examining the legislative history for Virginia Code §20-124, which in 1990 was amended to add that in addition to sealing judicial records in Chapter 6 cases, courts were also permitted to seal "any agreement of the parties, filed therein."[22] The fact that the General Assembly took care to amend the statute to ensure that divorce, affirmation, or annulment litigants could receive the benefits of sealing their case even when their case resolved by mutual agreement as opposed to judicial disposition serves to further highlight the special attention the General Assembly determined was owed to the sensitive matters of these cases.

As such, all that is statutorily required is that a party request the sealing, and the permissive nature of the judicial directive ("may order") simply means that normal principles of abuse of discretion apply. When a court is exercising its discretion, there are only three main ways a court can abuse its discretion: "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."[23] That is not to say that every case merits sealing; a court can still abuse its discretion in finding it appropriate to seal (or not) under specific facts. The factors outlined in *Falkoff* "for" or "against" sealing records, therefore, still provide tremendous value for courts to consider; it is simply that the burden of proof moving parties are required to demon-

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strate should be in fact lower than that under which we are all operating.

There is a balance between protecting access to records and acting on the very real fact "that custody and divorce and other domestic relations matters occasionally present issues of such sensitivity, intimacy and privacy that a Court might appropriately conclude that sealing is warranted."[24] That balance can tip more in favor of protecting the litigants' privacy than *Shenandoah Pub. House, Inc.* has led us to believe. Balancing these interests could allow for the sealing initial pleadings that – for example – are inflammatory, salacious, or risk emotional or professional harm simply by being "out there" in the public sphere, until there is adjudication of the matter, at which time the court could utilize the benefit of hindsight, examine the evidence actually now in the record, and assess whether, like in *Shiembob*, vacating the prior order to seal was appropriate. I do not suggest that every divorce case is now ripe for sealing. I do propose that, in light of the legislative history of our sealing statutes as compared to when *Shenandoah Pub. House, Inc.* was decided, it is appropriate to reexamine and relax the burden of proof required to obtain an order sealing judicial records in Chapter 6 cases.

Endnotes

1. *Falkoff v. Falkoff*, 103 Va. Cir. 405, 409 (2019).
2. *Falkoff*, 103 Va. Cir. at 408. As Judge Oblon also noted in *Falkoff*, "domestic relations cases" means cases contained with Chapter 6 of the Virginia Code, excluding Chapter 6.1 dealing with custody and visitation. However, as a practical matter, because divorce and custody are often so "inextricably mixed," sealing divorce records will often have the result of the "ancillary sealing of some related custody and visitation records." *Id*. at n2.
3. *Shenandoah Pub. House, Inc. v. Fanning*, 235 Va. 253, 256 (1988).
4. *See, e.g., Shiembob v. Shiembob*, 55 Va. App. 234, 244 (Va. Ct. App. 2009); *Burchfield v. Burchfield*, 103 Va. Cir. 447, 448 (Va. Cir. Ct. Feb. 20, 2018); *Falkoff*, 103 Va. Cir. at 409.
5. 103 Va. Cir. at 448.
6. *Shenandoah Pub. House, Inc.*, 235 Va. at 257 *Id*. at 257 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (*Richmond Newspapers I*)).
7. *Id*. (quoting *Richmond Newspapers I,* 488 U.S. at 573).
8. *Richmond Newspapers I*, 488 at 581 n.18.
9. *Shenandoah Pub. House, Inc.,* 235 Va. at 257.
10. *Id*. at 258.
11. *Id*. (emphasis added).
12. *Id*. at 258-59 (emphases added).
13. *Id*. at 257 (quoting *Press-Enterprise Co. v. Superior Court of Cal*., 464 U.S. 501, 510 (1984)).
14. *See, e.g., Falkoff*, 103 Va. Cir at 411-15 (reflecting on the reasons that, per *Shenandoah Pub. House, Inc.*, are "bad reason[s] to seal", including, but not limited to, agreement by or desire of the litigants to seal; an unparticularized concern of damage to professional reputation, emotional damage, or financial harm; mere existence of salacious allegations as a bad reason to seal; public figure status, publicity surrounding the case, and malicious use of court records including malicious filings, but also determining that establishing particularized proof of harm; potentially exposing privileged materials, trade secrets, or personally identifiable information; protection of children from particularized harm, lack of relevance, or demonstrable false information could demonstrate good cause of sealing).
15. *Id*.; see also *Shiembob v. Shiembob*, 55 Va. App. 234, 244 (Va. Ct. App. 2009); *Burchfield v. Burchfield*, 103 Va. Cir. 447, 448 (Va. Cir. Ct. Feb. 20, 2018).
16. *See CSG USA, Inc. v. Jenkins*, 2023 Va. Cir. LEXIS 10*4-5 (Va. Cir. Ct. Jan. 28, 2023) ("The Virginia General Assembly has provided statutory exceptions that allow the court discretion to seal judicial records in divorce, affirmation and annulment cases, mediated cases, and appeals involving child abuse and neglect. Va. Code Ann. §20-124, §8.01-581.22 & §17.1-513.1." (citing *In re Bennett*, 301 Va. 68, 72-73 (2022)); see also *Stern v. John Doe*, 108 Va. Cir. 339 (Va. Cir. Ct. Aug. 5, 2021 ("Exceptions created by the legislature include, inter alia, the empowerment of courts to seal judicial records in divorce, affirmation, and annulment cases (see Va. Code §20-124), mediated cases (see Va. Code §8.01-581.22), and appeals involving child abuse and neglect (see Va. Code §17.1-513.1)"); but see *Burchfield v. Burchfield*, 103 Va. Cir. 447 ("Significantly, Virginia Code §20-124 is not an exception to the presumption of openness in judicial records.").
17. *Sheimbob*, 55 Va. App. at 243 (2009).
18. *Id*. at 244 (quoting S*henandoah Pub. House, Inc. v. Fanning*, 235 Va. 253, 259 (1988)).
19. *Shenandoah Pub. House, Inc*. 235 Va. at 258.
20. *Falkoff*, 103 Va. Cir. at 412.
21. *Stern v. John Doe*, 108 Va. Cir. at 340-41 (internal citations omitted).
22. 1990 Va. HB 607.
23. *Landrum v. Chippenham & Johnston-Willis Hosps*., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (emphasis added) (citation and internal quotation marks omitted).
24. *Burchfield*, 103 Va. Cir. at 449.