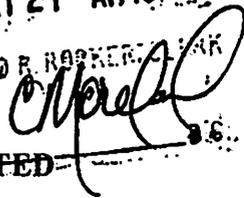


IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR DAVIDSON COUNTY,
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE, TENNESSEE

FILED

2012 MAY 21 AM 10:21

RICHARD B. ROBERTS, CLERK



IN RE: Conservatorship petition regarding)
Dr. John Witherspoon)
REQUESTED BY CHILDREN:) NOTICE OF ENTRY REQUESTED
Reese Witherspoon aka Reese Witherspoon) Case No. 12P-759
Toth and John Witherspoon, Jr.) Judge Kennedy

**[MEDIA INTERVENORS WILL ASK AT THE HEARING ON MONDAY,
MAY 21, 2012, THAT THIS MOTION BE FILED PUBLICLY]**

EMERGENCY MOTION
TO INTERVENE FOR THE LIMITED PURPOSE OF BEING HEARD
TO REQUEST UNSEALING OF JUDICIAL RECORDS, TO OPPOSE FURTHER
SEALED FILINGS AND CLOSED PROCEEDINGS. AND TO REQUEST CAMERA
ACCESS TO HEARINGS UNDER TENN. R. SUP. CT. 30

The Tennessean and WSMV-TV Channel Four¹ (collectively, the proposed “Intervenors”), respectfully move to intervene for the limited purpose of requesting unsealing of judicial records and opposing further sealed filings and closed proceedings (including the hearing scheduled this morning, May 21), and requesting camera access to this hearing under Tenn. Sup. Ct. R. 30. Intervenors ask that their intervention be granted *nunc pro tunc* to May 11, 2012 at 3 p.m. Central time, the date/time on which the Court first conducted a hearing in this matter, and *The Tennessean* and WSMV-TV were allowed to participate, make motions (one of which—for judicial notice under Tenn. R. Evid. 201), and present their objections to closure, sealing and the exclusion of cameras.²

¹ *The Tennessean* is the regional daily newspaper which is owned by Gannett Satellite Information Network, Inc. WSMV-TV Channel Four is the NBC-affiliate television station headquartered in Nashville and which is owned by Meredith Corporation.

² On information and belief, the Court has entered two Orders from the hearing on May 11, 2012, both prepared by Petitioners’ counsel. One, closing the Court and denying camera access, has been provided to the undersigned counsel. It is believed that this Order was entered on Wednesday, May 16—but that is based on a phone call from the Court’s judicial assistant. In that Order, it is believed that the Court states: “Counsel for the media did not make any motion to intervene in the matter.” Since the Intervenors’ counsel made an appearance on May 11, cited *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985)(and its progeny) and Tenn. R. Sup. Ct. 30 (and the lead case construing that Rule, *State v. Morrow/Meredith Broadcasting*, Tennessee Court of

The Petitioners' counsel sent an email Friday (May 18) afternoon at 3:35 p.m. stating that a hearing was scheduled in this case at 11:15 am on Monday, May 21. A copy of that email exchange is attached as Exhibit 1. Both *The Tennessean* and WSMV-TV Channel Four have submitted camera requests to the Circuit Court Clerk under Tenn. Sup. Ct. R. 30. Copy of these two requests are attached hereto as collective Exhibit 2.³

This Motion has been filed in advance of the "next" hearing, and notice has been provided to the Guardian ad litem and Petitioners' counsel.

As grounds for this Motion, the Movants/Intervenors state as follows:

Criminal Appeals, April 12, 1996, No. 01CO1-9601-CC-00022), and was allowed to participate in the hearing and make motions, it is requested that this formal written Motion to intervene be granted nunc pro tunc to May 11, 2012 at 3 pm. Central Time. The Media could not have prepared a formal Motion to intervene since the hearing was scheduled without any public notice on an "emergency" basis and no petition/complaint was filed prior to the hearing. On information and belief, the Petitioners through counsel had prepared pleadings which were submitted at or immediately following the hearing, but were not filed in advance. Those remain under seal.

On information and belief, the Court has entered another Order in this case on or about May 11. According to Petitioners' proposed Order regarding sealing, that Order must have been submitted on May 11, 2012, and grants the Petitioners some relief including the sealing of every filing in this case. On information and belief, based on an email from Petitioners' counsel received Friday afternoon, May 18, 2012, the Court has appointed Nashville lawyer Winston Evans as guardian ad litem. Mr. Evans has advised that he was appointed pursuant to Tenn. Code Annot. §34-1-107.

³ On information and belief, the Court stated in its Order (prepared by Petitioners' counsel) granting Petitioners' oral May 11 closure motion as follows:

"Prior to the hearing, reporter Jonathan Martin of WSMV-TV Channel Four News ("Mr. Martin") filed with the Circuit Court Clerk's Office a request that a camera be allowed in the proceeding. This notice was not provided to counsel for Petitioners or any of the interested persons (Petitioners, Respondent, and Respondent's spouse) prior to, during, or after the hearing. As of the submission of this Order by counsel for the Petitioners on Tuesday, May 15, 2012, counsel for Petitioners still has not received any such notice from Mr. Martin or his counsel."

Attached hereto as Exhibit 3 is a copy of an email communication from the Intervenors' counsel to Petitioners' counsel sent on Tuesday, May 15 at 3:24 p.m. Central Time and attaching a copy of the WSMV camera request. As noted in that communication, Tenn. R. Sup. Ct. 30 does not call for camera requests to be provided to Petitioners or their counsel – and this camera request was referred to in the May 11 hearing. The WSMV-TV camera request, filed minutes before the hearing conducted by the Court on May 11, does not refer to this Action by case number since no filings had been made by Petitioners.

1. Petitioners have obtained a total sealing of judicial records. (See Caselink, online record system of Davidson County Circuit Court Clerk's Office—"pop up" notice states "RESTRICTED RECORD TYPE/CALL COURT CLERK FOR MORE INFO"). It is believed that this was accomplished through a written proposed Order submitted to the Court by Petitioners' counsel the afternoon of May 11, 2012.

2. Petitioners obtained a closure of courtroom proceedings on Friday, May 11, 2012, and the Court ordered that the Media be excluded from the Courtroom. Petitioners obtained an exclusion of cameras from the Court hearing on May 11, 2012.

3. On information and belief, the Court ordered Petitioners' counsel "to provide advance notice of future hearing to counsel for the media." The undersigned counsel has asked both the Petitioners' counsel and the Guardian *ad litem* whether any motion to close the Monday, May 21 hearing has been or will be submitted. Neither will provide a response in light of the Court's blanket sealing Order (which is under seal).

4. The Movants/Intervenors request permission to intervene in this matter for the limited purpose of requesting the unsealing of judicial records, opposing the further sealing of judicial records and closure of court proceedings, and requesting cameras under Tenn. R. Sup. Ct. 30. It is requested that the Motion to intervene be granted *nunc pro tunc* to Friday, May 11, 2012 at 3 p.m. Central time.

5. The Tennessee Supreme Court has long recognized the qualified right of the public to attend judicial proceedings and to examine the documents generated in those proceedings. Ballard v. Herzke, 924 S.W.2d 652, 662 (Tenn. 1996); State v. Drake, 701 S.W.2d 604, 607 (Tenn. 1985). These rights have been declared to be founded in the First Amendment to the United States Constitution and common law. *Id.* Tennessee courts have held that the rights must be carefully balanced against competing interests, and "any restriction on public access must be narrowly tailored to accommodate the competing interest without unduly impeding the flow of information." Knoxville News Sentinel v. Huskey, 982 S.W.2d 359 (Tenn. Crim. App. 1998) (citing Drake, 701

S.W.2d at 607). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,” are insufficient to establish good cause. Ballard, 924 S.W.2d at 658.

6. The Tennessee Supreme Court has articulated a very specific set of substantive and procedural requirements for dealing with closure requests. See State v. Drake, 701 S.W.2d 604, 607 (Tenn. 1985) These requirements apply to both closure and sealing requests.

7. Movants/Intervenors submit that these rights to open courts and judicial records are founded not only in the United States Constitution and common law, but also in the Tennessee Constitution, Article I, Section 17 (“all courts shall be open”), Article I, Section 19 (“the printing presses shall be free to every person to examine the proceedings...of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty...”), Article I, Section 8 (“No person shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.”), Article XI, Section 16 (“everything in the bill of rights [the Declaration of Rights, Article I of the Tennessee Constitution]...shall forever remain inviolate.”), and the Tennessee Public Records Act, T.C.A. §§ 10-7-501 et seq.

8. On information and belief, either during a hearing from which the media had been excluded on May 11 or shortly afterwards, Petitioners Reese Witherspoon and her brother John filed a petition. That petition is under seal; however, an Order prepared by Petitioners’ counsel states the following caption: In re: Conservatorship of John Draper Witherspoon, No. 12P-759 (Seventh Circuit (Probate) Court for Davidson County, Tennessee).

9. On May 11, 2012, the Court “opened court for the purpose of conducting an emergency hearing” upon the request of Respondent’s two children. (See Order believed to have been entered 5/16/12). No petition was filed before the hearing; no case number had been issued; and no court reporter was present.⁴ On information and belief, a Petition had been prepared prior to the Court

⁴ What is believed to be the Court’s 5/16/12 Order states: “The hearing had been scheduled for 3 p.m. on Friday, May 11, 2012, at the request of Petitioner’s [sic] counsel by way

hearing, and was submitted to the Court either during the closed hearing or afterwards. Sometime after the closed hearing, the Clerk's office opened a case and assigned it Docket No. 12P-759. The "Chamber Rules and Practice and Procedure Manual" governing Seventh Circuit (Probate) Court states in Section 8 as follows:

8. Emergency Petitions

The petition should indicate plainly that it is a request for emergency relief such as "PETITION FOR APPOINTMENT OF AN EMERGENCY TEMPORARY CONSERVATOR." The petition should be filed first with the Probate Clerk. Next, counsel should inform the clerk that it is an emergency and ask the clerk to walk it up to the Judge's office for processing.

(See <http://circuitclerk.nashville.gov/circuit/circuitchamberrules.asp#8>). Local Rule 39.05 requires that conservatorship petitions "be verified and contain the information required by statute and these Rules."

10. The Court invited Petitioners' counsel to put on proof regarding the closure motion, and stated as follows in what is believed to have been entered:

The Court permitted the Petitioners' counsel to put on proof to support the Petitioners' objection and oral motion [for closure and sealing]. Respondent's spouse testified. Her testimony included that she and Respondent and their son are private citizens, that the subject of the Petition involves sensitive and private information about her marriage to Respondent, their finances, and Respondent's health care matters, that this information is potentially damaging to her family, and that she did not believe the courtroom should be open to the media under the circumstances.

of a telephone call with the Court's judicial assistant. The matter was scheduled on an expedited basis due to the emergency nature of the proceedings and to prevent imminent and irreparable harm to the Respondent and his estate which was alleged by the Petitioners. No public notice of the hearing was given, and none was required given the emergency nature of the proceedings and that all interested parties (Petitioners, Respondent, and Respondent's spouse) were present at the hearing and were not in opposition to the relief requested by Petitioners."

(Order, p.3). The Court ruled that the “prejudice that would befall these private citizens in the opening up and laying out of their personal affairs greatly overrides any value that their disclosure might have to the public.” (Order, p.4).

11. The Intervenors respectfully submit that there has been no finding of “particularized prejudice” that outweighs the public’s right to attend the proceeding or to have access to judicial records. *See State v. James*, 902 S.W.2d 911, 914 (Tenn. 1995). There is no claim (nor could there be) that conducting the hearing in public would prejudice the Court toward any party. The generalized assertion of embarrassment which Mary Elizabeth Witherspoon said she would feel as a result of open hearings is immaterial. *Id.* This is especially true in light of the public records recently filed by Mary Elizabeth Witherspoon in connection with her separate annulment action. *See Mary Elizabeth Witherspoon v. John Draper Witherspoon*, No. 12D1447 (Third Circuit Court Davidson County, filed May 8, 2012). Ms. Witherspoon’s affidavit (copy filed hereto as Exhibit 4) provides detailed medical information about Dr. John Witherspoon as well as financial and personal information about Dr. Witherspoon, herself, and matters involving their family.

12. The Court in what is believed to be the closure Order stated:

Counsel for the media also moved that the Court, pursuant to Tenn. R. Evid. 201, take judicial notice of the fact that there has already been media coverage regarding the controversy which led to the Petition. The Court agreed to take judicial notice of the fact that there has already been media coverage of a related matter filed by the Respondent’s spouse in the Third Circuit Court for Davidson County, Tennessee. The Court did not take judicial notice of there being any prior media coverage of the Petition which was before the Court at the hearing.

(Order, p.3). Presumably, some Petition was later filed, but there was no “Petition which was before the Court at the hearing.” In addition to the public filings in the annulment Action, reports posted before the hearing (and some updated later) include many news outlets including the following:

(a) <http://www.tennessean.com/article/20120509/NEWS/305100019/Reese-Witherspoon-s-father-sued-bigamy>

(b) <http://www.tennessean.com/article/20120510/NEWS03/305100087/Reese-Witherspoon-s-mother-obtains-restraining-order-against-husband-s-new-wife->

- (c) <http://www.wsmv.com/story/18304289/suit-accuses-reese-witherspoons-father-of-bigamy>
- (d) <http://todayentertainment.today.msnbc.msn.com/news/2012/05/11/11656908-reese-witherspoons-mom-sues-her-father-for-bigamy?lite>
- (e) http://www.cbsnews.com/8301-31749_162-57431942-10391698/reese-witherspoons-father-sued-for-bigamy/
- (f) <http://www.latimes.com/entertainment/gossip/la-et-mg-reese-witherspoon-parents-bigamy-lawsuit.0.5602978.story>
- (g) <http://abcnews.go.com/Entertainment/reese-witherspoons-dad-accused-bigamy/story?id=16219349>

and many more available in Google® searches.

Conclusion

Movants/Intervenors respectfully submit that they have a right to the relief requested under federal and state constitutional law, common law, state statute, and Court Rules. Movants/Intervenors further preserve their rights under the Tennessee Public Records Act and Tenn. Sup. Ct. R. 30. Accordingly, Movants/Intervenors ask that the Court unseal the judicial records and refuse to close this and future proceedings, and grant camera access under Tenn. Sup. Ct. R. 30. Movants/Intervenors reserve the right to supplement the authorities cited herein.

Respectfully submitted,



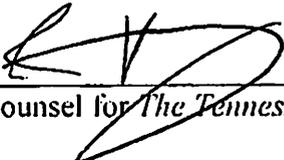
Robb S. Harvey (Tenn. BPR No. 11519)
WALLER LANSDEN DORTCH & DAVIS LLP
511 Union Street, Suite 2700
Nashville, TN 37219
Telephone: (615) 244-6380
Email: robb.harvey@wallerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, a true and correct copy of the foregoing has been served via first-class U.S. Mail, postage pre-paid, and via electronic mail, as follows:

Andra J. Hedrick (counsel for Petitioners)
Gullett Sanford
150 Third Avenue South, Suite 1700
Nashville, TN 37201
Email: ahedrick@gprm.com

Winston Evans (Guardian *ad litem*)
Evans, Jones & Reynolds, PC
1810 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219-2424
Email: wevans@ejrlaw.com



Counsel for *The Tennessean* and WSMV-TV

THE MOVANTS/INTERVENORS INTEND TO PRESENT THIS MOTION AT THE EARLIEST POSSIBLE OPPORTUNITY. A HEARING HAS BEEN SCHEDULED IN THIS MATTER AT THE REQUEST OF THE PETITIONERS OR GUARDIAN AD LITEM AT 11:15 A.M. ON MONDAY, MAY 21, 2012.

Robb Harvey

From: Robb Harvey
Sent: Friday, May 18, 2012 5:31 PM
To: 'Andra Hedrick'
Cc: WEvans@ejrlaw.com
Subject: RE: Witherspoon Matter--5/18

FILED

2012 MAY 21 AM 10:27

RICHARD R. ROBERTSON, CLERK

Chere...

Thanks very much.
Winston, welcome to the case.

From: Andra Hedrick [mailto:ahedrick@gasm.com]
Sent: Friday, May 18, 2012 4:40 PM
To: Robb Harvey
Cc: WEvans@ejrlaw.com
Subject: RE: Witherspoon Matter--5/18

The Guardian ad Litem is Winston Evans. I've copied him.

This is not an emergency hearing. Rather, it is simply a "housekeeping" type appearance, scheduled by the Guardian ad Litem with consent of all interested persons, to present proposed Orders on some matters from the closed hearing of 5/11.

Andra

From: Robb Harvey [mailto:Robb.Harvey@wallerlaw.com]
Sent: Friday, May 18, 2012 3:57 PM
To: Andra Hedrick
Subject: RE: Witherspoon Matter--5/18

This acknowledges receipt of your email.

Would you please respond to me and to the guardian ad litem so I know who that is, and so either you or the guardian ad litem can advise what the general subject matter of the hearing is -- and whether an emergency is being claimed again.

If something has been filed regarding the right of the public to attend this hearing, please let me know. Nothing has been received, and the court docket contains nothing except a pop up box that the case has been sealed.

Robb S. Harvey
Attorney

waller

511 Union Street, Suite 2700
Nashville, TN 37219
615.850.8859 direct
Robb.Harvey@wallerlaw.com

From: Andra Hedrick [mailto:ahedrick@gasm.com]
Sent: Friday, May 18, 2012 3:35 PM
To: Robb Harvey
Subject: Witherspoon Matter

Robb:

As you know Judge Kennedy instructed me to give you notice of future hearings. This afternoon, the Guardian Ad Litem scheduled an appearance in front of Judge Kennedy for Monday, May 21st at 11:15. Please reply to this e-mail so that I know you have received it. Thank you.

Andra

Andra J. Hedrick
Gullett Sanford
Robinson & Martin PLLC
150 Third Avenue South, Suite 1700 | Nashville TN 37201
Phone | 615.244.4994 (main line) or 615.921.4269 (direct line)
Fax | 615.921.4369
ahedrick@gasm.com
www.gasm.com

.....
New IRS rules restrict written federal tax advice from lawyers and accountants. We include this statement in all outbound emails because ev
Nothing in this message is intended to be used, or may be used, to avoid any penalty under federal tax laws. This message was not written t
This email may contain privileged, confidential, copyrighted, or other legally protected information. If you are not the intended recipient

.....
We are required by IRS Chapter 23 to inform you that any statements contained herein are not intended or written to be used, and cannot be used, by you or any other taxpayer, for the purpose of avoiding any penalties that may be imposed by federal tax law. The information contained in this e-mail and any attachments is intended only for the use of the individual or entity to which it is addressed. And any confidential information that is developed, disclosed, and received from disclosure under applicable law. If you have received this message in error, you are prohibited from copying, distributing, or using the information. Please contact the sender immediately by return e-mail and delete the original message.

.....
New IRS rules restrict written federal tax advice from lawyers and accountants. We include this statement in all outbound emails because ev
Nothing in this message is intended to be used, or may be used, to avoid any penalty under federal tax laws. This message was not written t
This email may contain privileged, confidential, copyrighted, or other legally protected information. If you are not the intended recipient



THE TENNESSEAN

1100 BROADWAY
NASHVILLE, TENNESSEE
37203-3134
(615) 259-8095
www.tennessean.com

FILED
2012 MAY 21 AM 11:30
RICHARD R. ROOKER, CLERK
[Signature] U.C.

May 18, 2012

Duane Gang, Reporter
The Tennessean

To: Judge Kennedy

The Tennessean respectfully requests permission to cover, photograph and videotape a hearing in your courtroom Monday, May 21 in the John D. Witherspoon case. The hearing is scheduled for 11:15 a.m.

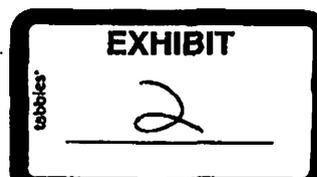
The newspaper makes the following request under Supreme Court Rule 30 and requests that the two-day notice requirement be waived, if applicable.

Thank you. Please do not hesitate to contact me if you have any questions or suggestions for expediting this request. My phone number is 615-726-5982, my e-mail is dgang@tennessean.com and my fax is 615-259-8093.

Sincerely,



Duane Gang
The Tennessean



AH
Robb

WORKING FOR YOU

FACSIMILE COVER PAGE

TO: Judge Randy Kennedy

COMPANY: Davidson Co. Probate Court

FAX #: 296-4502

FROM: **CHANNEL 4 NEWS DEPARTMENT**

Phone: 615/ 353-2231 FAX: 615/ 353-2343

DATE: 5-18-12

Total Pages Including this Cover Page: 2

PLEASE NOTIFY ME IF ANY PAGES ARE MISSING OR UNREADABLE.

