

Should peeking into divorce files be allowed?

Minister's case raises debate

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OTTAWA - When details of Vic Toews' difficult divorce were splashed across Twitter, many Canadians shared a commiserating shudder with the public safety minister.

Those who've been through an ugly split involving litigation know some of the most intimate details of their lives are often contained in publicly accessible records.

That includes not just bitter affidavits but social insurance numbers, tax returns, mortgage statements, investment details — the list goes on. Even if a case is settled prior to going before a judge, the files remain.

Some family law and privacy experts suggest the time has come to change the way divorce records are handled.

Toews last week obtained a court order to see who had accessed his divorce file — parties to the litigation and journalists would not be listed. But that didn't change the public nature of the file itself.

Toronto-area lawyer Andrew Feldstein says one of his clients was ostracized by many friends after a divorce. Feldstein heard through the grapevine many of the couple's acquaintances went to take a look at the court filings.

"It also gives one side a very large advantage in the negotiation of the matrimonial dispute, because when you put something in a court file, it's subject to absolute privilege," Feldstein says.

"When the media goes and reads a court file, the media can say these are allegations contained in the court file. ... That means there's no ability to sue for slander or libel at the end of the day."

Fareen Jamal, another Toronto-area lawyer, says the openness of family court has roots in the years when individuals who committed a "marital offence," such as adultery, were essentially shamed through the process.

Until 1968, Canadians had to petition Parliament for a divorce, a very public and often embarrassing process.

Jamal says there's a school of thought that family law isn't even appropriate for the courts, where the openness is treated essentially the same as a criminal or civil case.

"It concerns me, because you're infringing on privacy rights. I think about the children," says Jamal.

"From a child's perspective, you've got these children, who will grow up and ... nobody asked them if they wanted their information public."

There's also the threat of identity theft with all that personal data accessible. In the United States, more court filings are going online, making it even easier to snoop.

Both Jamal and Feldstein say the identities of Canadians in family law cases should be protected, with letters or numbers assigned to their cases.

But other critics warn that would only undermine the concept of the open legal system, where the public — and the media by extension — is entitled to know what is going on.

Chris Waddell, director of Carleton University's School of Journalism and Communication, says the value of having the records remain public clearly outweighs the few times a couple's divorce files are perused.

"One thing that's important about politicians is their character. It's in the voter's interest to know the character of politicians, and this might be information that would help you determine the character of a politician," Waddell offers as an example.

Still, David Fewer of the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa says a balance could be struck that provides a certain degree of anonymity to the litigants.

Fewer refers to the "practical obscurity" concept, that is, making it difficult to examine records by not putting them online, for example.

The centre is currently an intervener in a Supreme Court case where a minor allegedly defamed online is arguing for his or her identity to be protected.

"The default ought to be the open court principle, but you ought to be able to avail yourself of the anonymity test right away," Fewer says.

"So you file a statement of claim and you file with it a request to treat the matter anonymously, and here's the reasons why."

The tweets referring to Toews' divorce file were from an anonymous Twitter account. The Liberals eventually admitted that a staffer, Adam Carroll, was responsible for the Twitter revelations.

But the only person listed at the Winnipeg courthouse as having looked at the file was a provincial NDP employee who had a peek after the "Vikileaks" controversy broke.

The initial tweets were posted as a sort of retaliation for a new Conservative bill that would give law enforcement officials easier access to Internet records. Toews drew much public ire by suggesting those who opposed the bill stood with child pornographers.

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