MESSAGE: ~~This is~~ A Rule 30 Request For
A Hearing in the case of John Witherspoon



WSMV-TV, Nashville, TN

Fax #: 296-4502

Date: 5-18-12

Name and Address:
Judge Randy Kennedy
Davidson Co. Probate Court

Dear Judge Randy Kennedy:

WSMV Television News respectfully requests permission to bring a camera into your courtroom for the court proceeding of Name: John Witherspoon
 This request would also include permission to locate a wireless microphone on the bench for sound from the actual hearing. WSMV-TV will be covering the proceeding.

This request is submitted in keeping with the Tennessee Supreme Court guidelines allowing media coverage. We respectfully submit our request in writing.

Thank you for your consideration in this matter.

Sincerely,

Les Moster
 WSMV-TV

:bbc

* * * Communication Result Report (May. 18. 2012 6:28PM) * * *

1) WSMV
2)

Date/Time: May. 18. 2012 6:27PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
2571 Memory TX	9-2964502	P. 2	OK	

Reason for error
 E. 1) Hang up or line fail
 E. 2) Busy
 E. 3) No answer
 E. 4) No facsimile connection
 E. 5) Exceeded max. E-mail size

~~WORKING TO YOU~~

FACSIMILE COVER PAGE

TO: Judge Rody Kennedy
 COMPANY: Davidson Co. Probate Court
 FAX #: 296-4502
 FROM: CHANNEL 4 NEWS DEPARTMENT
 Phone: 615/383-2231 FAX: 615/393-2343
 DATE: 5-18-12

Total Pages including this Cover Page: 2

PLEASE NOTIFY ME IF ANY PAGES ARE MISSING OR UNREADABLE

MESSAGE: File 25-A-116 30 request for hearing in the case of John Witherspoon

Robb Harvey

From: Robb Harvey
Sent: Tuesday, May 15, 2012 3:24 PM
To: 'Andra Hedrick'
Subject: RE: Witherspoon Matter--5/15/12

Flag Status: Orange

Attachments: WSMV - Witherspoon.pdf

FILED
2012 MAY 21 AM 11:30
RICHARD R. ROOKER, CLERK
[Signature] O.C.



WSMV -
herspoon.pdf (17 KE)

Ms. Hedrick:

Attached is the request by WSMV reporter Jonathan Martin to the Clerk in advance of the hearing in the case which had not been filed on Friday. Under Rule 30 of the Rules of the Tennessee Supreme Court, a copy is not supposed to be provided to Petitioners or to you, notwithstanding your objection in your proposed order.

Please advise me of the subject matter of the hearing proposed for June 25, 2012, and whether you intend to move for closure as to that hearing.

Your proposed order received today states that it is "TO BE FILED UNDER SEAL PURSUANT TO 5/11/12 ORDER" -- is there a closed Order sealing the entire record in Case 12P-759?

Please advise whether you object to the public filing of any Order of the Court regarding the Court's action on 5/11/12 ejecting the media and sealing whatever record was created after the hearing began.

We do not agree with the content of your Order; however, I intend to provide it to my clients unless you contend that my doing so will violate some Order.

I look forward to hearing from you.

Robb S. Harvey
Attorney, Waller Lansden Dortch & Davis LLP
511 Union Street, Suite 2700
Nashville, TN 37219
615.850.8859 direct
Robb.Harvey@wallerlaw.com

-----Original Message-----

From: Andra Hedrick [mailto:ahedrick@gsrcm.com]
Sent: Tuesday, May 15, 2012 2:56 PM
To: Robb Harvey
Subject: Witherspoon Matter

<<Order Denying Media Coverage and Closing Proceedings.pdf>> Attached is a proposed Order submitted today concerning the media issues.

Also, this is to advise you that the Court has set the matter for further hearing on June 25, 2012, at 10:00 a.m. The hearing will be in the Seventh Circuit (Probate) Court for Davidson County, with Judge Kennedy presiding.

Andra

Andra J. Hedrick
Gullett Sanford
Robinson & Martin PLLC



150 Third Avenue South, Suite 1700 | Nashville TN 37201 Phone | 615.244.4994 (main line) or 615.921.4269 (direct line)
Fax | 615.921.4369 aheadrick@gprm.com www.gprm.com

New IRS rules restrict written federal tax advice from lawyers and accountants. We include this statement in all outbound emails because even inadvertent violations may be penalized.

Nothing in this message is intended to be used, or may be used, to avoid any penalty under federal tax laws. This message was not written to support the promotion or marketing of any transaction. Please contact the firm if you wish to engage us to provide formal written advice as to tax issues.

This email may contain privileged, confidential, copyrighted, or other legally protected information. If you are not the intended recipient (even if the email address above is yours), you may not use, copy, or retransmit it. If you have received this by mistake please notify us by return email, then delete.

In connection to the John Witherspoon
Conservatorship hearing, which we
understand has been set for an
emergency proceeding, WSMV-TV
Channel 4 requests to have a
camera in the courtroom under
TN Supreme Court Rule 30

Jonathan Martin
WSMV Channel 4 News

5/11/12

2:44 pm

Copy

WITHERSPOON v. WITHERSPOON
No. 12D1447 DAVIDSON COUNTY
CIRCUIT COURT, FILED MAY 8, 2012

EXHIBIT A

AFFIDAVIT OF MARY ELIZABETH WITHERSPOON

FILED
2012 MAY 21 AM 11:30
RICHARD R. RODGER, CLERK
C.C.
[Signature]

EXHIBIT
4
tabbles

2012 MAY -8 AM 11:38

AFFIDAVIT OF MARY ELIZABETH WITHERSPOON

I, Mary Elizabeth Witherspoon, after being duly sworn, do hereby make oath as follows:

1. My maiden name is Mary Elizabeth Reese. I am married to Dr. John Drake Witherspoon. We were married March 21, 1970. We have been married forty two years. We have never divorced. We have lived in separate households since 1996 when I moved out because of my husband's alcoholism, infidelity, overspending and hoarding.
2. We have two grown children: John Draper Witherspoon Jr., age 39, and Reese Witherspoon, age 36.
3. I live at 183 Moultric Park, Nashville, TN 37205. My date of birth is August, 18, 1948. My social security number is [REDACTED]. I am a retired professor from Tennessee State University and nurse at Vanderbilt University Medical Center for 24 years.
4. My husband is an otolaryngologist in practice in Nashville, at Baptist Hospital, and has practiced in Nashville for thirty years. His date of birth is April 1, 1942. His social security number [REDACTED].
5. I love my husband and do not want a divorce. We have been married forty two years. He needs help. He has a problem with alcohol. He also has a problem with hoarding, which led to our separation. I understand that due to recent events, he has been let go from his medical practice. He suffers from depression which became worse when his mother died in 2003. He also has a problem with spending. He has at least five

Copy

motorcycles, at least five boats and other properties. As career nurse with a master's in nursing, an E.D.D. in administration, I fear that he has early onset of dementia.

6. Our combined income exceeds \$350,000, more than fifty percent from my husband's medical practice. We also own over \$1 million in rental property.
7. In 2005 my husband tried to get me to sign a note at Bank of America for \$200,000. I refused to sign the note. I later learned that he or someone else signed my name to the note at Bank of America. I received no proceeds or benefit from that note.
8. Also in 2011 my husband asked me to sign a note for \$400,000 at Bank of America. I refused to do so. I don't know whether he signed my name or he had someone else sign my name. I have received no proceeds or benefit from this note.
9. My husband has always refused to provide support for the last thirty years. I have had to pay all of the bills, credit cards, food, children's education, his medical school, house notes, etc. out of my income.
10. In 2006-7, my daughter and I made a decision not to allow my husband to borrow money recklessly which might encumber the marital estate. So we put the condominium where my husband now lives and my house in Sugartree in my daughter's name.
11. My current residence and my husband's condominium at 110 31st Ave. South, Apartment 702, Nashville, TN are titled to my daughter - Reese Witherspoon.
12. My husband's spending practices have accelerated. I now understand that he may have borrowed \$400,000 at Bank of America and either forged my name or had his girlfriend posing as his wife sign. This past week he bought a black Cadillac.

13. I learned from reading the Tennessean on April 22, 2012 that my husband married a woman named Tricianne Taylor. A copy of the wedding announcement is attached. Other people called me and notified me that my husband appeared in a wedding announcement, and that the couple planned a July ceremony with family. The date of the marriage was January 14, 2012. I did not learn about the marriage until April 22.
14. When I confronted my husband, he said he didn't know who Tricianne Taylor was and that he did not remember getting married.
15. On April 30, 2012 I contacted Tricianne Taylor, the new bride. She refused to talk to me. I also wrote her a letter stating that John Witherspoon was married and had two children and four grandchildren. I have had no response. But she clearly knows now that she is married to a man who is not divorced.
16. Friends told me that they have seen my husband and Tricianne (Patricia) Taylor together. They were seen together at Oktoberfest in October. My husband tried to bring Tricianne Taylor to my daughter Reese's wedding in California in March 2011. The security officers at the wedding refused to let her in because she was not on the guest list.
17. I have since learned from friends and investigators that Tricianne Taylor has attempted to borrow money as Ms. John Witherspoon. Also, she is living in the condominium owned by my daughter Reese. And she is driving our vehicles. I have also learned through an investigator that she has gotten my husband to sign a new will.
18. All of our property is marital property. I fear that Tricianne Taylor will attempt to borrow money, transfer marital assets, and dissipate our marital estate. She has already gotten my husband to change his will and sign a note at the bank in 2011.

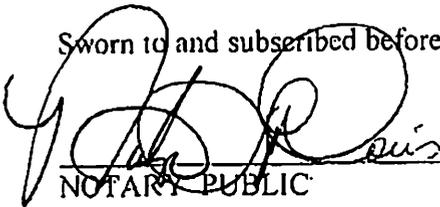
Copy

19. I also fear for my husband's personal safety and the safety of my family. My husband is diabetic, has heart disease, and is otherwise not in good health. He could easily die through lack of medicine, or too much medicine, or some other malicious act.

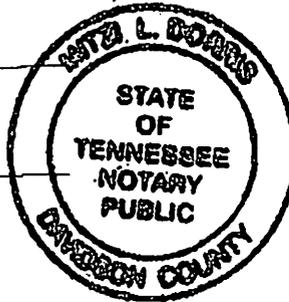
FURTHER, AFFIANT SAYETH NOT:


MARY ELIZABETH WITHERSPOON

Sworn to and subscribed before me, a notary public, this the 7th day of May, 2012.


NOTARY PUBLIC

3-8-2016
MY COMMISSION EXPIRES:



3. At the time of the filing of the Petition, Respondent was not represented by counsel. Since the filing of the Petition, Respondent has retained as his counsel, Anne C. Martin, Esq. ("Ms. Martin"), and Richard J. Nickels, Esq. ("Mr. Nickels"), both of the Nashville Bar, to represent his interests.

4. Neither Mr. Ramsey, Ms. Martin, nor Mr. Nickels were served with the Media's Motion or present when the Media's Motion was set for hearing. They did not agree to have Media's Motion set for hearing on June 1, 2012.

5. As the matter is presently scheduled, any written opposition to the Media's Motion must be filed by Tuesday, May 29, 2012, looking to a hearing as presently set for Friday, June 1, 2012. Mr. Ramsey, Ms. Martin, and Mr. Nickels have prior obligations which would prevent them from preparing and filing timely responses to the Media's Motion and attending the hearing of the Media's Motion if that hearing does occur on June 1, 2012.

6. All interested persons are now represented by counsel. However, counsel for Mrs. Witherspoon and counsel for Respondent are new to this matter and are in the process of investigating, understanding, and analyzing not only the legal, but the personal, financial, health and emotional issues involved in the matter. It is not Petitioners who stand most to be harmed by a ruling on the Media's Motion, but rather Respondent and Mrs. Witherspoon. Their counsel need further opportunity to fully investigate and evaluate this matter, including the Media's Motion and what position they should take or what, if any, accommodation might be made to the Media's request.

7. The Movants are all agreeable to continuing the hearing of the Petition (currently set for June 25, 2012) to a later date so that June 25, 2012 may be used instead as the hearing date for the Media's Motion. Such relief is necessary and appropriate to allow both Respondent

and Mrs. Witherspoon, and their recently retained counsel, and the Guardian ad Litem, to fully and carefully investigate and evaluate all aspects of this matter prior to the hearing. If the matters are not continued, counsel and the Guardian ad Litem may be forced to file responses to the Media's Motion which are not complete or were prepared in haste and without sufficient time to fully research and respond to the matter. This matter involves very sensitive, private, and potentially harmful or embarrassing health, financial, and employment/business information of Respondent and Mrs. Witherspoon. It is crucial to the protection of the privacy interests of Respondent and Mrs. Witherspoon that counsel and the Guardian ad Litem be given adequate time and a fair opportunity to fully address and respond to the issues raised in the Media's Motion. These issues, and the Court's ruling on them, are very important to both the Media and the Movants. The Media would argue that the hearing of these issues should not be unduly delayed, and the Movants do not disagree. But nor should the hearing on these matters be so rushed that Respondent and Mrs. Witherspoon, the persons whose interests are most affected, are effectively prevented from participating in the proceedings.

8. Movants are prepared to agree, without prejudice to their positions as those may be determined between now and June 25, 2012, that: 1) the Media be allowed to intervene for the limited purpose of being heard to request unsealing of judicial records, to oppose further sealed filings and closed proceedings, and to request camera access to hearings under Tenn. R. Sup. Ct. 30; 2) the Media be informed of what has been previously filed in the sealed record, and anything which might be filed prior to June 25, 2012, by identifying the names of the documents (without revealing the contents of the documents); and 3) the Media receive prior notice of and access to any hearing prior to June 25, 2012. Such agreement is adequate to protect the interests

of the Media between now and June 25, 2012. With such protections in place, there would be no prejudice to the Media.

9. The Media serves an honorable and vital purpose in our society. So do the Courts. Those purposes are not always in complete harmony. In *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996), the Tennessee Supreme Court recognized such tension in addressing protective orders by stating:

Protective orders are intended to offer litigants a measure of privacy, while balancing this privacy interest the public's right to obtain information concerning judicial proceedings. In addition, protective orders are often used by courts as a device to aid the progression of litigation and to facilitate settlements. Protective orders strike a balance, therefore, between public and private concerns.

The warning of Professor Miller in an article in the *Harvard Law Review*, as cited in a 2008 Tennessee Court of Appeals opinion, is appropriate:

Without minimizing the importance of public access to judicial records, we must not lose sight of the "primary goal" of the judicial system, that is, "providing citizens an effective truth-seeking procedure for resolving their disputes without impairing their other rights." Miller, 105 HARV. L. REV. at 432.

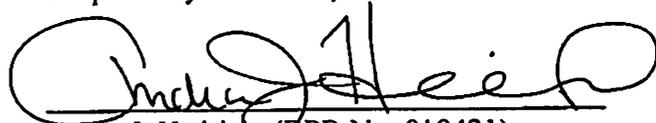
In re NHC -- Nashville Fire Litig., 293 S.W.3d 547, 568 (Tenn. Ct. App. 2008).

10. Granting the rescheduling of these hearings in this manner and with these protections will protect the rights of the Media. It will allow the parties to further investigate and evaluate this matter, further the orderly progression of the legal case, and by doing so in an orderly manner may facilitate resolution of an unfortunate matter of private concern.

11. Movants request that this matter be heard on an expedited basis given that the Media's Motion is currently set for hearing on June 1, 2012 and responses to the Media's Motion are therefore due on May 29, 2012. If Movants were required to set this matter on the Court's

regular Motion docket, which is after these dates, the matter would be moot and the interests of Respondent and Mrs. Witherspoon would not be adequately protected. If the Court is unable to set this matter for hearing prior to the time that responses are due, the Movants request that the response deadline be tolled pending the Movants' joint request for a continuance.

Respectfully submitted,



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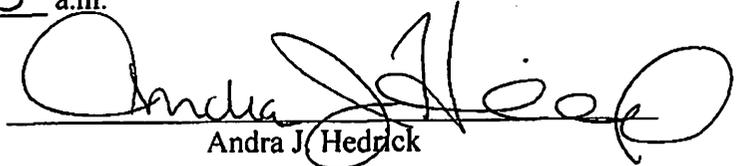
Guardian Ad Litem

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via e-mail and U.S. Mail, postage prepaid, upon:

Robb S. Harvey
Waller Lansden Dortch & Davis LLP
511 Union Street, Suite 2700
Nashville, TN 37219

This 25th day of May, 2012, at 8:45 a.m.


Andra J. Hedrick

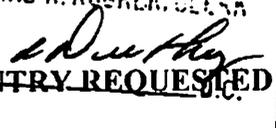
NOTICE OF HEARING

THIS MATTER IS EXPECTED TO BE HEARD ON _____, MAY ____, 2012, AT _____, IN THE SEVENTH CIRCUIT (PROBATE) COURT, JUDGE RANDY KENNEDY PRESIDING.

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE, TENNESSEE

FILED
2012 MAY 25 PM 1:57

RICHARD R. ROBER, CLERK



IN RE: Conservatorship petition regarding)
Dr. John Witherspoon)
REQUESTED BY CHILDREN:)
Reese Witherspoon aka Reese Witherspoon)
Toth and John Witherspoon, Jr.)

NOTICE OF ENTRY REQUESTED
Case No. 12P-759
Judge Kennedy

**[MEDIA WILL ASK AT THE "EMERGENCY" HEARING ON FRIDAY,
MAY 25, 2012, THAT THIS RESPONSE AND THE UNDERLYING
MOTION FOR A CONTINUANCE BE FILED PUBLICLY]**

**RESPONSE (EXPEDITED) OF THE TENNESSEAN AND WSMV-TV CHANNEL FOUR
TO "JOINT MOTION (EXPEDITED) TO CONTINUE HEARING DATES"**

An "emergency" motion was filed this morning to continue the hearing set for June 1, 2012, on the Media Intervenors' Emergency Motion to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings Under Tenn. Sup. Ct. R. 30. That hearing was scheduled on May 21, after discussion regarding the Court's busy schedule and conflicts of counsel for the Petitioners and Guardian *ad litem*, on a date that was agreed upon.¹ The Court declined to postpone the hearing until June 25, finding that the constitutional issues raised merited an early hearing.

On Tuesday, May 22, counsel for the Media Intervenors proposed to counsel for Petitioners and to the Guardian *ad litem* as follows:

Allow me to propose a means of resolving the issues raised by the Emergency Motion -- since the judicial record is supposed to be open, unless the person/entity moving for closure meets the high burden -- why don't y'all get a copy of the docket or a list of all

¹ The Court may recall that Friday, May 25 was one of the dates suggested by the Court—but either counsel for the Petitioners or the Guardian *ad litem* had some conflict, which is why June 1 was agreed to by counsel for Petitioners, the Guardian *ad litem*, and the Media Intervenors.

filings (which should not contain secret or personal information -- it should just have a description 'Petition of X,' "Affidavit of Y") and let us know what you object to unsealing and what you don't object to unsealing? We might be able to work out something and submit an agreed order.

In light of the public record in the annulment case, and Judge Kennedy's comments yesterday, I am hoping that the Petitioners do not continue to seek a blanket seal on the entire judicial record.

My suggestion may save us all time and expense. I look forward to hearing from you.

Petitioners' counsel, rather than responding substantively to the suggestion, have organized an expedited motion and scheduled another "emergency" Friday afternoon hearing, asking to continue the hearing on the "unsealing" Motion to a date previously rejected by the Court.

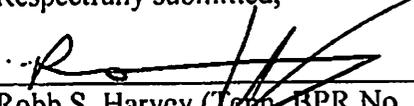
Upon the undersigned's return from Court this morning at about 11 a.m., a prompt response to Petitioners' counsel was provided. The undersigned asked that, in light of the request of Tuesday, May 22 (above), and the movants' "volunteering" to provide a listing of filed documents, that he be provided with a listing of the filings in Court to date so he could consult with his clients about their position to the movants' proposal for a several week postponement. The response from Petitioners' counsel was "I will provide a list so long as the matter is continued."

The undersigned is respectful of whatever plans that counsel who are new to the case have made for this holiday weekend, and would agree to a short postponement. However, given the scheduling difficulties which were mentioned at the May 21 hearing, it is doubtful that the Court can organize everyone's schedules to reach an earlier date. **Therefore, since the movants have taken the time to prepare a motion and order for a continuance and assemble all lawyers for an "emergency" hearing on Friday afternoon, May 25, the undersigned proposes that counsel for the movants be prepared to address the docket sheet today.** Presumably, the Court has entered orders which contain no allegedly "personal" information. The undersigned respectfully submits that it is likely there are several other filings which could not be filed "under seal" except

for the blanket sealing order currently in place. And, as demonstrated in the Media Intervenors' Motion filed May 21, substantial allegedly (or formerly) "private" information has already been voluntarily published by Mrs. Witherspoon in her filed affidavit.

Justice Brandeis famously wrote that "sunlight is said to be the best of disinfectants." Nineteenth century British statesman William E. Gladstone is attributed the famous quote "Justice delayed, is justice denied." In this case, significant constitutional concerns have been raised. As the United States Supreme Court stated in Nixon v. Warner Communications, 435 U.S. 589 (1978), "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." And, "What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. 367, 374 (1947).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012, a true and correct copy of the foregoing has been served via first-class U.S. Mail, postage pre-paid, and via electronic mail, as follows:

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Counsel for *The Tennessean* and WSMV-TV

FILED

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR
DAVIDSON COUNTY, TENNESSEE

2012 MAY 25 PM 4: 22

RICHARD R. ROCKER, CLERK

[Handwritten signature]

IN RE:)
)
CONSERVATORSHIP OF)
)
JOHN DRAPER WITHERSPOON,)
)
Respondent.)

No. 12P-759

~~[TO BE FILED UNDER SEAL PURSUANT TO 5/11/12 ORDER]~~ *TRC*

ORDER GRANTING JOINT MOTION (EXPEDITED)
TO CONTINUE HEARING DATES

This matter came to be heard by the Court on May 25, 2012 upon the joint motion of the petitioners, John Draper Witherspoon, Jr. and Reese Witherspoon, the respondent, John Draper Witherspoon, the respondent's spouse, Mary Elizabeth Witherspoon, and the guardian ad litem, Winston S. Evans, Esq.

Upon consideration of the joint motion, arguments of counsel, and the entire record, the Court finds that the joint motion is well taken and should be granted.

It is, therefore, Ordered by the Court as follows:

1. The joint motion to continue hearing dates is granted.
2. The hearing of the motion to intervene filed by *The Tennessean* and WSMV-TV Channel Four ("Media") is continued and is reset for hearing on Monday, June 25, 2012, at 10:00 a.m.

3. The hearing of the underlying conservatorship petition is continued and shall be reset by agreement of the parties, excluding the Media, but the Media shall be given prior notice of the hearing.

4. The Media shall be allowed to intervene for the limited purpose of being heard on June 25, 2012 to request unsealing of judicial records, to oppose further sealed filings and closed proceedings, and to request camera access to hearings under Tenn. R. Sup. Ct. 30.

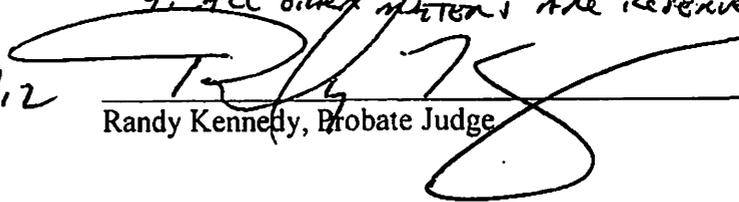
5. The parties shall inform the Media of what has been previously filed in the sealed record, and anything which might be filed prior to June 25, 2012, by identifying the names of the documents without revealing the contents of the documents, by 5:00 p.m. on May 25, 2012. ^{LR}

6. The parties shall give the Media prior notice of and access to any hearing prior to June 25, 2012.

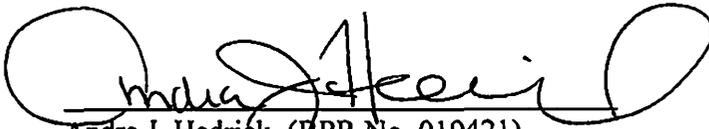
7. The protections herein shall be without prejudice to the parties' positions as those may be determined between now and June 25, 2012.

8. IF the media is not satisfied with the disclosure of the information described in Paragraph 5, Counsel for the media + all other counsel shall attempt to achieve a resolution, and if unsuccessful will notify the court. ^{LR}

9. All other matters are reserved.

5/25/12 
Randy Kennedy, Probate Judge

APPROVED FOR ENTRY:



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(615) 256-4448 (fax)

Guardian Ad Litem

CERTIFICATE OF SERVICE

certify that a copy of the foregoing has been served via e-mail and U.S. Mail, postage prepaid, upon:

Robb S. Harvey
Waller Lansden Dortch & Davis LLP
511 Union Street, Suite 2700
Nashville, TN 37219

This 25th day of May, 2012, at 8:45 a.m.


Andra J. Hedrick

7-10-12

FILED

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE, TENNESSEE

2012 MAY 25 PM 4:22

RICHARD R. ROEKER, CLERK
Roeker

IN RE: Conservatorship petition regarding)
Dr. John Witherspoon)

NOTICE OF ENTRY REQUESTED O.C.

REQUESTED BY CHILDREN:)
Reese Witherspoon aka Reese Witherspoon)
Toth and John Witherspoon, Jr.)

Case No. 12P-759
Judge Kennedy

Setting Hearing on Re
ORDER GRANTING IN PART THE EMERGENCY MOTION
FILED BY THE TENNESSEAN AND WSMV-TV CHANNEL FOUR
AND SETTING HEARING *Re*

This matter came before the Court the morning of Monday, May 21, 2012, on certain matters proposed by the Guardian *ad litem* to be entered. As evidenced by the record, counsel for *The Tennessean* and WSMV-TV Channel Four (the "Movants/Intervenors")¹ was sent an email on Friday, May 18, 2012 at 3:35 p.m. Central time stating that this hearing had been scheduled.

Prior to the hearing, the Movants/Intervenors filed an "Emergency Motion to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings Under Tenn. Sup. Ct. R. 30" (the "Emergency Motion"). The Court considered the Emergency Motion at the beginning of the hearing.

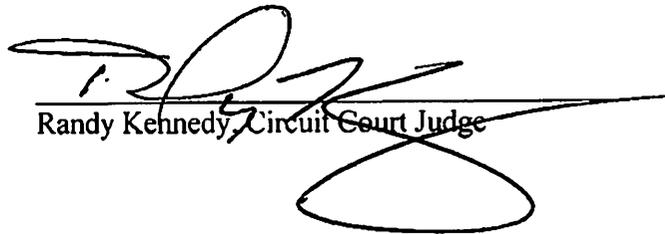
At this hearing, counsel for Petitioners and the Guardian *ad litem* did not move for closure of the courtroom proceeding, and did not oppose a camera in the courtroom.

Petitioners' counsel requested additional time to respond to the Emergency Motion. A hearing on that Motion is set for *Monday 25* Friday, June 4, 2012, at *10:00 A.M.* 1:30 p.m. Central time.

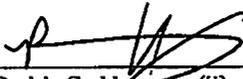
¹ *The Tennessean* is the regional daily newspaper which is owned by Gannett Satellite Information Network, Inc. WSMV-TV Channel Four is the NBC-affiliate television station headquartered in Nashville and which is owned by Meredith Corporation.

At the request of counsel for the Movants/Intervenors, the Emergency Motion is not subject to any prior ruling sealing the Court proceedings and records, and must be publicly filed. The Clerk is directed to file the Emergency Motion as a public record, and to take such steps as are necessary to make the filing available via the Caselink system.

IT IS SO ORDERED.


Randy Kennedy, Circuit Court Judge

SUBMITTED BY:


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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2012, a true and correct copy of the foregoing has been served via first-class U.S. Mail, postage pre-paid, and via electronic mail, as follows:

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Counsel for *The Tennessean* and WSMV-TV

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR
DAVIDSON COUNTY, TENNESSEE

FILED

2012 JUN 19 PM 12:13

RICHARD R. ROOKER, CLERK

[Signature] D.C.

IN RE:)
)
CONSERVATORSHIP OF)
)
JOHN DRAPER WITHERSPOON,)
)
)
Respondent.)

No. 12P-759

RESPONSE TO EMERGENCY MOTION OF
THE TENNESSEAN AND WSMV-TV CHANNEL FOUR

The petitioners, John Draper Witherspoon, Jr. and Reese Witherspoon (“Petitioners”), by their counsel, respond to the Emergency Motion of *The Tennessean* and WSMV-TV Channel Four (“Media”) to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings Under Tenn. R. Sup. Ct. 30 (“Media’s Motion”) as follows:

I. INTERVENTION

In its “Order Granting Joint Motion (Expedited) To Continue Hearing Dates,” entered on May 25, 2012, the Court allowed the Media to intervene for the limited purpose of being heard on June 25, 2012 to request unsealing of judicial records, to oppose further sealed filings and closed proceedings, and to request camera access to hearings under Tenn. R. Sup. Ct. 30. Petitioners did not oppose the intervention of the Media for this limited purpose. No further ruling is required regarding this aspect of the Media’s Motion, as intervention of the Media has already been allowed. The other aspects of the Media’s Motion are addressed below.

II. CLOSING OF PROCEEDINGS AND CAMERA ACCESS

The Media has sought access to the hearings in this matter. Media access at a hearing is to be determined pursuant to the provisions of Tenn. R. Sup. Ct. 30 on a case-by-case basis for each hearing before the Court. Section A(2) of Tenn. R. Sup. Ct. 30 states that “[r]equests by representatives of the media for such coverage must be made in writing to the presiding judge not less than two (2) business days before the proceeding is scheduled to begin. The presiding judge may waive the two-day requirement at his or her discretion.” In this case Petitioners have not objected to the presence of media at any of the past hearings except for the initial hearing on May 11, 2012. But Petitioners do reserve the right to move to close future courtroom proceedings. The closure of any hearing must be evaluated by the Court on an individual basis. The Court should not entertain the Media’s request to rule on this issue generally and prospectively. The Court has ordered that counsel for the Media be provided with notice of future hearings in this matter. The parties have complied, and will continue to comply, with the Court’s instructions. This procedural safeguard adequately protects the Media as to its opportunities to request access pursuant to Tenn. R. Sup. Ct. 30.

III. SEALING OF RECORDS

A. *Tennessee Law Provides for the Sealing of Court Records When Appropriate.*

The Media has objected to the Court’s sealing of records in this case and has moved to open all of the Court’s records, arguing that it and the public have the right to examine these documents. Although there is a presumption that the public has the right to “inspect and copy judicial documents and files,” this presumption does not mean that access is absolute. *In re: The Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983) (copy attached). Courts

have the power and may prevent the public from seeing court records if deemed proper: "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Comm., Inc.*, 435 U.S. 598, 598 (1978) (copy attached). "For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not '*used to gratify private spite or promote public scandal*,'" the Supreme Court held in *Nixon. Id.* (emphasis added). In Tennessee, "[c]ourts have inherent power to seal their records when privacy interests outweigh the public's right to know." *The Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 n.1 (Tenn. Crim. App. 1998)(following *In re: Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470 (6th Cir. 1983)("trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know.")).

The decision whether to seal judicial records is left to the discretion of the trial court, and will not be reversed on appeal absent a showing of abuse of discretion. *Ballard v. Hertzke*, 924 S.W.2d 652, 659 (Tenn. 1996); *In re: Knoxville News-Sentinel Co., Inc.*, 723 F.2d at 474. Once the trial court seals records, "[t]he burden of establishing abuse of discretion is on the party seeking to overturn the trial court's ruling on appeal." *Ballard*, 924 S.W.2d at 659. In *In re: NHC*, the Tennessee Court of Appeals affirmed the trial court's order establishing a blanket initial seal on all documents filed with the court and finding of good cause to retain the protective order on unfiled discovery, holding that the intervening newspaper had not demonstrated that the court had abused its discretion. *In re: NHC*, 293 S.W.3d 547 (Tenn. Ct. App. 2008). The newspaper intervened in the case seeking unsealing of the court's records and a lifting of the protective order. *Id.* at 553. Following a number of hearings on these issues, the

court retained the seal on certain records regarding confidential health information and expert reports but unsealed the remaining court records. *Id.* at 555-556. The newspaper appealed, arguing that the court “did not follow constitutionally mandated procedures for filing documents under seal or follow applicable law as to whether pretrial discovery not filed with the trial court should be subject to a protective order.” *Id.* at 556.

The court in *In re: NHC* noted that court proceedings and judicial records are presumed to be open, and that a restriction on public access should be narrowly tailored to account for privacy interests without unduly impeding public access. *Id.* at 560-561. The Court held, however, that “the common law right of access is not absolute.” *Id.* at 561. “Every court has supervisory power over its own records and files, and *access has been denied where court files might have become vehicles for improper purposes, such as promoting public scandal or publication of libelous statements,*” the court held. *Id.* (quoting *Nixon*, 435 U.S. at 598)(emphasis added).

In the *In re: NHC* case, the newspaper argued that the initial sealing of documents, and the protocol the trial court instituted to evaluate those documents for unsealing, delayed its access to the documents to such an extent that it constituted an unconstitutional denial of access. *Id.* at 566. The appellate court noted that the newspaper had a legitimate interest in timely access to the documents, but held that the trial court did not abuse its discretion in implementing a procedure that took some amount of time to properly review the documents before release. *Id.* at 567. The Court held that, “[w]ithout minimizing the importance of public access to judicial records, we must not lose sight of the ‘primary goal’ of the judicial system, that is, ‘providing citizens an effective truth-seeking procedure for resolving their disputes without impairing their other rights.’” *Id.* at 568 (quoting *Miller*, 105 Harv. L. Rev. 427, 432). The Miller article, which

the Court cited with approval, stated further that “[t]he current pressure to restrict judicial discretion to grant protective orders, by contrast, often seeks to promote goals unrelated to the litigation before the court, such as increased data gathering by the media and aiding third-party lawyers bringing similar suits.” *Miller*, 105 Harv. L. Rev. at 432. This pressure promotes these unrelated goals by “burdening people’s use of the system rather than facilitating that use.” *Id.* The court in *In re: NHC* held that “a third party such as a media representative or public interest group” could intervene to seek access to documents when the “intervenor asserts that the public interest is served by disclosure.” *Id.* 573. It further held, however, that the public interest asserted must truly be for the betterment of the public, as where the issue was nursing home safety, with a statement seemingly directed at this very matter, stating: “*We do not address a situation in which media intervention serves only voyeuristic purposes, as in litigation involving a celebrity, or in which the third party seeks to further its own interests, such as seeking access to discovery information in the hopes of utilizing it for profit.*” *Id.* (emphasis added).

In determining whether to seal records, a court should balance “one party’s need for information against the injury that would allegedly result if disclosure is compelled.” *Ballard*, 924 S.W.2d at 658. Factors supporting opening of records include: “(1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency.” *Id.* Factors supporting the closing of records include: “(1) the litigation involves private litigants; (2) the litigation concerns matters of private concern or of little legitimate public interest; and (3) disclosure would result in serious embarrassment or other specific harm.” *Id.* at 58-659. Also, the parties’ reliance on a protective order supports keeping judicial records closed. *Id.* at 659.

As an additional consideration, courts should seal records where those records have been accorded a higher level of privacy or confidentiality in other areas of the law. In *In re: Knoxville News-Sentinel Co., Inc.*, the court allowed sealing of records showing information about the customers of a bank. *In re: Knoxville News-Sentinel Co., Inc.*, 723 F.2d at 476. The court held that “[t]he district court’s order allowing removal of Exhibits 3 and 4 from its file properly protected the identity and privacy of customers of the bank whose names were included in the two exhibits. Congressional support for this action is reflected in statutory provisions and regulatory rules.” *Id.* The court then discussed several federal statutes requiring that bank customer information be kept private, and held that “[t]he privacy interests embodied in those provisions identify a compelling government interest in preserving the secrecy of personal financial records.” *Id.* at 477.

The Eighth Circuit Court of Appeals followed a similar line of reasoning in *Webster Groves School Dist. v. Pulitzer Publishing Co.* where it closed hearings and sealed court records in a case involving a juvenile in part because other laws prohibited disclosure of sensitive or stigmatizing information of juveniles. *Webster Groves School Dist. v. Pulitzer Publishing Co.* 898 F.2d 1371 (8th Cir. 1990) (copy attached). That court cited a number of Missouri and federal statutes, such as the Family Educational Rights and Privacy Act, that all mandated securing the privacy of minor students, and held that these statutes supported extending these privacy considerations to court hearings and records. *Id.* at 1374-1375. In ruling that the records would remain sealed, the court held that “Whether we apply a constitutional standard or a common law standard, the result is the same: Pulitzer’s interest in access to the records in this case clearly is outweighed by T.B.’s privacy interest and the state’s interest in protecting minors from the public dissemination of hurtful information.” *Id.* at 1377. Likewise, in the instant case this Court

should consider federal and Tennessee financial privacy laws and privacy laws pertaining to medical information, such as HIPAA, which require the privacy of this information, in determining whether to seal the records containing such information in this case.

B. Sealing of Court Records in this Case is Appropriate.

In this case the facts clearly support the continued sealing of this Court's records after giving consideration to the factors discussed in the *Ballard* case. None of the parties are public entities or officials.¹ All of the parties are private citizens who sought this Court's assistance with regard to a matter of private concern. The documents in the Court's records contain or relate to private information pertaining to the health, finances, marriage, and employment/business interests of the Respondent and/or Mrs. Witherspoon.² The release of such information would cause serious embarrassment to the parties, and would generate no real benefit to the public. The public has little, if any, legitimate interest in this matter. Releasing the records would promote public scandal and serve only voyeuristic purposes, which are improper purposes and frowned upon by the courts in the *Nixon* case (U.S. Supreme Court) and the *In re: NHC* case (Tennessee Court of Appeals). Further, the parties have relied upon the court records remaining sealed during the duration of this case in the interests of their privacy.

¹ Although the public may be aware of Respondent's daughter because of her profession and related accomplishments, she is not a public official and she remains a private citizen entitled to the same privacy protections as other private citizens.

² Without question, certain documents in the record contain private information which is not already known to the Media or public and should remain protected. These documents include: 1) the petition for conservatorship; 2) the fiduciary oath; 3) the order concerning temporary conservatorship of the person; 4) the letters of temporary conservatorship of the person; 5) the order concerning temporary conservatorship of the property; and 6) the letters of temporary conservatorship of the property. Petitioners oppose the release of these records, as well as any other documents which may become part of the record in the future and which deal with the health, finances, marriage, and employment/business interests of Respondent and/or Mrs. Witherspoon or any other party.

The Media has failed to demonstrate that this Court abused its discretion in this case in keeping its records sealed. The Court held a hearing on May 11, 2012 at which it heard testimony that demonstrated that the privacy interests of the Respondent outweighed the public's right of access to the Court's records in this matter. The burden is now on the Media to demonstrate that this Court abused its discretion in sealing these records. There is no public interest in the contents of the Court's files in this case other than a voyeuristic interest in any possible scandal that may be generated from releasing this information, which is, as the cases discussed above make clear, an insufficient public interest to support release of confidential information. The Media's interest in these documents is based squarely on the identity of the Respondent's daughter, one of the Petitioners, and on the possible profits to be generated from the publication of these documents.

The Media has correctly stated that there is a general public interest in court proceedings and documents, but Tennessee law clearly states that this general interest must give way to interests of privacy when the circumstances require. And in the instant case, the need for public oversight of court proceedings is diminished by the fact that all parties are represented by counsel, and in addition the Court has appointed a *Guardian ad Litem* to insure that the rights of the Respondent are protected. The Media's reliance on the procedural requirements stated in *State v. Drake* is misplaced, since *Drake* was a criminal case which addressed the closure of court hearings, not the sealing of documents. See *State v. Drake*, 701 S.W.2d 604, 608 (Tenn. 1985). No Tennessee court has directly addressed sealing of records in cases of guardianship or conservatorship records, but other courts have and have found sealing of records in such cases to be appropriate.

C. Courts in Other States Have Sealed Records in Conservatorship and Guardianship Cases.

There are no Tennessee opinions where a court has addressed sealing of records in the context of a conservatorship or guardianship action, but courts in other jurisdictions have held that the interests of privacy outweighed the public's right of access in cases involving guardianships or conservatorships. In *In the Matter of du Pont*, the Court of Chancery of Delaware held that guardianship records were afforded a level of privacy that outweighed the public's right to inspect court records. *In the Matter of du Pont*, 1997 Del. Ch. LEXIS 100 (Del. Ch. 1997) (copy attached). The court held that generally, "[a]lthough there is a general presumption of access to civil proceedings and records, courts have the discretion and power to close hearings and keep records under seal when appropriate." *Id.* at *9. The court noted that "Delaware and other states have had a long tradition of restricting access to records in certain types of civil cases. Delaware case law, and written policies document the fact that access to guardianship records, in particular, has been restricted in Delaware at least throughout the past few decades." *Id.* In a footnote, the court observed that "[b]oth the Delaware and U.S. Supreme Court have recognized the significance of tradition and experience in determining whether a common law right of access exists." *Id.* at *9 n.7. A guardianship matter involves "a legitimate interest of the ward that justifies some intrusion into the normal practice of open access by the press of court records." *Id.* at *14. Guardianship records contain personal medical and financial information, and "[m]erely because a person may need the help of a guardian does not ordinarily provide a ground to say that their rights to privacy have been surrendered." *Id.*

The *du Pont* court affirmed its decision to deny the media's motion to gain unrestricted access to the guardianship file and kept the records sealed, but released the transcript of the *in*

camera hearing regarding access to the records. *Id.* at *2. The court held that “[t]he narrowly tailored remedy in this instance was providing the media with access to the transcript of the hearing and the ruling, while keeping the file generally sealed, no good cause having been shown to permit media access to Mr. du Pont’s personal medical and financial information.” *Id.* at *14-15. The court held that in determining whether a closure order is appropriate, “the court has discretion to consider many factors, including ‘the parties’ interest in secrecy, whether the parties seeking secrecy are public entities, the parties’ reliance on a standing confidentiality order, potential embarrassment to the parties, and whether the action involves public health or safety.” *Id.* at *15 n.11 (quoting *Doe v. Methacton Sch. Dist.*, 878 F. Supp. 40, 42 (E.D. Pa. 1995)).

In *Matter of Astor*, the Supreme Court of New York acknowledged that there existed a presumption of openness and access to court proceedings and records, but held that a countervailing interest in the privacy of an individual being placed under a guardianship supported the sealing of records. *Matter of Astor*, 824 N.Y.S.2d 755 (N.Y. 2006) (copy attached). The court considered four factors in reaching its holding: the interest of the public in the proceeding, the orderly and sound administration of justice, the nature of the proceedings, and the privacy rights of the individual. *Id.* at 755. The court held that the first factor, the interest of the public, supported opening of the proceedings because there was a general social interest in the outcome of court cases and the individual subject to guardianship was a public figure, Brooke Astor. *Id.* On the second factor, the sound administration of justice, the court held that this factor supported closure of certain records of the proceedings because it was in the best interests of the individual for the court-appointed evaluator to perform a thorough evaluation without fear of private information coming to light. *Id.* On the third and fourth factors, the nature of the proceedings and the privacy rights of the individual, the court held that these factors supported

closing certain records because the proceedings necessarily involved the review of confidential medical and financial records. *Id.*

The news organizations argued that the media had already disclosed allegations contained in the original guardianship petition, and cited a prior opinion where the court had opened the proceedings because the information sought to be suppressed had been “known to the public for months.” The court distinguished this prior opinion because the parties in the *Astor* case had intended to seal the court records from the beginning and the information in the sealed files was not public, holding as follows:

Here, in contrast, the petitioner intended for the court file to be sealed from the outset, and the parties cannot be precluded from seeking to seal the file and close the courtroom pursuant to *MHL § 81.14* solely because the press got hold of a copy of the unsigned order to show cause and supporting papers shortly after the commencement of the case. Nor do the allegations in the petition sum up the entirety of this dispute, and the precise details of what may have occurred in the last several years of Mrs. Astor’s life have yet to be explored.

Id. The court further held that “the parties have demonstrated good cause to seal portions of the court’s file in this matter,” after “balancing the rights of the public against the privacy interests of Mrs. Astor and the need for the court evaluator to function effectively.” *Id.* The court ruled that the “file shall be sealed only with respect to medical, mental health and nursing records ... and all of the court examiner’s reports.” *Id.* The court further sealed all documents showing Mrs. Astor’s “social security number, bank and brokerage account numbers, and other similar personal identifying financial information.” *Id.* In addition, the court also ruled that “any court hearings whereby testimony concerning any documents filed under seal is to be presented shall be closed to the public and the press.” *Id.*

In *In re: Estate of Carpenter*, the Hamilton County Probate Court, Ohio, retained the seal on guardianship and settlement documents, holding that the privacy of the individuals outweighed the public interest in knowing the contents of the documents. *In re: Estate of Carpenter*, 127 Ohio Misc. 2d 22 (Ohio P. Ct. 2004) (copy attached). The guardianship, trust, and settlement records in *Carpenter* stemmed from wrongful death settlements paid by the Cincinnati Police Department in alleged excessive force cases. *Id.* at 24-25. The state appointed guardians for the minor children of two of the decedents, and set up wrongful death trusts for their benefit. *Id.* at 25. The guardians and trustees in the case moved to seal all records in the case, including information regarding distribution of the settlement amounts from the wrongful death cases. *Id.*

The court held that “[g]enerally, court documents and proceedings are public records subject to disclosure under Ohio’s Public Records Act,” and that under federal law and the U.S. Constitution “trials and court records are presumptively open and available for public inspection.” *Id.* at 26. The presumption of openness “is subject to a *Fourteenth Amendment* limited right to a privacy balancing test, where the court must determine whether the right of access is outweighed by the individual’s privacy interest,” the court held. *Id.* “To seal a record, a court must find that the risk of harm to the individual’s privacy rights outweighs the public’s interest in maximum public access to court records, governmental accountability, public safety, and the use of the courts to resolve disputes and the effective use of the court’s staff,” the court held. *Id.*

The court declined to seal the filings prior to the date of the hearing on sealing the records because those records only contained information on the gross settlement amount and a proposed distribution, and those figures had previously been published in the media. *Id.* at 27-28.

The court held that, however, “[t]he question of whether the court’s future rulings in these cases, including the ultimate distribution of the funds and whether future reports of the guardians ad litem and future accounts and other records of the trustees of the minors should be sealed, is more problematic.” *Id.* at 28. The court reviewed the possible harm that would arise, and had already arisen, out of the publicity attached to the case and the likely effects of the attention the settlement amount paid to the children’s trusts would draw. *Id.* at 28. The court held that, “[b]ased on the foregoing, the court finds that the public interest in these cases is satisfied by the knowledge of the overall settlement of the \$4.5 million involving the 22 plaintiffs and specifically by the gross amounts distributed in these two cases.” *Id.* at 29. “Such disclosure of the division of the settlement fund satisfies only a voyeuristic interest. The court finds that protecting the privacy interests of the children to develop as normally as possible under their tragic circumstances outweighs any public right to know this specific information.” *Id.*

This courts in *du Pont*, *Astor*, and *Carpenter* all held that either partial or complete closure of court records was appropriate in the case of guardianships or conservatorships because the very private nature of the information addressed in these types of cases outweighed the public’s right to access the court’s records. The courts in these three cases followed balancing tests akin to that used in Tennessee for the sealing of records, and each court examined a number of factors in deciding that the privacy concerns trumped the right of access.

D. Sealing of Court Records in this Case is Consistent with this Court’s Tradition of Protecting the Privacy Interests of Parties in Certain Types of Cases.

As a probate court, the Seventh Circuit Court of Davidson County exercises jurisdiction over types of cases which do not share the same characteristics of a traditional “plaintiff vs.

defendant” type of lawsuit, and therefore are of a lesser interest to the public. Often the cases are non-adversarial matters in which a person or family has sought intervention from the Court to administer an estate or trust, to protect the interests of minors, or to protect the interests of others who are disabled and in need of assistance. These are typically private family matters which do not involve an alleged wrong perpetrated on a third party (such as in the *Drake* case or other criminal cases) and are not matters affecting public safety (such as in the *In re: NHC* case or other similar litigation cases). Cases heard by this Court may involve private information of the parties which the parties do not wish to be made public. In past cases, the Court has either partially or completely sealed the Court records to protect the privacy rights of parties when those privacy rights outweighed the public’s legitimate interest in the matter. Statistics as to the number of partially sealed files in this Court were unavailable. But over the past five (5) years, this Court has sealed approximately thirty-four (34) cases, in their entirety.³

The case at bar is just one of many cases in which the Court has exercised its discretion to limit the public’s access to court documents. The sealing of records in this case was in keeping with the Court’s long tradition to protect the privacy rights of parties in similar cases, including

³ A search of the Court’s records revealed that:

- In 2008, 9 cases were completely sealed (5 conservatorships; 2 name changes; 1 minor recording contract; and 1 guardianship);
- In 2009, 3 cases were completely sealed (all minor recording contracts);
- In 2010, 14 cases were completely sealed (5 conservatorships; 6 minor recording contracts; 1 guardianship; 1 estate; and 1 name change);
- In 2011, 2 cases were completely sealed (both conservatorships); and
- In 2012 (through June 13, 2012), 6 cases were completely sealed (4 guardianships; 1 minor recording contract; and 1 conservatorship).

Cases prior to 2008 were not examined. But the Court may take judicial notice that there are numerous examples from 2007 and earlier in which the court records were partially or completely sealed under appropriate circumstances.

conservatorships. The parties in this case should be, and were, afforded the same privacy protections as have been afforded to parties in other similar cases before the Court. The Court correctly held that “the prejudice that would befall these private citizens in the opening up and laying out of their personal affairs greatly overrides any value that their disclosure might have to the public.” Order Denying Media Coverage and Closing Proceedings, p. 4. In so ruling, the Court did not identify what value the disclosure might have to the public. The Media has not asserted any value that disclosure of the records might have to the public or any legitimate purposes that the public might have in viewing the court records. The Petitioners assert that there is none. Release of the documents would not benefit the public, although it could benefit the Media in terms of possible profits resulting from its coverage of the case. On the other hand, the risk of detriment to the parties in terms of possible embarrassment and infringement upon their privacy rights, is substantial. The release of the documents would promote tabloid-like coverage of the case. It would only fuel the public’s voyeuristic interest in the case and promote a public scandal over what is a private family matter. The Court weighed the private and public interests, and correctly determined that the matter should be sealed.

IV. CONCLUSION

A. Intervention. The Media’s limited intervention into this matter is not in dispute. The Media has already intervened for limited purposes. No further ruling on the issue of intervention is required.

B. Media Access to Judicial Proceedings. The Media’s request for access to the hearing of May 11, 2012 was denied after an evidentiary hearing and the weighing of the private and public interests. This was an appropriate exercise of the Court’s discretion and the Court

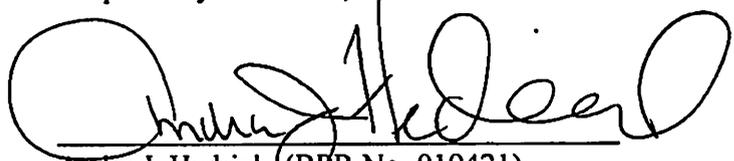
limited its ruling to only that particular hearing. The Media's requests for access to other hearings which have taken place in this matter were granted without opposition. The Media's request that the Court "refuse to close this and future proceedings, and grant camera access under Tenn. Sup. Ct. R. 30" is overly broad in that it calls for unlimited access to all future proceedings without regard to the subject matter or other particulars of the proceeding. Requests for media access pursuant to Tenn. R. Sup. Ct. 30 should be considered on a case-by-case basis for each hearing before the Court. Certainly, with respect to any future hearing the Media has the right to request access, and the parties have the right to oppose such access. If there is opposition to the presence of the Media at any future hearing, the Court may address the matter at that time. The Court should not make any broad, generalized and prospective ruling concerning the Media's access to future judicial proceedings. No ruling on this issue is required at the hearing scheduled for June 25, 2012, unless there should be a request and opposition as to that hearing.

C. Media Access to Judicial Records. Tennessee law allows the partial or complete sealing of judicial records under appropriate circumstances. This case involves the type of circumstances which warrant sealing of judicial records. At the hearing of May 11, 2012, the Court took into account the arguments for and against closure and the public and private interests involved. The Court ultimately determined that closing of judicial records was appropriate in this case. The Court has discretion to control access to its own records, and no abuse of that discretion has been shown by the Media. The circumstances present at the May 11, 2012 hearing, which warranted the sealing of the record, are still present today. For the same reasons it sealed the record then, the Court should deny the Media's request to unseal the record now.

There are no Tennessee appellate opinions addressing the issue of sealing records in guardianship or conservatorship cases. But this issue has been addressed in other states, and the

courts in those cases have found either partial or complete closure of the court records to be appropriate because the very private nature of the information addressed in these types of cases outweighed the public's right to access the court records. This Court has a long history of sensitivity to parties' privacy concerns, particularly in matters such as conservatorships where the parties have sought assistance from the Court in addressing an otherwise private family matter, and there is little if any legitimate public interest in the case. The Court's ruling in this matter is consistent with Tennessee law, decisions in other jurisdictions, and the tradition of this Court. The Court should deny the Media's request to unseal the judicial records, and allow those records to remain sealed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andra J. Hedrick". The signature is written in a cursive style with a large initial "A" and "H".

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This 19th day of June, 2012.



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FILED

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RICHARD R. ROOKER, CLERK

Richard R. Rooker

In re Knoxville News-Sentinel Co.
723 F.2d 470
(6th Cir. Tenn. 1983)



In re: The KNOXVILLE NEWS-SENTINEL COMPANY, INC., (83-5095) In re:
KNOXVILLE JOURNAL CORPORATION and Tennessee Newspapers, Inc.,
(83-5096), Petitioners

Nos. 83-5095, 83-5096

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

723 F.2d 470; 1983 U.S. App. LEXIS 14537; 38 Fed. R. Serv. 2d (Callaghan) 242; 10
Media L. Rep. 1081

August 1, 1983, Argued
December 13, 1983, Decided

PRIOR HISTORY: [**1] On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Tennessee.

COUNSEL: Richard L. Hollow, Robert H. Watson, Jr., Knoxville, Tennessee, Bruce W. Sanford, N.W., Washington, District of Columbia, for Appellant.

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Dean Hill Rivkin, Knoxville, Tennessee, Amicus Curiae, for petitioner.

JUDGES: Engel, Martin and Contie, Circuit Judges.

OPINION BY: MARTIN, JR.

OPINION

[*471] BOYCE F. MARTIN, JR., Circuit Judge.

In this appeal, two Tennessee newspapers, intervening parties in the lawsuit between United American Bank and the Federal Deposit Insurance Corporation, are seeking a writ of mandamus. The newspapers request that we vacate an order of the district court which permitted the bank to remove from the court's record, prior to public [**2] inspection, two exhibits the bank had filed in its lawsuit against the FDIC.

On January 25, 1983, bank examiners of the FDIC, pursuant to their statutory authority to regulate federally-insured state banks, presented the bank officials with a list of 423 questionable loans in United American's portfolio. The list contained the names of borrowers and the amount of each loan. The bank responded by submitting to the FDIC a loan-by-loan defense of each of the 423 loans listed by the FDIC as questionable. This response contained extensive discussion of the borrower's financial condition, prospects and personal life.

During this time, stories were appearing in the Tennessee news media discussing the FDIC's concern over the bank's financial condition. Apparently in response to this media attention, the bank issued a press release on January 28, 1983, disclosing its fourth-quarter and year-end financial results for 1982. The figures

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38 Fed. R. Serv. 2d (Callaghan) 242; 10 Media L. Rcp. 1081

relied upon in this press release came from an audit report prepared by the bank's own independent accountants. The press release did not mention the FDIC's list of questionable loans.

[*472] On February 4, 1983, the FDIC served on the bank a Temporary [**3] Order to Cease and Desist which required that:

Immediately upon service of this TEMPORARY ORDER TO CEASE AND DESIST, the Bank shall correct the false or misleading public statements disseminated by the Bank, or officers, directors, or employees of the Bank, on or about January 29, 1983.

The Bank shall file an amended consolidated Report of Condition and an amended consolidated Report of Income as provided under section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. § 1817(a)) which shall accurately reflect the financial condition of the Bank as of December 31, 1982.

On February 8, the bank filed suit in the district court pursuant to 12 U.S.C. § 1818(c)(2), seeking an injunction to prohibit the FDIC from enforcing its Temporary Cease and Desist Order.

Upon filing, counsel for the bank was granted, *ex parte*, a protective order from the district court sealing the entire court record. At that time, the record contained the bank's complaint, ten exhibits, and responsive pleadings. Included among the ten exhibits were the FDIC's list of questionable loans, Exhibit 3, and the bank's loan-by-loan response, Exhibit [**4] 4. The protective order, dated February 8, barred all public access to the court file and ordered the parties to keep confidential any information derived from the court file. On February 11, the Knoxville News-Sentinel Co., whose reporters had been assigned to monitor the litigation between the bank and the FDIC, filed in this court a Petition for a Writ of Mandamus to vacate the protective order. On February 14, the Knoxville Journal Corporation and Tennessean Newspapers, Inc., also filed a Petition for a Writ of Mandamus. The newspapers argued that the lawsuit between the bank and the FDIC dealt with events and personalities of "immense public interest." They

contended public access to the file was needed to facilitate further discussion and debate among the citizens of Tennessee about these important matters.

In a memorandum opinion dated February 11, 1983, the district court set forth its reasons for sealing the court record. First, the court noted the sensitive nature of the exhibits relating to the bank's customers and the bank's loan policy. The district court acknowledged the bank's contention that public disclosure "would result in the FDIC prevailing in the action before [**5] the issues are joined or any necessary hearing is held." In light of these circumstances, the court concluded there was authority to deny public access to the court file in order to "protect the interest of the Bank in this case."

On February 14, the Tennessee Commissioner of Banking ordered United American closed because of extensive loan losses, and appointed the FDIC as receiver of the bank. On February 15, the FDIC negotiated an agreement with the First Tennessee Bank of Knoxville to assume all the assets and liabilities of United American Bank. On the same day, the district court issued an order dismissing the lawsuit between United American and the FDIC. This order also lifted the February 8 protective order, but directed that Exhibits 3 and 4 be withdrawn from the court file and returned to counsel for the bank, "with the understanding that the exhibits will be preserved and submitted to the Sixth Circuit if requested by that Court." On February 18, the newspapers filed amended Petitions for a Writ of Mandamus in this court seeking an order vacating the February 15 order to the extent that it permits the removal of Exhibits 3 and 4 from the district court's records.

In [**6] our view, this appeal presents two separate issues:

(1) Did the district court's February 15 order, which dismissed the underlying lawsuit between the bank and the FDIC and provided for public access to the remaining documents in the court file, moot the newspapers' claims against the district court?

(2) Did the district court abuse its discretion by permitting counsel for the [*473] bank to remove Exhibits 3 and 4 from the court's file?

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Our conclusion after a review of the record indicates no abuse of discretion in ordering Exhibits 3 and 4 expunged from the record. We also find that the remainder of the newspapers' claims against the district court have been rendered moot.

Regarding the first issue, it is well established that we do not decide moot questions. *Hall v. Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969); *Golden v. Zwickler*, 394 U.S. 103, 22 L. Ed. 2d 113, 89 S. Ct. 956 (1969). Here, the newspapers have requested that we instruct the district court to refrain from issuing orders similar to the order of February 8, 1983. They complain that such an order violates their common law and *first amendment* [**7] rights of access to judicial records. They argue that only definitive instructions from this court will prevent future protective orders from being issued. This we decline to do. *International Union, etc. v. Dana Corp.*, 697 F.2d 718 (6th Cir. 1983).

It is undisputed that the newspapers now have access to the court's entire file, except for Exhibits 3 and 4. Putting aside their right of access to these latter two exhibits, the newspapers are now in the same position they would have been had no protective order issued. There is no indication the district court intends to place future restrictions on the public's access to the file in this case. The record before us does not reveal a set of facts "of sufficient immediacy and reality" warranting a writ of mandamus. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941); *United States v. Brooklier*, 685 F.2d 1162, 1173 (9th Cir. 1982). Thus, we have before us "more than a 'mere voluntary cessation of allegedly illegal conduct' where we would leave the [district court] free to return to [its] old ways. As to the [newspapers] [**8] ' original complaint, there is now 'no reasonable expectation that the [alleged] wrong will be repeated. "' *Preiser v. Newkirk*, 422 U.S. 395, 402, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975) (citations omitted); *Cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S. Ct. 1070, 1074, 71 L. Ed. 2d 152 (1982).

As the facts stand now, further relief is unnecessary. The newspapers cannot point to any continuing harm or future threat that the district court will issue similar protective orders denying their right of access to the file in question. As stated in *United States v. SCRAP*, 412 U.S. 669, 688-689, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973), "pleadings must be something more than an

ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged [governmental] action, not that he can imagine circumstances in which he could be affected by [governmental] action." Speculative contingencies afford no basis for our granting relief. *Preiser v. Newkirk*, *supra*, 422 U.S. at 403; *Hall v. Beals*, *supra*, 396 U.S. at 49-50. [**9]

The other issue in this case concerns whether the district court abused its discretion in ordering Exhibits 3 and 4 removed from its file prior to public inspection. In *Nixon v. Warner Communications*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), the Supreme Court noted that "every court has supervisory power over its own records and files." This principle has been consistently applied by this court and the other circuits when reviewing a district court's handling of its records and files. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Krause v. Rhodes*, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 459 U.S. 823, 103 S. Ct. 54, 74 L. Ed. 2d 59 (1982); *Offices of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679 F.2d 778 (9th Cir. 1982); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); *United States v. Hubbard*, 208 U.S. App. D.C. 399, 650 F.2d 293 (D.C. Cir. 1980).

Yet, the power to exercise "discretion" does not imply that discretionary powers can be exercised without restraint. A district court's determination [**10] on the sealing of its own record is "not insulated from review merely because the judge has discretion in this domain. The district court's [*474] discretion is circumscribed by a long-established legal tradition." *Brown & Williamson*, 710 F.2d at 1177. This long-established legal tradition is the presumptive right of the public to inspect and copy judicial documents and files. *Nixon v. Warner Communications*, 435 U.S. at 597; *In Re Application of National Broadcasting Co., Inc.*, (*United States v. Criden I*), 648 F.2d 814, 819 (3d Cir. 1981); *In Re Application of National Broadcasting Co., Inc.*, (*United States v. Jenrette*), 209 U.S. App. D.C. 354, 653 F.2d 609, 612 (D.C. Cir. 1981); *In Re Application National Broadcasting Co., Inc.*, (*United States v. Myers*), 635 F.2d 945, 949 (2d Cir. 1980); *United States v. Mitchell*, 179 U.S. App. D.C. 293, 551 F.2d 1252, 58-60 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, *supra*. The recognition of this right of access goes back to the Nineteenth Century, when, in *Ex Parte Drawbaugh*, 2 App. D.C. 404 (1894), [**11] the

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D.C. Circuit stated: "Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access." *Id.* at 407.

There are, however, important exceptions which limit the public's right of access to judicial records.

The right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

Nixon v. Warner Communications, 435 U.S. at 598 (citations omitted). Thus, trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know. *Brown & Williamson*, 710 F.2d at 1179; *In Re Halkin*, 194 U.S. App. D.C. 257, 598 F.2d 176, 190-192 (D.C. Cir. 1979); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977) (sealing of record at preliminary injunction stage of judicial proceedings between bank and state banking commissioner not an unconstitutional infringement on free press guaranty). But, as noted, the decision as to when judicial records should be sealed is left to the sound discretion of the district court, subject to appellate review for abuse.

In reviewing the district court's determination on this matter, we feel compelled to make two points. First, we note the failure of the district court to afford the press a reasonable opportunity to state their objections to its protective order. As noted by the Supreme Court in *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 401, 99

S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (Powell, J., concurring), *id.* at 446 (Blackmun, J., concurring [**13] in part and dissenting in part), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 2622 n.25, 73 L. Ed. 2d 248 (1982), "representatives of the press and the general public 'must be given an opportunity to be heard on the question of their exclusion.' " See also *United States v. Brooklier*, *supra*, 685 F.2d at 1168; *United States v. Criden II*, 675 F.2d 550, 558-59 (3d Cir. 1982); *Sacramento Bee v. United States District Court*, 656 F.2d 477, 481-482 (9th Cir. 1981). *Gannett* involved a motion, made in open court, requesting the public and press be excluded from a pretrial suppression hearing in a murder prosecution. *Globe* concerned a motion, made during preliminary hearings, to exclude the public from the courtroom during the prosecution of a defendant charged with raping three minor girls. Writing for four Justices in *Gannett*, Justice Blackmun stated:

I would conclude that any person removed from a court should be given a [*475] reasonable opportunity to state his objections prior to the effectiveness of the order. This opportunity need not take the form of an [**14] evidentiary hearing; it need not encompass extended legal argument that results in delay; and the public need not be given prior notice that a closure order will be considered at a given time and place. But where a member of the public contemporaneously objects, the court should provide a reasonable opportunity to that person to state his objection.

Gannett, 443 U.S. at 445-446 (Blackmun, J., concurring in part and dissenting in part). Justice Powell adopted a similar view in his concurring opinion.

Representatives of these groups must be given an opportunity to be heard on the question of their exclusion. But this opportunity extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public. Upon timely objection to the granting of the motion, it is incumbent upon the trial court to afford those present a reasonable

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opportunity to be heard on the question whether the defendant is likely to be deprived of a fair trial if the press and public are permitted to remain in attendance.

[**15] 443 U.S. at 401 (Powell, J. concurring). See also *Globe Newspaper Co.*, supra, 102 S. Ct. at 2622 n.25. It is clear from these statements that persons present in open court have a right to be heard on the question of their exclusion.

The Third and Ninth Circuits have extended this right to be heard to cases where requests for closure are made to the trial judge in writing or during in-chambers conference when members of the public are not present. *Brooklier*, supra; *Criden II*, supra. Both of these courts have required that reasonable steps be taken to afford the public and press an opportunity to submit their views on the question of their exclusion before a closure motion is acted upon. *Brooklier*, 685 F.2d at 1168; *Criden II*, 675 F.2d at 559-560. We believe our holding in *Brown & Williamson*, supra, invites application of a similar rule where a district court is requested, either in writing under seal or during an in-chambers conference, to seal its record. See *Associated Press v. United States District Court*, 705 F.2d 1143, 1146 n.1 (9th Cir. 1983). [**16]

Like the district courts in *Brooklier* and *Criden I*, the district court below was well aware of the public's interest in the litigation between United American and the FDIC. After receiving the bank's request to seal the record, the district court had an obligation to consider the rights of the public and the press. In its memorandum opinion the district court acknowledged the interest of the public in disclosure, but found that interest subordinate to the interests of the bank. In our view, the district court should not be placed "in the position of sole guardian of first amendment interests even against the express wishes of both parties." Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 Neb. L. Rev. 1, 6-7 (1977), quoted in *Criden II*, 675 F.2d at 558. Rather, the public and press should be afforded, where possible, an independent opportunity to present their claims. "Certainly, the failure to invite participation of the party seeking to exercise first amendment [and common law rights] reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the amendment [and the common law] seeks to assure." *Carroll v. President and Commissioners of*

Princess Anne, 393 U.S. 175, 184, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968). The importance of the rights involved and interests served by those rights require that the public and press be given an opportunity to respond before being denied their presumptive right of access to judicial records.

In order to protect this right to be heard, the most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records. If a party moves to seal a [*476] document, or the entire court record, such a motion should be made "sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court." *Criden II*, 675 F.2d at 559. The district court should then allow interested members of the public a reasonable opportunity to present their claims, without causing unnecessary or material delay in the underlying proceeding. *Brooklier*, 685 F.2d at 1168, citing *Gannett*, 443 U.S. at 401 [**18] (Powell, J., concurring), *id.* at 446 (Blackmun, J., concurring in part and dissenting in part). In this case, however, we believe the progression of events, including our own review, has sufficiently cured the district court's failure to afford the press an opportunity to be heard on the question of their exclusion, and we therefore deny mandamus relief on this issue.

The second point we wish to make concerns the scope of our review. In light of the important rights involved, the district court's decision is not accorded the traditional scope of "narrow review reserved for discretionary decisions based on first-hand observations." *United States v. Criden I*, 648 F.2d at 818. Only the most compelling reasons can justify non-disclosure of judicial records. *Brown & Williamson*, 710 F.2d at 1179-80; *United States v. Myers*, 635 F.2d at 952. As stated by the D.C. Circuit:

To say that discretion exists, however, is not to say, as appellee contends, that what is involved here "is simply a policy determination." Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While [**19] the courts have sanctioned incursions on this right, they have done so only when they have concluded that "justice so requires." To demand any less

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would demean the common law right.

United States v. Mitchell, 551 F.2d at 1260 (footnotes omitted). With these principles in mind, we conclude the district court did not abuse its discretion in ordering Exhibits 3 and 4 removed from the file.

The district court's order allowing removal of Exhibits 3 and 4 from its file properly protected the identity and privacy of customers of the bank whose names were included in the two exhibits. Congressional support for this action is reflected in statutory provisions and regulatory rules. The Right to Financial Privacy Act, 12 U.S.C. § 3401-3421, outlines numerous restrictions on the disclosure of financial records held by bank employees and federal regulatory authorities. The Act imposes an affirmative duty on the government and banking officials to safeguard the financial records of individuals utilizing the services of banks. Section 3417(a) enforces the Act's commands by allowing bank customers to recover civil penalties from "any agency [**20] or department of the United States or financial institution obtaining or disclosing financial records" in violation of the Act. In addition to the civil penalties permitted by 12 U.S.C. § 3417, Congress has also made it a federal crime for bank examiners, federal or private, to disclose information obtained in the course of examining a federally insured bank. 18 U.S.C. § 1906 expressly prohibits any bank examiner with access to the financial records bank customers from disclosing personal information discovered from those records.

Further Congressional recognition of the confidentiality of financial records is illustrated in 5 U.S.C. § 552(b)(8). This provision exempts from disclosure under the Freedom of Information Act information compiled by government officials responsible for the regulation or supervision of financial institutions. As noted in *Consumers Union of United States, Inc. v. Heimann*, 191 U.S. App. D.C. 8, 589 F.2d 531, 534 (D.C. Cir. 1978), the "primary reason for adoption of exemption 8 was to ensure the security of financial institutions." Without this exemption, there was [**21] Congressional concern that indiscriminate disclosure of financial records regarding the loan policies of banks "might undermine public confidence and cause unwarranted runs on banks." *Id.* at 534 (footnote omitted). Congress also recognized [*477] the need to preserve the close relationship between banks and their supervising agencies. "If details of the bank

examinations were made freely available to the public and to bank competitors, there was concern that banks would cooperate less than fully with federal authorities." *Id.* at 534. Furthermore, exemption 8 prevents the casual disclosure of customer financial data held by the government pursuant to their regulatory authority, thereby ensuring traditional concepts of confidentiality associated with personal banking records.

Finally, the confidentiality of financial records is recognized in regulations governing the disclosure of financial documents held by the FDIC. 12 C.F.R. § 309.5(f)(8) (1982) provides that "records contained in or related to examination, operating, or condition reports by or on behalf of, or for the use of, the [FDIC] or any agency responsible for the regulation or supervision of financial institutions, [**22] " are exempt from public disclosure. Similar provisions are applicable to the Comptroller of the Currency, 12 C.F.R. § 4.16(b)(8) (1982); Board of Governors of the Federal Reserve System, 12 C.F.R. § 261.6(a)(2) (1982); and the Federal Home Loan Bank Board, 12 C.F.R. § 505.5(a)(2) (1982). The legality of these regulations has survived judicial scrutiny. *Denny v. Carey*, 78 F.R.D. 370, 372 (E.D. Pa. 1978), citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 95 L. Ed. 417, 71 S. Ct. 416 (1951). Viewed together, these statutory and regulatory provisions clearly indicate Congress' intention that the banking records of individuals be kept in strict confidence. The privacy interests embodied in those provisions identify a compelling government interest in preserving the secrecy of personal financial records. The February 15 order of the district court is narrowly tailored to serve that interest.

The strongest argument against the action of the district court is our decision in *Brown & Williamson Tobacco v. FTC*, 710 F.2d 1165 (6th Cir. 1983). But this case is distinguishable. In *Brown & Williamson* this court refused [**23] to uphold a lower court's sealing of the record, notwithstanding the claim that public access to the file would hurt Brown and Williamson's business prominence. "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Id.* at 1179. Here, however, the district court's removal of Exhibits 3 and 4 was designed not to protect the business reputation of the bank, which no longer existed as a banking entity when the order was issued, but rather to protect the privacy rights of borrowers who dealt with the

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bank. Unlike the protected party in *Brown & Williamson*, who sought to deny public access because of the adverse business effect disclosure might cause, the individuals protected by the closure order here are third parties who were not responsible for the initiation of the underlying litigation. These individuals possessed a justifiable expectation of privacy that their names and financial records not be revealed to the public. Their interests in privacy are sufficiently compelling to justify non-disclosure. *United States v. Jenrette, supra*, 653 F.2d at 620 [**24] (interest in avoiding injury to innocent third parties properly weighed against broadcasters' right of access); *Application of American Broadcasting Companies*, 537 F. Supp. 1168, 1172-73 (D.D.C. 1982); *Application of KSTP Television*, 504 F. Supp. 360, 363 (D. Minn. 1980).

Brown & Williamson is distinguishable in another way. There, the court noted the public's strong interest in disclosure because the subject being litigated "potentially involves the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market." *Id.* at 1180. See also *United States v. General Motors*, 99 F.R.D. 610, (D.D.C. 1983) (public interest in disclosure of documents regarding auto safety outweighs defendant's interest in avoiding adverse publicity). Here, the newspapers can point to no analogous need of the public to know about the names and financial records of the bank's customers. While it is true the litigation between the bank and the FDIC involved matters of [*478] "immense public interest," the "presumptively paramount" right of the public to know must be [**25] weighed against competing interests of privacy. *Nixon v. Warner Communications*, 435 U.S. at 598; *In Re Franklin National Bank Securities Lit.*, 92 F.R.D. 468-471 (E.D.N.Y. 1981), *aff'd*, *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); *United States v. Jenrette*, 653 F.2d at 620; *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980). As noted in *Brown & Williamson*, the "privacy rights of participants and third parties" are

among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records. *Brown & Williamson*, 710 F.2d at 1179. Under the particular facts here, we find the privacy rights of these borrowers sufficiently compelling to warrant a restriction of the public's right to know.

Finally, we must take account of the bank's initial reliance on the district court's protective order. The bank asserts it was forced to file suit against the FDIC to protect its business interests. They contend, however, that their cause of action under 12 U.S.C. § 1818(c)(2) was initiated "only after" they [**26] obtained the protective order needed to safeguard the stability of the bank and privacy interests of its customers. Regardless of whether we accept the bank's version of the facts, or the newspapers' version (the protective order was issued simultaneously to the bank's filing), we do note that the bank placed significant reliance upon the protective order. Once placed in this position, only "extraordinary circumstances" or "compelling need" warrant the reversal of a protective order. *FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) ("Once a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification.") The particular facts of this case indicate no extraordinary circumstance or compelling need warranting this court's issuance of a writ of mandamus.

As stated in *In Re Traffic Executive Ass'n-Eastern Railroads v. Long Island R.R. Co.*, 627 F.2d 631, 634 (2d Cir. 1980), "this Court will not issue mandamus with respect to a discretionary order except in most extraordinary circumstances." See also *Allied Chemical Corp. v. Duiflon, Inc.*, 449 U.S. 33, 35, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980), [**27] *In re Post Newsweek Stations, Michigan, Inc.*, 722 F.2d 325 (6th Cir. 1983). Accordingly, we deny the newspaper's petition for a writ of mandamus.

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435 U.S. 589
(U.S. 1978)



NIXON v. WARNER COMMUNICATIONS, INC., ET AL.

No. 76-944

SUPREME COURT OF THE UNITED STATES

435 U.S. 589; 98 S. Ct. 1306; 55 L. Ed. 2d 570; 1978 U.S. LEXIS 80; 3 Media L. Rep.
2074

November 8, 1977, Argued

April 18, 1978, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 179 U. S. App. D. C. 293, 551 F.2d 1252, reversed and remanded.

SUMMARY:

Copies of tapes of conversations recorded by ex-President Nixon were admitted into evidence and played at a criminal trial of third persons arising from the "Watergate" investigation. After the trial had begun in the United States District Court for the District of Columbia, certain broadcasters, over Mr. Nixon's objection, petitioned for immediate access to the tapes for the purpose of copying, broadcasting, and selling to the public those portions of the tapes played at trial. During the course of the trial, transcripts of the tapes that had been furnished by the court were widely reprinted in the press. At the close of trial, the District Court denied the broadcasters' petition for immediate access to the tapes on the ground of possible prejudice to the rights of the convicted defendants, in view of their pending appeals (397 F Supp 186). The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the common-law right of access to judicial records required the District Court to release the tapes (179 App DC 293, 551 F2d 1252).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Powell, J., joined by Burger, Ch. J., and Stewart, Blackmun, and Rehnquist, JJ., it was held that (1) the District Court was not authorized by the common law right of public access to judicial records to release those tapes that had been admitted into evidence--transcripts of the tapes having been widely reprinted in the press--in view of the Presidential Recordings and Materials Preservation Act (44 USCS 2107 note) which presented an alternative means of public access to the tapes by providing a congressionally prescribed administrative procedure for the processing and release to the public of the ex-President's presidential materials of historical interest, the existence of the Act being a decisive element in the proper exercise of the District Court's discretion with respect to release of the tapes; (2) the District Court was not required by the *First Amendment* guarantee of freedom of the press to release the tapes, since (a) there was no claim that the press was precluded from publishing or utilizing the testimony and exhibits filed in evidence as it saw fit, (b) the press was permitted to listen to the tapes, and report on what it heard, and (c) there was no question of a truncated flow of information to the public; and (3) the District Court was not required by the *Sixth Amendment* guarantee of a public trial to release the tapes, since (a) the guarantee of a public trial conferred no special benefit on the press, and (b) the *Sixth Amendment* did not require that the trial, or any part of it, be broadcast live or on tape to the public, the requirement

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55 L. Ed. 2d 570, ***; 1978 U.S. LEXIS 80

of a public trial being satisfied by the opportunity of members of the public and press to attend the trial and to report what they observed.

White, J., joined by Brennan, J., dissented in part, expressing the view that, while the Presidential Recordings and Materials Preservation Act was dispositive of the case and the judgment of the Court of Appeals should have been reversed, the case should have been remanded to the District Court with instructions to deliver the tapes to the Administrator of the General Services Administration, since 101(b) of the Act, which provides that the Administrator shall take possession of "historical materials" relating to ex-President Nixon's presidency, authorized the Administrator to receive the tapes at issue, even though they were copies, and to deal with them under the terms of the statute.

Marshall, J., dissenting, expressed the view that the Presidential Recordings and Materials Preservation Act, to the extent that it provided assistance in the case at bar, strongly indicated that the tapes should be released to the public as directed by the Court of Appeals.

Stevens, J., dissenting, expressed the view that (1) the public interest in protecting the dignity of the Presidency was eviscerated by the fact that the exhibits were already entirely in the public domain, with the normal presumption in favor of access strongly reinforced by the special characteristics of the litigation, and (2) the Presidential Recordings and Materials Preservation Act, far from requiring the District Court to suppress the tapes, manifested Congress' settled resolve to provide as much public access to the materials as was physically possible, as quickly as possible.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAWS §1

public records and documents -- inspection and copying --

Headnote:[1]

There is a general right to inspect and copy public records and documents, including judicial records and documents; enforcement of this right is generally not conditioned on a proprietary interest in the document or

upon a need for it as evidence in a lawsuit.

[***LEdHN2]

LAWS §8

judicial records -- right to inspect and copy --
supervisory power of court --

Headnote:[2]

The right to inspect and copy judicial records is not absolute, every court having supervisory power over its own files.

[***LEdHN3]

PARTIES §3

"Watergate" tapes -- release -- standing --

Headnote:[3A][3B]

Ex-President Nixon has standing to object to the release to certain broadcasters of tapes of conversations recorded by him which had been admitted into evidence and played at a federal criminal trial of third persons arising from the "Watergate" investigation, and portions of which the broadcasters wished to copy, broadcast, and sell to the general public after transcripts of the tapes had been furnished by the court and widely reprinted in the press, the constitutional element of standing being present, since (1) ex-President Nixon was the party from whom the original tapes were subpoenaed, (2) he was one of the persons whose conversations are recorded, and (3) his allegations of further embarrassment, unfair appropriation of his voice, and additional exploitation of materials originally thought to be confidential establish injury in fact that would be redressed by a favorable decision of his claim.

[***LEdHN4]

LAWS §8

subpoenaed presidential tapes -- discretionary release -- copying --

Headnote:[4]

A Federal District Court which, in a criminal prosecution of third persons, became custodian of tapes obtained by subpoena over the opposition of a sitting

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President solely to satisfy fundamental demands of due process of law in the fair administration of criminal justice, has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production; this responsibility does not permit copying upon demand.

[***LEdHN5]

LAWS §8

judicial records -- public access -- "Watergate" tapes

Headnote:[5A][5B]

A Federal District Court is not authorized by the common-law right of public access to judicial records to release to certain broadcasters tapes of conversations recorded by ex-President Nixon which had been admitted into evidence and played at a criminal trial of third persons arising from the "Watergate" investigation, and portions of which the broadcasters wished to copy, broadcast, and sell to the public--transcripts of the tapes having been furnished by the court and widely reprinted in the press--in view of the Presidential Recordings and Materials Preservation Act (44 USCS 2107 note) which presents an alternative means of public access to the tapes by providing a congressionally prescribed administrative procedure for the processing and release to the public of the ex-President's presidential materials of historical interest, the existence of the Act being a decisive element in the proper exercise of the District Court's discretion with respect to release of the tapes. (Marshall and Stevens, JJ., dissented from this holding.)

[***LEdHN6]

LAWS §8

"Watergate" tapes -- Presidential Recordings Act --

Headnote:[6A][6B]

Litigation in which certain broadcasters attempt to compel a Federal District Court to release tapes of conversations recorded by ex-President Nixon which had been admitted into evidence and played at a criminal trial of third persons arising from the "Watergate" investigation cannot be utilized as a substitute for the procedures and safeguards set forth in the Presidential

Recordings and Materials Preservation Act (44 USCS 2107 note), since (1) the lawsuit arose independently of the Act, (2) the Administrator of the General Services Administration, who is appointed under the Act to take custody of the ex-President's presidential tapes and documents, is not a party, (3) any procedures arising from the lawsuit would not necessarily be developed with reference to the statutory standards the Administrator must consider in the exercise of his duty under the Act, (4) there may be persons other than the ex-President who may wish to assert private or public interests in the tapes themselves or in the manner of dissemination, and (5) the broadcasters may not necessarily represent the interests of the public generally or of the Administrator.

[***LEdHN7]

LAW §935.5

freedom of press -- right to taped evidence --

Headnote:[7A][7B]

A Federal District Court is not required by the *First Amendment* guarantee of freedom of the press to release to certain broadcasters tapes of conversations recorded by ex-President Nixon which had been admitted into evidence and played at a criminal trial of third persons arising from the "Watergate" investigation, and portions of which the broadcasters wished to copy, broadcast, and sell to the public, where (1) there was no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence, (2) the press was permitted to listen to the tapes and report on what was heard, and (3) there was no question of a truncated flow of information to the public, transcripts of the tapes having been furnished by the court to the press and widely reprinted.

[***LEdHN8]

LAW §47.5

guarantee of public trial -- release of taped evidence

Headnote:[8A][8B]

A Federal District Court is not required by the *Sixth Amendment* guarantee of a public trial to release to certain broadcasters tapes of conversations recorded by ex-President Nixon which had been admitted into

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evidence and played at a criminal trial of third persons arising from the "Watergate" investigation, and portions of which the broadcasters wished to copy, broadcast, and sell to the public--transcripts of the tapes having been furnished by the court and widely reprinted in the press--since (1) the guarantee of a public trial confers no special benefit on the press, and (2) the *Sixth Amendment* does not require that the trial, or any part of it, be broadcast live or on tape to the public, the requirement of a public trial being satisfied by the opportunity of members of the public and press to attend the trial and to repeat what they observe.

[***LEdHN9]

LAW §935.5

First Amendment -- press rights -- trial information

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Headnote:[9]

The *First Amendment* generally grants the press no right to information about a trial superior to that of the general public; once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom, but the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public.

[***LEdHN10]

LAW §47.5

guarantee of public trial -- recording and broadcasting of testimony --

Headnote:[10]

For the purposes of the *Sixth Amendment* guarantee of a public trial, there is no constitutional right to record and broadcast the testimony of a live witness.

SYLLABUS

During the criminal trial of several of petitioner ex-President's former advisers on charges, *inter alia*, of conspiring to obstruct justice in connection with the so-called Watergate investigation, some 22 hours of tape recordings made of conversations in petitioner's offices in

the White House and Executive Office Building were played to the jury and the public in the courtroom, and the reels of the tapes were admitted into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with transcripts, which were not admitted as evidence but were widely reprinted in the press. At the close of the trial, in which four of the defendants were convicted, and after an earlier unsuccessful attempt over petitioner's objections to obtain court permission to copy, broadcast, and sell to the public portions of the tapes, respondent broadcasters petitioned for immediate access to the tapes. The District Court denied the petitions on the grounds that since the convicted defendants had filed notices of appeal, their rights would be prejudiced if respondents' petitions were granted, and that since the transcripts had apprised the public of the tapes' contents, the public's "right to know" did not overcome the need to safeguard the defendants' rights on appeal. The Court of Appeals reversed, holding that the mere possibility of prejudice to defendants' rights did not outweigh the public's right of access, that the common-law right of access to judicial records required the District Court to release the tapes in its custody, and that therefore the District Court abused its discretion in refusing immediate access. *Held*:

1. Considering all the circumstances, the common-law right of access to judicial records does not authorize release of the tapes in question from the District Court's custody. Pp. 597-608.

(a) The common-law right to inspect and copy judicial records is not absolute, but the decision whether to permit access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. Pp. 597-599.

(b) Because of the congressionally prescribed avenue of public access to the tapes provided by the Presidential Recordings and Materials Preservation Act, whose existence is a decisive element in the proper exercise of discretion with respect to release of the tapes, it is not necessary to weigh the parties' competing arguments for and against release as though the District Court were the only potential source of information regarding these historical materials, and the presence of an alternative means of public access tips the scales in favor of denying release. Pp. 599-608.

2. The release of the tapes is not required by the *First*

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Amendment guarantee of freedom of the press. The question here is not whether the press must be permitted access to public information to which the public generally has access, but whether the tapes, to which the public has never had *physical* access, must be made available for copying. There is in this case no question of a truncated flow of information to the public, as the contents of the tapes were given wide publicity by all elements of the media, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, distinguished, and under the *First Amendment* the press has no right to information about a trial superior to that of the general public. Pp. 608-610.

3. Nor is release of the tapes required by the *Sixth Amendment* guarantee of a public trial. While public understanding of the highly publicized trial may remain incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning, the same could be said of a live witness' testimony, yet there is no constitutional right to have such testimony recorded and broadcast. The guarantee of a public trial confers no special benefit on the press nor does it require that the trial, or any part of it, be broadcast live or on tape to the public, but such guarantee is satisfied by the opportunity of the public and the press to attend the trial and to report what they have observed. P. 610.

COUNSEL: William H. Jeffress, Jr., argued the cause for petitioner. With him on the briefs were Herbert J. Miller, Jr., and R. Stan Mortenson.

Floyd Abrams and Edward Bennett Williams argued the cause for respondents. With Mr. Abrams on the brief for respondent National Broadcasting Company, Inc., et al. were Eugene R. Scheiman, Corydon B. Dunham, and J. Laurent Scharff. With Mr. Williams on the brief for respondent Warner Communications, Inc., were Gregory B. Craig and Sidney Rosditcher.

JUDGES: POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, post, p. 611. MARSHALL, J., post, p. 612, and STEVENS, J., post, p. 613, filed dissenting opinions.

OPINION BY: POWELL

OPINION

[*591] [***575] [**1308] MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence at the trial of petitioner's former advisers. Respondents [**1309] wish to copy the tapes for broadcasting and sale to the public. The Court of Appeals for the District of Columbia Circuit held that the District Court's refusal to permit immediate copying of the tapes was an abuse of discretion. *United States v. Mitchell*, 179 U. S. App. D. C. 293, 551 F.2d 1252 (1976). We [***576] granted certiorari, 430 U.S. 944 (1977), and for the reasons that follow, we reverse.

I

On July 16, 1973, testimony before the Senate Select Committee on Presidential Campaign Activities revealed that petitioner, then President of the United States, had maintained a system for tape recording conversations in the White House Oval Office and in his private office in the Executive Office Building. Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess., 2074-2076 (1973). A week later, the Watergate Special Prosecutor issued a subpoena *duces tecum* directing petitioner to produce before a federal grand jury tape recordings of eight meetings and one telephone conversation recorded in petitioner's offices. When petitioner refused to comply with the subpoena, the District Court for the District of Columbia ordered production of the recordings. *In re Subpoena to Nixon*, 360 F.Supp. 1, aff'd sub nom. *Nixon v. Sirica*, 159 U. S. App. D. C. 58, 487 F.2d 700 [*592] (1973). In November 1973, petitioner submitted seven of the nine subpoenaed recordings and informed the Office of the Special Prosecutor that the other two were missing.

On March 1, 1974, the grand jury indicted seven individuals¹ for, among other things, conspiring to obstruct justice in connection with the investigation of the 1972 burglary of the Democratic National Committee headquarters. In preparation for this trial, styled *United States v. Mitchell*,² the Special Prosecutor, on April 18, 1974, issued a second subpoena *duces tecum*, directing petitioner to produce tape recordings and documents relating to some 64 additional Presidential meetings and conversations. The District Court denied petitioner's motions to quash. *United States v. Mitchell*, 377 F.Supp.

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1326 (1974). This Court granted certiorari before judgment in the Court of Appeals and affirmed. *United States v. Nixon*, 418 U.S. 683 (1974). In accordance with our decision, the subpoenaed tapes were turned over to the [*593] District Court for *in camera* inspection. The court arranged to have copies made of the relevant and admissible portions. [***577] It retained one copy and gave the other to the Special Prosecutor.³

1 The seven defendants were as follows: John N. Mitchell, former Attorney General and head of the Committee for the Re-election of the President; H. R. Haldeman, former Assistant to the President, serving as White House Chief of Staff; John D. Ehrlichman, former Assistant to the President for Domestic Affairs; Charles W. Colson, former Special Counsel to the President; Robert C. Mardian, former Assistant Attorney General and official of the Committee for the Re-election of the President; Kenneth W. Parkinson, hired as the Committee's counsel in June 1972; and Gordon Strachan, staff assistant to Haldeman.

2 Crim. No. 74-110 (DC 1974). Defendant Colson pleaded guilty to other charges before trial, and the case against him was dismissed. Strachan's case was severed and ultimately dismissed. The jury acquitted Parkinson and found Mardian guilty of conspiracy. Mitchell, Haldeman, and Ehrlichman were convicted of conspiracy, obstruction of justice, and perjury.

The convictions of Mitchell, Haldeman, and Ehrlichman were affirmed. *United States v. Haldeman*, 181 U.S. App. D. C. 254, 559 F.2d 31 (1976), cert. denied, 431 U.S. 933 (1977). Mardian's conviction was reversed, *United States v. Mardian*, 178 U.S. App. D. C. 207, 546 F.2d 973 (1976), and no further proceedings were instituted against him.

3 The Clerk of the District Court described the copying procedure:

"White House tape recordings were submitted to the Court pursuant to two separate subpoenas. The first group of tapes were delivered in November 1973 and the second in July and August 1974. In each instance, the Court received what purported to be the entire reel of original recording on which was found any portion of a subpoenaed conversation.

"As the time for trial in *U.S. v. Mitchell, et al.*, CR 74-110, approached, the Court reproduced subpoenaed conversations from the original recordings, using technical assistance supplied by the Watergate Special Prosecutor. Portions of conversations and, in some cases, entire conversations which the Court had previously declared to be subject to privilege were not reproduced. Two copies of each conversation were produced simultaneously and were designated Copy A and Copy B. The Copy B series was delivered to the Special Prosecutor pursuant to the subpoenas aforementioned for use in the preparation of transcripts. Copy A series tapes were retained by the Court and later marked for identification as Government Exhibits in CR 74-110. These tapes are contained on about 50 separate reels.

"In the Government's case at trial, some, but not all, of the Copy A series tapes were admitted into evidence. Some, but again not all, of the tape exhibits were published to the jury. Those published were played to the jury either in whole or in part. Where exhibits were not published in their entirety, the deletions had been made either by the Government on its own motion or pursuant to an order of Judge Sirica. Deletions were effected not by modifying the exhibit itself, but by skipping deleted portions on the tape or by interrupting the sound transmission to the jurors' headphones. The exhibits remain as originally constituted.

"The jurors were provided with transcripts of the tape recorded conversations for use as aids in listening to the exhibits. These written transcripts were marked for identification as Government Exhibits, and copies provided to the individual jurors, counsel, and news media representatives at the time the tapes were played. Deletions in the copies of transcripts used by the jurors and others matched precisely the deletions in tapes as they were published at trial.

"In many instances the Copy A series tapes introduced as Government Exhibits contain material that has not been published to the jury and others present in the courtroom." Affidavit of James F. Davey, Nov. 26, 1974, pp. 2-3; App.

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24-25.

The District Court retains custody of the Copy A tapes, which are at issue here, and of the original recordings, which are not. The Copy B series is in the files of the Office of the Special Prosecutor, stored at the National Archives.

We note that under § 101 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695, note following 44 U. S. C. § 2107 (1970 ed., Supp. V), the original tape recordings are subject to the control of the Administrator of General Services.

[*594] The [**1310] trial began on October 1, 1974, before Judge Sirica. During its course, some 22 hours of taped conversations were played for the jury and the public in the courtroom. The reels of tape containing conversations played for the jury were entered into evidence. The District Court furnished the jurors, reporters, and members of the public in attendance with earphones and with transcripts prepared by the Special Prosecutor. The transcripts were not admitted as evidence, but were widely reprinted in the press.

Six weeks after the trial had begun, respondent broadcasters⁴ filed a [***578] motion before Judge Sirica, seeking permission to copy, broadcast, and sell to the public the portions of the tapes played at trial. Petitioner opposed the application. Because *United States v. Mitchell* was consuming all of Judge Sirica's time, this matter was transferred to Judge Gesell.

4 On September 17, 1974, representatives of the three commercial television networks had written informally to Judge Sirica, asking permission to copy for broadcasting purposes portions of the tapes played during the course of the trial. Judge Sirica referred this request to Chief Judge Hart, who consulted with other judges of the District Court and advised against permitting such copying. On October 2, 1974, Judge Sirica informed the network representatives that copying would not be allowed.

The three commercial networks and the Radio-Television News Directors Association filed with the District Court this formal application to copy the tapes on November 12, 1974. The Public Broadcasting System joined the

application the next day. Warner Communications, Inc., filed a separate application on December 2, 1974.

[*595] On December 5, 1974, Judge Gesell held that a common-law privilege of public access to judicial records permitted respondents to obtain copies of exhibits in the custody of the clerk, including the tapes in question. *United States v. Mitchell*, 386 F.Supp. 639, 641. Judge Gesell minimized petitioner's opposition to respondents' motion, declaring that neither his alleged property interest in the tapes nor his asserted executive privilege sufficed to prevent release of recordings already publicly aired and available, in transcription, to the world at large. *Id.*, at 642. Judge Gesell cautioned, [**1311] however, against "overcommercialization of the evidence." *Id.*, at 643. And because of potential administrative and mechanical difficulties, he prohibited copying until the trial was over. *Ibid.* He requested that the parties submit proposals for access and copying procedures that would minimize overcommercialization and administrative inconvenience at that time. *Ibid.* In an order of January 8, 1975, Judge Gesell rejected respondents' joint proposals as insufficient. *Id.*, at 643-644. Noting the close of the *Mitchell* trial, he transferred the matter back to Judge Sirica.

On April 4, 1975, Judge Sirica denied without prejudice respondents' petitions for immediate access to the tapes. *United States v. Mitchell*, 397 F.Supp. 186. Observing that all four men convicted in the *Mitchell* trial had filed notices of appeal, he declared that their rights could be prejudiced if the petitions were granted. Immediate access to the tapes might "result in the manufacture of permanent phonograph records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales." *Id.*, at 188. Since release of the transcripts had apprised the public of the tapes' contents, the public's "right to know" did not, in Judge Sirica's view, overcome the need to safeguard the defendants' rights on appeal. *Id.*, at 188-189. Judge Sirica also noted the passage of the Presidential Recordings and Materials Preservation Act [*596] (Presidential Recordings Act), 88 Stat. 1695, note following 44 U. S. C. § 2107 (1970 ed., Supp. V),⁵ and the duty thereunder of the Administrator of General Services (Administrator) to submit to Congress regulations governing access to Presidential tapes in

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general. Under the proposed regulations then before Congress, ⁶ public distribution of copies would be delayed for 4 1/2 years. Although Judge Sirica doubted that the Act covered the copies at issue here, he viewed the proposed regulations as suggesting that immediate release was not of overriding importance. 397 F.Supp., at 189.

⁵ For a detailed discussion of the terms and validity of the Act, see *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

⁶ 40 Fed. Reg. 2670 (1975). Those regulations ultimately were disapproved. S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609-28614 (1975). See also n. 16, *infra*.

The [***579] Court of Appeals reversed. *United States v. Mitchell*, 179 U.S. App. D. C. 293, 551 F.2d 1252 (1976). It stressed the importance of the common-law privilege to inspect and copy judicial records and assigned to petitioner the burden of proving that justice required limitations on the privilege. In the court's view, the mere possibility of prejudice to defendants' rights in the event of a retrial did not outweigh the public's right of access. *Id.*, at 302-304, 551 F.2d, at 1261-1263. The court concluded that the District Court had "abused its discretion in allowing those diminished interests in confidentiality to interfere with the public's right to inspect and copy the tapes." *Id.*, at 302, 551 F.2d, at 1261. It remanded for the development of a plan of release, but noted -- in apparent contrast to the admonitions of Judge Gessell -- that the "court's power to control the uses to which the tapes are put once released . . . is sharply limited by the First Amendment." *Id.*, at 304 n. 52, 551 F.2d, at 1263 n. 52 (emphasis in original). We granted certiorari to review this holding that the common-law right of access to judicial records requires the District Court to release the tapes in its custody.

[*597] II

Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision. Indeed, no case directly in point -- that is, addressing the applicability of the common-law [**1312] right to exhibits subpoenaed from third parties -- has been cited or discovered.

A

[***LEdHR1] [1]It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, ⁷ including judicial records and documents. ⁸ In contrast to the English practice, see, e. g., *Browne v. Cumming*, 10 B. & C. 70, 109 Eng. Rep. 377 (K. B. 1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance [*598] of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e. g., [***580] *State ex rel. Colscott v. King*, 154 Ind. 621, 621-627, 57 N. E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams*, 41 N. J. L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, e. g., *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 677, 137 N. W. 2d 470, 472 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N. W. 2d 241 (1966). But see *Burton v. Reynolds*, 110 Mich. 354, 68 N. W. 217 (1896).

⁷ See, e. g., *McCoy v. Providence Journal Co.*, 190 F.2d 760, 765-766 (CA1), cert. denied, 342 U.S. 894 (1951); *Fayette County v. Martin*, 279 Ky. 387, 395-396, 130 S. W. 2d 838, 843 (1939); *Nowack v. Auditor General*, 243 Mich. 200, 203-205, 219 N. W. 749, 750 (1928); *In re Egan*, 205 N. Y. 147, 154-155, 98 N. E. 467, 469 (1912); *State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes*, 29 Nev. 50, 82-86, 84 P. 1061, 1072-1074 (1906); *Brewer v. Watson*, 71 Ala. 299, 303-306 (1882); *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374-375, 181 N. E. 2d 376, 378 (1962). In many jurisdictions this right has been recognized or expanded by statute. See, e. g., Ill. Rev. Stat., ch. 116, § 43.7 (1975).

⁸ See, e. g., *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504 (CC Colo. 1902); *In re Sackett*, 30 C. C. P. A. 1214 (Pat.), 136 F.2d 248 (1943); *C. v. C.*, 320 A. 2d 717, 724-727 (Del. 1974); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N. W. 2d 758, 762-763 (N. D. 1967). See also *Ex parte Uppercu*, 239 U.S. 435 (1915). This common-law right has been recognized in the courts of the District of Columbia since at least 1894. *Ex parte*

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Drawbaugh, 2 App. D. C. 404 (1894). See also *United States v. Burka*, 289 A. 2d 376 (D. C. App. 1972).

[**LEdHR2] [2] It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." *In re Caswell*, 18 R. I. 835, 836, 29 A. 259 (1893). Accord, e. g., *C. v. C.*, 320 A. 2d 717, 723, 727 (Del. 1974). See also *King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N. W. 731, 734-735 (1888); see *Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N. Y. S. 2d 355, 356 (1944); see also *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N. E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, see, e. g., *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N. W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A. 2d 799, 800 (N. J. Ch. 1945).

It is difficult to distill from the relatively few judicial [*599] decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the [**1313] particular case. 9 In any event, we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here. 10

9 Cf. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N. W. 2d 470, 474-475 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N. W. 2d 241 (1966).

10 See n. 11, *infra*.

B

[**LEdHR3A] [3A] Petitioner advances several reasons supporting the exercise of discretion against release of the tapes. 11

11 Petitioner also contends that the District Court was totally without discretion to consider release of the tapes at all. He offers three principal arguments in support of that position: (i) exhibit materials subpoenaed from third parties are not "court records" in terms of the common-law right of access; (ii) recorded materials, as opposed to written documents, are not subject to release by the court in custody; and (iii) the assertion of third-party property and privacy interests precludes release of the tapes to the public.

As we assume for the purposes of this case (see text above) that the common-law right of access is applicable, we do not reach or intimate any view as to the merits of these various contentions by petitioner.

Petitioner further argues that this is not a "right of access" case, for the District Court already has permitted considerable public access to the taped conversations through the trial itself and through publication of the printed transcripts. We need not decide whether such facts ever could be decisive. In view of our disposition of this case, the fact that substantial access already has been accorded the press and the public is simply one factor to be weighed.

[**LEdHR3B] [3B] Whatever the merits of these claims and those considered in the text, petitioner has standing to object to the release of the tapes. As the party from whom the original tapes were subpoenaed, and as one of the persons whose conversations are recorded, his allegations of further embarrassment, unfair appropriation of his voice, and additional exploitation of materials originally thought to be confidential establish injury in fact that would be redressed by a favorable decision of his claim. Thus, the constitutional element of standing is present. See *Warth v. Seldin*, 422 U.S. 490, 498-502 (1975).

[*600] First, [**581] petitioner argues that he has a property interest in the sound of his own voice, an interest that respondents intend to appropriate unfairly. 12

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In respondents' view, our decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), upholding the constitutionality of the Presidential Recordings Act, divested petitioner of any property rights in the tapes that could be asserted against the general public. Petitioner insists, however, that respondents' point is not fully responsive to his argument. Petitioner is not asserting a proprietary right to the tapes themselves. He likens his interest to that of a third party whose voice is recorded in the course of a lawful wiretap by police officers and introduced into evidence on tape. In petitioner's view, use of one's voice as evidence in a criminal trial does not give rise to a license for commercial exploitation.

12 Petitioner develops this argument more fully in support of his claim that the District Court lacks power to release these tapes. See n. 11, *supra*. The argument also is relevant, however, in determining whether the discretionary exercise of such power was proper.

Petitioner also maintains that his privacy would be infringed if aural copies of the tapes were distributed to the public. ¹³ The Court of Appeals rejected this contention. It reasoned that with the playing of the tapes in the courtroom, the publication of their contents in the form of written transcripts, and the passage of the Presidential Recordings Act -- in which Congress contemplated ultimate public distribution of aural copies -- any realistic expectation of privacy disappeared. 179 U. S. App. D. C., at 304-305, 551 F.2d, at 1263-1264. [*601] Furthermore, the court ruled that as Presidential documents the tapes were "impressed with the 'public trust'" and not subject to ordinary privacy claims. *Id.*, at 305, 551 F.2d, at 1264. Respondents add that aural reproduction of [**1314] actual conversations, reflecting nuances and inflections, is a more accurate means of informing the public about this important historical event than a verbatim written transcript. Petitioner disputes this claim of "accuracy," emphasizing that the tapes required 22 hours to be played. If made available for commercial recordings or broadcast by the electronic media, only fractions of the tapes, necessarily taken out of context, could or would be presented. Nor would there be any safeguard, other than the taste of the marketing medium, against distortion [***582] through cutting, erasing, and splicing of tapes. There would be strong motivation to titillate as well as to educate listeners. Petitioner insists that this use would infringe

his privacy, resulting in embarrassment and anguish to himself and the other persons who participated in private conversations that they had every reason to believe would remain confidential.

13 See n. 12, *supra*.

Third, petitioner argues that our decision in *United States v. Nixon*, 418 U.S. 683 (1974), authorized only the most limited use of subpoenaed Presidential conversations consistent with the constitutional duty of the judiciary to ensure justice in criminal prosecutions. The Court of Appeals concluded, however, that the thrust of our decision in that case was to protect the confidentiality of Presidential conversations that were neither relevant nor admissible in the criminal proceeding; it did not relate to uses of conversations actually introduced into evidence. Since these conversations were no longer confidential, 179 U. S. App. D. C., at 305-306, 551 F.2d, at 1264-1265, Presidential privilege no longer afforded any protection.

Finally, petitioner argues that it would be improper for the courts to facilitate the commercialization of these White House tapes. The court below rejected this argument, holding [*602] it a "question of taste" that could not take precedence over the public's right of access. *Id.*, at 306, 551 F.2d, at 1265. Petitioner rejoins that such matters of taste induce courts to deny public access to court files in divorce and libel litigation. See, e. g., *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893); *Munzer v. Blaisdell*, 268 App. Div., at 11, 48 N. Y. S. 2d, at 356. Moreover, argues petitioner, widespread publication of the transcripts has satisfied the public's legitimate interests; the marginal gain in information from the broadcast and sale of aural copies is outweighed by the unseemliness of enlisting the court, which obtained these recordings by subpoena for a limited purpose, to serve as the vehicle of their commercial exploitation "at cocktail parties, . . . in comedy acts or dramatic productions, . . . and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies." Brief for Petitioner 30.

C

[***LEdHR4] [4]At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts. ¹⁴ On respondents' side of the scales is the incremental gain in public understanding of an

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immensely important historical occurrence that arguably would flow from the release of aural copies of these tapes, a gain said to be not inconsequential despite the already widespread dissemination of printed transcripts. Also on respondents' side is the presumption -- however gauged -- in favor of public access to judicial records. On petitioner's side are the arguments identified above, which must be assessed in the context of court custody of the tapes. Underlying each of [***583] petitioner's arguments is the crucial fact that respondents require a court's cooperation in furthering their commercial [*603] plans. The court -- as custodian of tapes obtained by subpoena over the opposition of a sitting President, solely to satisfy "fundamental demands of due process of law in the fair administration of criminal [**1315] justice," *United States v. Nixon, supra, at 713* -- has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production. This responsibility does not permit copying upon demand. Otherwise, there would exist a danger that the court could become a partner in the use of the subpoenaed material "to gratify private spite or promote public scandal," *In re Caswell, supra, at 836, 29 A. 259*, with no corresponding assurance of public benefit.

14 Judge Sirica's principal reason for refusing to release the tapes -- fairness to the defendants, who were appealing their convictions -- is no longer a consideration. All appeals have been resolved. See n. 2, *supra*.

[***LEdHR5A] [5A] We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below. In the Presidential Recordings Act, Congress directed the Administrator of General Services to take custody of petitioner's Presidential tapes and documents. The materials are to be screened by Government archivists so that those private in nature may be returned to petitioner, while those of historical value may be preserved and made available for use in judicial proceedings and, eventually, made accessible to the public. Thus, Congress has created an administrative procedure for processing and releasing to the public, on terms meeting with congressional approval, all of petitioner's Presidential materials of historical interest, including recordings of the conversations at issue

here.¹⁵

15 Both sides insist that the Act does not in terms cover the copies of the tapes involved in this case. Section 101 (a) of the Act directs the Administrator to "receive, obtain, or retain, complete possession and control of all *original* tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which --

"(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

"(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

"(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974." 88 Stat. 1695 (emphasis added).

The tapes at issue here are not "originals." See n. 3, *supra*. Nor were they recorded during the relevant period or in the designated areas.

MR. JUSTICE WHITE would direct that the copies of the tapes at issue in this case be delivered forthwith to the Administrator. He reaches this result by construing § 101 (b) of the Act, in conjunction with 44 U. S. C. § 2101, as sweeping within the ambit of the Act's provisions *copies* as well as the originals of the tapes and materials generated by petitioner during the specified period (*i. e.*, Jan. 20, 1969, to Aug. 9, 1974). Apart from the point that these copies were created after the close of that period, it is difficult to believe that § 101 (b) was intended to sweep so broadly. In any event, we need not consider in this case what Congress may have intended by § 101 (b). That section specifies duties of the Administrator. He is not a party to this case, has made no claim to entitlement to these copies, and the scope of § 101 (b) has not been fully briefed and argued.

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[*604] In [***584] *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), we noted two major objects of the Act. First, it created a centralized custodian for the preservation and "orderly processing" of petitioner's historical materials. Second, it mandated protection of the "rights of [petitioner] and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained." *Id.*, at 436. To these ends, the Act directed the Administrator to formulate regulations that would permit consideration of a number of different factors. ¹⁶ [**1316] Thus, the Act provides for [*605] legislative and executive appraisal of the most appropriate means of assuring public access to the material, subject to prescribed safeguards. Because of this congressionally prescribed [*606] avenue of public access we need not weigh the parties' competing arguments as though [***585] the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.

16 Under § 104 of the Act, the Administrator is to propose regulations governing public access to the Presidential tapes. These regulations must meet with congressional approval. Section 104 provides in pertinent part as follows:

"REGULATIONS RELATING TO PUBLIC ACCESS

"Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title [Dec. 19, 1974] submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

"(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

"(2) the need to make such recordings and materials available for use in judicial proceedings;

"(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to

information relating to the Nation's security;

"(4) the need to protect every individual's right to a fair and impartial trial;

"(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

"(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

"(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

"(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

"(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

"(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a)." 88 Stat. 1696-1697.

The Administrator's fourth set of proposed regulations has become final. 42 Fed. Reg. 63626 (1977). The first set was disapproved, S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609-28614 (1975), as was the second, S. Res.

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428, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 10159-10160 (1976). The House rejected six provisions of a third set. H. R. Res. 1505, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 30251 (1976). See also S. Rep. No. 94-368 (1975); H. R. Rep. No. 94-560 (1975); S. Rep. No. 94-748 (1976).

Respondents argue that immediate release would serve the policies of the Act. The Executive and Legislative Branches, however, possess superior resources for assessing the proper implementation of public access and the competing rights, if any, of the persons whose voices are recorded on the tapes. These resources are to be brought to bear under the Act, and court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons. Simply stated, the policies of the Act can best be carried out under the Act itself. Indeed, Judge Sirica -- as we have noted *supra*, at 595-596 -- referred to the scheme established under the Act in assessing the need for immediate release. 397 F.Supp., at 189; cf. *United States v. Monjar*, 154 F.2d 954 (CA3 1946). But because defendants' appeals were pending, he merely denied respondents' petition without prejudice, contemplating reconsideration after exhaustion of all appeals. ¹⁷ [*607] Thus, he did not have to [*1317] confront the question whether the existence of the Act is, as we hold, a decisive element in the proper exercise of discretion with respect to release of the tapes.

¹⁷ The suggestion of MR. JUSTICE STEVENS, *post*, at 614, that the trial court has exercised its discretion to permit release of the copies is not supported by the facts. It is true that Judge Gesell declared that respondents eventually should be permitted to copy the tapes at issue here, but he imposed stringent standards to safeguard against overcommercialization and administrative inconvenience. 386 F.Supp., at 643. Respondents failed to satisfy those standards. *Id.*, at 643-644. When the matter returned to Judge Sirica, he framed the crucial issue as that of "the timing of the release, if ever, of certain tapes received in evidence" in the Mitchell trial. 397 F.Supp., at 187 (emphasis added). Thus, even if the defendants' appeals had not been pending, it is entirely speculative whether Judge Sirica would have exercised his discretion so as to permit

release. In light of the appeals, Judge Sirica actually denied respondents' applications without prejudice. Consequently, this case is not correctly characterized as one in which the District Court and the Court of Appeals "have concurred," *post*, at 614, as to the proper exercise of discretion. Moreover, neither court gave appropriate consideration to the factor we deem controlling -- the alternative means of public access provided by the Act.

[***LEdHR6A] [6A] We emphasize that we are addressing only the application in this case of the common-law right of access to judicial records. We do not presume to decide any issues as to the proper exercise of the Administrator's independent duty under the statutory standards. He remains free, subject to congressional disapproval, to design such procedures for public access as he believes will advance the policies of the Act. ¹⁸ Questions [***586] concerning [*608] the constitutionality and statutory validity of any access scheme finally implemented are for future consideration in appropriate proceedings. See *Nixon v. Administrator of General Services*, 433 U.S., at 438-439, 444-446, 450, 455, 462, 464-465, 467; *id.*, at 503-504 (POWELL, J., concurring).

18 [***LEdHR6B] [6B]

Section 105-63.404 (c) of the Administrator's final regulations provides in part that "[researchers] may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States v. Mitchell, et al.*; *In re National Broadcasting Company, Inc., et al.*, D. C. Miscellaneous 74-128." 42 Fed. Reg. 63629 (1977). In fact, the District Court has not approved any procedures. Hence, this regulation may reflect the belief that the federal judiciary, in delineating the scope of the common-law right of access to the tapes at issue here, would pass on questions of proprietary interest, privacy, and privilege that could affect release under the Act. See §§ 104 (a)(5), (7), 105 (a), (c). Because we decide that the existence of the Act itself obviates exercise of the common-law right in this case, we have not found it necessary to pass on any such questions.

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Moreover, this lawsuit arose independently of the Act, the Administrator is not a party, and any procedures that might have arisen from it would not necessarily have been developed with reference to the statutory standards the Administrator must consider. Further, there may be persons other than petitioner who may wish to assert private or public interests in the tapes themselves or in the manner of dissemination. We cannot accept respondents as necessarily representing the interests of the public generally or of the Administrator.

In sum, this litigation cannot be utilized as a substitute for the procedures and safeguards set forth in the Act, upon which we relied in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

***LEdHR5B] [5B]Considering all the circumstances of this concededly singular case, we hold that the common-law right of access to judicial records does not authorize release of the tapes in question from the custody of the District Court. We next consider whether, as respondents claim, the Constitution impels us to reach a different result.

III

***LEdHR7A] [7A] ***LEdHR8A] [8A]Respondents argue that release of the tapes is required by both the *First Amendment* guarantee of freedom of the press and the *Sixth Amendment* guarantee of a public trial. Neither supports respondents' conclusion.

A

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court held that the *First Amendment* prevented a State from prohibiting the press from publishing the name of a rape victim where that information had been placed "in the public domain on official court records." *Id.*, at 495. Respondents [*609] claim that *Cox Broadcasting* guarantees the press "access" to -- meaning the right to copy and publish -- exhibits and materials displayed in open court.

1318] *LEdHR7B] [7B]This argument misconceives the holding in *Cox Broadcasting*. Our decision in that case merely affirmed the right of the

press to publish accurately information contained in court records open to the public. Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know. *Id.*, at 491-492. In the instant case, however, there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions upon press access to, or publication of, any information in the public domain. Indeed, the press -- including reporters of the electronic media -- was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. ***587] The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes -- to which the public has never had *physical* access -- must be made available for copying. Our decision in *Cox Broadcasting* simply is not applicable.

***LEdHR9] [9]The *First Amendment* generally grants the press no right to information about a trial superior to that of the general public. "Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." *Estes v. Texas*, 381 U.S. 532, 589 (1965) [*610] (Harlan, J., concurring). Cf. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). See also *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

B

Respondents contend that release of the tapes is required by the *Sixth Amendment* guarantee of a public trial.¹⁹ They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis.

¹⁹ We assume, *arguendo*, that respondents have

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standing to object to an alleged deprivation of a defendant's right to a public trial. But see *Estes v. Texas*, 381 U.S. 532, 538 (1965); *id.*, at 583 (Warren, C. J., concurring); *id.*, at 588-589 (Harlan, J., concurring).

[***LEdHR8B] [8B] [***LEdHR10] [10] In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. *Estes v. Texas*, *supra*, at 539-542. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U.S. 257, 270 (1948), it confers no special benefit on the press. *Estes v. Texas*, 381 U.S., at 583 (Warren, C. J., concurring); *id.*, at 588-589 (Harlan, J., concurring). Nor does the *Sixth Amendment* require that the trial -- or any part of it -- be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. *Ibid.* That opportunity abundantly existed here.

IV

We hold that the Court of Appeals [***588] erred in reversing the District Court's decision [**1319] not to release the tapes in its custody. [*611] We remand the case with directions that an order be entered denying respondents' application with prejudice.²⁰

20 The task of balancing the various elements we have identified as part of the common-law right of access to judicial records should have been undertaken by the courts below in the first instance. "We need not remand for that purpose, however, because the outcome is readily apparent from what has been said above." *Bigelow v. Virginia*, 421 U.S. 809, 826-827 (1975).

According to the Manual for Clerks of the United States District Courts § 207.1 (1966), clerks of the District Courts should "obtain a direction, standing order or rule that exhibits be returned [to their owners] or destroyed within a stated time after the time for appeal has expired." Because we have not addressed the issue of ownership of the copies at stake in this case, we do not speak to the disposition of them after

remand.

So ordered.

DISSENT BY: WHITE (In Part); MARSHALL;
STEVENS

DISSENT

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

Although I agree with the Court that the Presidential Recordings and Materials Preservation Act is dispositive of this case and that the judgment of the Court of Appeals should be reversed, my reasons are somewhat different, for I do not agree that the Act does not itself reach the tapes at issue here. It is true that § 101 (a) of the Act requires delivery to the Administrator and his retention of only original tape recordings and hence does not reach the tapes involved here. But § 101 (b) is differently cast:

"(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

"(2) For purposes of this subsection, the term 'historical [*612] materials' has the meaning given it by section 2101 of title 44, United States Code."

"Historical materials" is defined in 44 U. S. C. § 2101 as "including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

Obviously, § 101 (b) has a far broader sweep than § 101 (a). It is not limited to originals but would reach copies as well. Nor is there any question that the tapes sought to be released here contain conversations that occurred during the critical period [***589] covered by § 101 (b) -- January 20, 1969, to August 9, 1974. That the tapes at issue are copies made at a later time does not remove the critical fact that the conversations on these

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copies, like the conversations on the originals, occurred during the relevant period. Furthermore, if the originals are of historical value, the copies are of equal significance. Otherwise, it is unlikely that there would be such an effort to obtain them.

Of course, the Administrator under the Presidential Recordings Act is not compelled to seek out every copy of every document or recording that was itself produced during the specified period of time. But surely he is authorized to receive the tapes at issue in this case and to deal with them under the terms of the statute.

It is my view, therefore, that the judgment of the Court of Appeals should be reversed, but that the case should be remanded to the District Court with instructions to deliver the tapes in question to the Administrator forthwith.

MR. JUSTICE MARSHALL, dissenting.

As the court below found, respondents here are "[seeking] to vindicate a precious common law right, one that predates the Constitution itself." *United States v. Mitchell*, 179 U. S. App. D. C. 293, 301, 551 F.2d 1252, 1260 (1976). The Court today recognizes this right and assumes that it is applicable [*613] here. *Ante*, at 598-599, and n. 11. It also recognizes that the court with custody of the records must have substantial discretion in making the decision regarding access. *Ante*, at 599.

The Court nevertheless holds that, contrary to the rulings below, respondents should be denied access to significant materials in which there is wide public interest. The Court finds "decisive" the existence of the Presidential Recordings and Materials Preservation Act. *Ante*, at 607. The Act, however, by its express terms covers only "original tape recordings," § 101 (a), and it is undisputed that the tapes at issue here are copies, see *ante*, at 593-594, n. 3, 603-604, n. 15. Indeed, in a commendable display of candor, petitioner has conceded that the Act does not apply. Supplemental Brief for Petitioner 2.

Nothing in the Act's history suggests that Congress intended the courts to defer to the Executive Branch with regard to these tapes. To the contrary, the Administrator of General Services had to defer to the District Court's "expertise" in order to secure congressional approval of regulations promulgated under the Act. See *post*, at 616,

and n. 5 (STEVENS, J., dissenting). It is clear, moreover, that Congress intended the Act to ensure "the American people . . . full access to all facts about the Watergate affair." S. Rep. No. 93-1181, p. 4 (1974).

Hence the Presidential Recordings Act, to the extent that it provides any assistance in deciding this case, strongly indicates that the tapes should be released to the public as directed by the Court of Appeals. While petitioner may well be "a legitimate class of one," *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977), we are obligated to adhere to the historic role of the Judiciary on this matter that both sides [***590] concede should be ours to resolve. I dissent.

MR. JUSTICE STEVENS, dissenting.

The question whether a trial judge has properly exercised his discretion in releasing copies of trial exhibits arises infrequently. It is essentially a question to be answered by reference [*614] to the circumstances of a particular case. Only an egregious abuse of discretion should merit reversal; and when the District Court ¹ and the Court [**1321] of Appeals ² have concurred, [*615] [***591] the burden of justifying review by this Court should be virtually insurmountable. Today's decision represents a dramatic departure from the practice appellate courts should observe with respect to a trial court's exercise of discretion concerning its own housekeeping practices.

1 District Judge Gesell explained the normal practice in the trial court:

"As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, any member of the public has a right to inspect and obtain copies of such judicial records. *Ex parte Drawbaugh*, 2 App. D. C. 404, 407 (1894). . . .

"The Court stated in *Drawbaugh*,

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"[Any] attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice.

....

"The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States v. Nixon*, [418 U.S. 683, 715 (1974)]. His words cannot be retrieved; they are public property and his opposition is accordingly rejected." *United States v. Mitchell*, 386 F.Supp. 639, 641-642 (DC 1974). Like the Court of Appeals, see n. 2, *infra*, and unlike the majority, *ante*, at 606-608, n. 17, I read this passage as a discretionary rejection of petitioner's claim that the tapes should be suppressed.

2 Explaining its concurrence in Judge Gesell's views, the Court of Appeals stated:

"Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency and thus they are both impressed with the 'public trust,' and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it

seems likely that as a result of the Presidential [Recordings] and [Materials] Preservation Act, the words and sounds at issue here will find a further entry way into the public domain. For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy.

....

"In any event, in light of the strong interests underlying the common law right to inspect judicial records -- interests especially important here given the national concern over Watergate -- we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights." *United States v. Mitchell*, 179 U. S. App. D. C. 293, 305-306, 551 F.2d 1252, 1264-1265 (1976) (footnotes omitted).

It is true that Judge Sirica refused to order release of the tapes before the appeals were concluded, but he expressed no disagreement with any aspect of Judge Gesell's opinion.

It should also be noted that although Circuit Judge MacKinnon dissented from the Court of Appeals decision that the tapes should be released forthwith, he also expressed no disagreement with Judge Gesell's views. *Id.*, at 306-307, 551 F.2d, at 1265-1266.

There is, of course, an important and legitimate public interest in protecting the dignity of the Presidency, and petitioner has a real interest in avoiding the harm associated with further publication of his taped conversations. These interests are largely eviscerated, however, by the fact that these trial exhibits are already entirely in the public domain. Moreover, the normal presumption in favor of access is [*616] strongly reinforced by the special characteristics of this litigation. The conduct of the trial itself, as well as the conduct disclosed by the evidence, is a subject of great historical interest. Full understanding of this matter may affect the future operation of our institutions. The distinguished trial judge, who was intimately familiar with the ramifications of this case and its place in history, surely struck the correct balance.

Today the Court overturns the decisions of the

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District Court and the Court of Appeals by giving conclusive weight to the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695.³ That Act, far from requiring the District Court to suppress these tapes, manifests Congress' settled resolve "to provide as much public access to the materials as is physically possible as quickly as possible."⁴ It is therefore not surprising that petitioner responded to the Court's post-argument request for supplemental briefs by expressly disavowing any reliance on the Presidential Recordings Act. Nor is there any reason to require the District Court to defer to the expertise of the Administrator of General Services, for the Administrator gained congressional approval of his regulations only by deferring to the expertise displayed by the District Court in this case.⁵ For this Court now to [***592] [**1322] rely on the Act as a basis for [*617] reversing the trial judge's considered judgment is ironic, to put it mildly.

3 It is, of course, true that the Act's effect on this litigation "was neither advanced by the parties nor given appropriate consideration by the courts below." *Ante*, at 603. But this is a reason for rejecting, not embracing, petitioner's claim.

4 S. Rep. No. 94-368, p. 13 (1975); H. R. Rep. No. 94-560, p. 16 (1975).

5 The Administrator of General Services first planned to forbid private copying of the tapes in his control, but the Senate emphatically rejected this initial proposal. S. Res. 244, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 28609-28614 (1975). The Senate's Committee Report condemned the Administrator's proposed regulation as "at best, unnecessary, and at worst, inconsistent with the spirit if not the letter of the act." S. Rep. No. 94-368, *supra*, at 13. The Report elaborated:

"In evaluating this regulation, it is also necessary to consider the basic intent of the Act. This legislation was designed, within certain limitations, to provide as much public access to the materials as is physically possible as quickly as possible. To that end, GSA recognizes that legitimate research requires the reproduction of printed materials; reproduction is no less necessary when the material is a tape recording." *Ibid*.

A House Report also disapproved the

proposal, rejecting the Administrator's fears of undue commercialization:

"There is of course a risk that some people will reproduce the recordings and exploit them for commercial purposes. That is the risk of a free society. Moreover, it is a risk the Founding Fathers accepted in adopting the free speech protections of the *first amendment*, any researcher can announce to the world the findings of his research." H. R. Rep. No. 94-560, *supra*, at 16.

The Administrator then revised his regulations, proposing that private reproduction of the tapes be prohibited for two years and that the ban be reviewed at the end of that period. This proposal was rejected twice. S. Res. 428, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 10159-10160 (1976); H. R. Res. 1505, 94th Cong., 2d Sess. (1976), 122 Cong. Rec. 30251 (1976). See also S. Rep. No. 94-748, pp. 23-24 (1976); H. R. Rep. No. 94-1485, p. 26 (1976).

The Administrator finally obtained congressional approval only by adopting the approach of the District Court in this case. His latest regulation, as approved, states:

"Researchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States v. Mitchell* . . ." 42 Fed. Reg. 63629 (1977).

Congress and the Administrator expected that the District Court would soon approve private copying of the tapes. The first congressional Reports on the Administrator's proposed regulations, after noting that reproduction of the court's tapes had been forbidden pending the appeals in *United States v. Mitchell*, expressed the belief that copying might begin when the prosecutions were completed. H. R. Rep. No. 94-560, *supra*, at 16 n. 4; S. Rep. No. 94-368, *supra*, at 13 n. 1. The Administrator, in explaining his latest regulations, said that "once the Court approves a plan for reproduction of the Nixon tape recordings," the Administrator would adopt "similar procedures." General Services Administration, Legal Explanation of Public

435 U.S. 589, *617; 98 S. Ct. 1306, **1322;
55 L. Ed. 2d 570, ***592; 1978 U.S. LEXIS 80

Access Regulations -- Presidential Recordings
and Materials Preservation Act, P. L. 93-526, p.
G-54 (1977).

I respectfully dissent.

REFERENCES

*16 Am Jur 2d, Constitutional Law 341-352; 20 Am Jur
2d, Courts 61, 62; 21 Am Jur 2d, Criminal Law 257-270*

USCS, *Constitution, 1st and 6th Amendments*

US L Ed Digest, Constitutional Law 935.5; Criminal Law
47.5; Records and Recording Laws 8

ALR Digests, Constitutional Law 791; Criminal Law
101; Records and Recording Laws 7

L Ed Index to Annos, Criminal Law; Freedom of Speech,
Press, Religion, and Association; Records

ALR Quick Index, Freedom of Speech and Press;
Records and Recording Laws; Trial

Federal Quick Index, Freedom of Speech and Press;
Records and Recording; Trial

Annotation References:

The Supreme Court and the right of free speech and
press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116,
16 L Ed 2d 1053, 21 L Ed 2d 976.*

Right to public trial in criminal case. *4 L Ed 2d 2128.*

Executive privilege with respect to presidential papers
and recordings. *19 ALR Fed 472.*

Broadcasting, recording, or photographing court
proceedings. *100 ALR2d 1404.*

Webster Groves School Dist. v. Pulitzer Pub. Co.
898 F.2d 137
(8th Cir. Mo. 1990)



Webster Groves School District, Appellees, v. Pulitzer Publishing Company,
Appellant

No. 89-2559

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

898 F.2d 1371; 1990 U.S. App. LEXIS 4447; 17 Media L. Rep. 1633

November 16, 1989, Submitted

March 27, 1990, Filed

SUBSEQUENT HISTORY: [**1] Rehearing and Rehearing En Banc Denied May 14, 1990.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Missouri. Honorable William L. Hungate, Judge. Reported at: 1990 U.S. App. LEXIS 7897.

COUNSEL: Counsel who presented argument on behalf of the Appellant was Robert B. Hoerncke, St. Louis, Missouri.

Counsel who presented argument on behalf of the Appellee were Stephen C. Hiotis, Clayton, Missouri.

JUDGES: Bowman, Circuit Judge, Ross, Senior Circuit Judge, and Beam, Circuit Judge.

OPINION BY: BOWMAN

OPINION

[*1373] BOWMAN, Circuit Judge.

Pulitzer Publishing Company (Pulitzer) appeals an order of the District Court¹ rejecting Pulitzer's efforts to open the proceedings in a lawsuit between the Webster Groves, Missouri, School District (School District) and a handicapped student. We affirm.

1 The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

In November 1988, T. B., a fourteen-year-old [**2] public school student who had been classified as a handicapped child under the Education of the Handicapped Act (EHA), 20 U.S.C. § 1401(1) (1988), brought a loaded handgun to school, in violation of school policy, and threatened classmates with it. He was first suspended and then expelled from school. Before expulsion, T. B.'s individualized education program (IEP) committee met to determine whether the behavior that resulted in the discipline was a result of the child's handicapping condition. T. B.'s grandmother and legal guardian, a member of the IEP committee, disagreed with the committee's finding of no relation between the gun incidents and the handicap, thus entitling her to seek administrative review on T. B.'s behalf. The "stay put" provision of the EHA, prohibiting expulsion pending the outcome of the review proceedings, was triggered when she requested administrative relief. 20 U.S.C. § 1415(e)(3) (1988). The School District then sought in Missouri circuit court to enjoin T. B. from attending school pending exhaustion of his administrative remedies, see *Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988), [**3] and was granted a temporary restraining order. Before the state court could hold a hearing on the School District's motion for a preliminary injunction, T. B. removed the case to federal

898 F.2d 1371, *1373; 1990 U.S. App. LEXIS 4447, **3;
17 Media L. Rcp. 1633

district court. As the hearing on the motion for a preliminary injunction was about to begin in the District Court on the afternoon of February 2, 1989, counsel for T. B. asked that the courtroom be closed to the public. The School District did not object. Ruling from the bench, Judge Hungate granted the request, whereupon a reporter for the *St. Louis Post-Dispatch*, a daily newspaper published by Pulitzer, left the courtroom without objecting. The hearing ended the same day, and five days later the court issued its memorandum opinion, which was filed under seal along with the rest of the court file.

On February 3, 1989 (the day following the hearing), Pulitzer filed motions to intervene and to open the courtroom. In an amended motion, Pulitzer also requested that the District Court unseal the court file. On March 2, 1989, Pulitzer filed a motion to stay the proceedings, which the District Court granted. The court held a hearing on the motion to intervene on May 25, 1989. On the day the stay was [**4] to expire, September 15, 1989, the District Court denied Pulitzer's motions to intervene and to open the courtroom and the file. By that time, the underlying proceedings between T. B. and the School District had been dismissed on the School District's motion.

The first issue is whether or not the motion to open the courtroom is moot, since the hearing is long over. Although neither party briefed or argued the mootness question, were we to render a decision in a case where no live controversy remains, we would be giving, in effect, an advisory opinion. "Federal courts have never been empowered to issue advisory opinions." *FCC v. Pacifica Found.*, 438 U.S. 726, 735, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978).

We may adjudicate an apparently moot case, however, if it is one "capable of repetition" as to the wronged party "yet evading review" because of the time required to move the case through the courts. *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 55 L. Ed. 310, 31 S. Ct. 279 (1911). Because we believe this is such a case, we will address the question of [*1374] whether or not the District Court took the proper precautions and made [**5] the appropriate findings of need when it closed the courtroom to the public in this case. ² See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) (case not moot even though transcript of closed preliminary hearing released);

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982) (courtroom closed pursuant to mandatory statute so clearly capable of repetition); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 563, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (Court found it was "reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record").

2 Pulitzer complains of the seven-month delay in resolving this issue, which delay, it contends, irreparably injured Pulitzer in its ability to cover the story since the proceedings between the parties are now over. We find this complaint to be without substance. Pulitzer did not make its motion to open the courtroom until the day after the hearing in the District Court ended. Therefore Pulitzer's case as to closing the courtroom was moot before it ever began and a prompt ruling on the motion would not have aided Pulitzer's news-gathering efforts. Our decision to review this issue as capable of repetition yet evading review, and thereby to reach the merits, protects Pulitzer's rights in future cases of a similar nature.

[**6] Pulitzer urges us to find a constitutional right of access to civil proceedings and to apply *First Amendment* standards to this case. ³ The District Court's order denying Pulitzer's motions appears to take that approach. Although the Supreme Court has held "that the right to attend criminal trials is implicit in the guarantees of the *First Amendment*," *Richmond Newspapers*, 448 U.S. at 580 (footnote omitted), it never has held that there is a constitutional right of access to civil trials. See *id.* at 580 n. 17 ("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."). Pulitzer nevertheless suggests we join two other circuits that, according to Pulitzer, have so held. See *Stone v. University of Md. Medical Sys. Corp.*, 855 F.2d 178 (4th Cir. 1988) (access sought to court file in civil rights suit); ⁴ *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (finding *First Amendment* right of access to civil proceedings and granting access to hearing on motion for preliminary [**7] injunction against disclosure at stockholders' meeting). The Eighth Circuit has yet to address the issue, although we did find a *First Amendment* right of access to contempt proceedings, a "hybrid" of criminal and civil proceedings. *In re Iowa Freedom of Information Council*,

724 F.2d 658, 661 (8th Cir. 1983) ("Arguably, the public interest in securing the integrity of the fact-finding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former but not the latter, but it is nonetheless true that the public has a great interest in the fairness of civil proceedings.").

3 In the portion of its brief advocating *First Amendment* access to civil trials, Pulitzer states, "The *First Amendment* values served by public access to civil trials is [sic] particularly compelling when applied to the press." Brief of Appellant at 9. If by this statement Pulitzer means to suggest that the media deserve special treatment not afforded the general public, we must disagree. The press has no greater right of access to the courts than does the public. See, e.g., *Nixon v. Warner Communications*, 435 U.S. 589, 610, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) ("the guarantee of a public trial . . . confers no special benefit on the press").

[**8]

4 We do not agree with Pulitzer that the Fourth Circuit in *Stone* has "squarely addressed the issue." Reply Brief of Appellant at 6. As we read *Stone*, the issue was the sealing of records in a civil rights trial, not the closure of the courtroom. The Fourth Circuit clearly did not decide that public access to the records had *First Amendment* protection. It distinguished the constitutional and common law protections and then said, "On remand, [the district court] must determine the source of the right of access with respect to each document sealed. Only then can it accurately weigh the competing interests at stake." *Stone*, 855 F.2d at 181.

We find it unnecessary to our decision in this case to decide whether there is a *First Amendment* right of access applicable to civil proceedings. Any *First Amendment* [*1375] right of access that might apply would be qualified, not absolute. Given the nature and the circumstances of this case, our decision must be the same whether the case is governed by a *First Amendment* qualified right of access or a common law right of access. [*9] We take this view because this case involves a handicapped child proceeding under the EHA, records and testimony regarding his disability, and his educational records. Under any qualified right of access

of which we can conceive, the District Court properly granted the motion of T. B.'s guardian to shelter the proceedings from public view.

The privacy of juveniles is protected by the legislatures and the courts of this country in a variety of ways. For example, in Missouri "the general public shall be excluded" from juvenile court hearings. *Mo.Rev.Stat. § 211.171.5* (1986). Juvenile court records are neither to be inspected nor disclosed, except to those who have a legitimate interest in them. *Id. § 211.321*. Certain juvenile records may be destroyed or sealed when the child reaches seventeen years old "if the court finds that it is in the best interest of the child." *Id. § 211.321.4*. In a federal juvenile delinquency proceeding, the minor's name and picture cannot be made public and the records of such a proceeding "shall be safeguarded from disclosure to unauthorized persons." 18 U.S.C. § 5038(a), (c), (e) (1988). Although it may be argued that [*10] the stigma of criminal proceedings distinguishes these situations from the present case, juvenile courts in Missouri also have jurisdiction over proceedings involving children in need of care or support, adoption proceedings, and guardianship proceedings. *Mo.Rev.Stat. § 211.031.1* (1986). Records of those actions also are regarded as confidential. These measures all reflect a strong public policy favoring the special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned. This strong public policy applies forcefully to students classified as handicapped because of a learning disability or some other disability that affects their educational progress.

Under the Family Educational Rights and Privacy Act (FERPA) and the regulations thereunder, a school's release of a student's records or personally identifiable information to unauthorized persons will result in the withholding of federal funds. 20 U.S.C. § 1232g(b) (1988); 34 C.F.R. § 99.30 (1988). FERPA applies to T. B., and Congress, through the EHA, has further restricted the release of information when a handicapped student is involved. 20 U.S.C. § 1417 [*11] (c) (1988).⁵ Identifying information about such students is not to be released absent parental consent and its confidentiality is to be protected. 34 C.F.R. §§ 300.571, 572 (1988). Much of the information is to be destroyed at the parent's request when no longer needed by the school. *Id. § 300.573*. In judicial proceedings brought pursuant to the EHA, a great deal of this statutorily protected information inevitably will be placed before the court. "In addition to

reviewing the administrative record, courts are empowered to take additional evidence at the request of either party. . . ." *Honig*, 484 U.S. at 312. In order to safeguard the confidentiality of such information in judicial proceedings, it therefore is appropriate to restrict access to the courtroom and the court file.

5 The School District has suggested that the following procedural guarantee of the EHA indicates that a hearing like the one involved here is presumptively closed: "Parents involved in hearings must be given the right to: . . . (2) Open the hearing to the public." 34 C.F.R. § 300.508(b)(2) (1988). That regulation, however, applies to state administrative hearings under the EHA, not to judicial proceedings.

[**12] The Supreme Court has confirmed that "safeguarding the physical and psychological well-being of a minor" is a "compelling" state interest. *Globe Newspaper Co.*, 457 U.S. at 607. In that case, the Court found unconstitutional a statute mandating closure of criminal trials where a minor is the victim of a sex crime, favoring instead a case-by-case determination of "whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. The Court suggested that "among the factors to be weighed [*1376] are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* Pulitzer is highly critical of the District Court for not weighing these factors in the court's order and memorandum. Brief of Appellant at 12, Reply Brief of Appellant at 11. *Globe Newspaper*, however, involved a criminal case with a minor victim, not a civil proceeding in equity concerning a handicapped child. The District Court therefore was not obligated to apply the *Globe Newspaper* factors. In any event, it seems perfectly clear that the factors articulated [**13] in *Globe Newspaper* that might be relevant to the present case all weigh heavily in favor of the District Court's order.

The hearing in the District Court was held to determine whether T. B. was such a danger to himself or others that he should be enjoined from attending public school. In granting the motion of T. B.'s guardian to close the proceedings, the District Court observed that the evidence was to include the testimony of minors who witnessed T. B. brandish the gun and threaten his schoolmates, ⁶ testimony of psychologists and

psychiatrists as to T. B.'s mental status, and evidence of his handicap. In these circumstances, the District Court did not err in granting the motion for closure.

6 Pulitzer argues that the District Court's granting of the motion for closure establishes a *per se* rule excluding the public from trials where minors are testifying. Brief of Appellant at 11; Reply Brief of Appellant at 12. We are satisfied, however, that the District Court has not established a *per se* rule. Judge Hungate's memorandum finds a strong justification for closure based on many considerations, not just the fact that minors were expected to testify at the hearing.

[**14] There remains Pulitzer's complaint that the procedure leading to the District Court's granting of the motion for closure was improper because the court gave no advance notice to the public. We disagree. The motion for closure was not made until the beginning of the hearing. The motion was made in open court and, hearing no objections from anyone, including the newspaper reporter then present in the courtroom, Judge Hungate granted the motion. ⁷ To provide an opportunity for objection by members of the public not then present in the courtroom, Judge Hungate *sua sponte* would have had to order a continuance and concoct some provision for public notice. We reject the notion that trial courts have any such duty.

7 At the request of the School District's counsel, the court permitted an attorney for the Special School District of St. Louis County to remain in the courtroom. Expert witnesses also were permitted to stay.

We now deal with the issue of sealing the court file. The parties agree that there is [**15] "a common-law right of access to judicial records." *Nixon v. Warner Communications*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978). This right of access is not absolute, but requires a weighing of competing interests. "Every court has supervisory power over its own records" and we review the sealing of the file for an abuse of the sound discretion of the trial court; "a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 598, 599. When the common law right of access to judicial records is implicated, we give deference to the trial court rather than taking the approach of some circuits and recognizing a "strong

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17 Media L. Rcp. 1633

presumption" favoring access. *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986).

Our Court has held that a qualified *First Amendment* "right of public access does extend to the documents filed in support of search warrant applications," as a search warrant is "an integral part of a criminal prosecution." *In re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).⁸ There, however, we were dealing with records [**16] in a criminal matter, [*1377] and the Supreme Court already had found a qualified *First Amendment* right of access to criminal trials. *Richmond Newspapers*, 448 U.S. at 580. The Supreme Court never has found a *First Amendment* right of access to civil proceedings or to the court file in a civil proceeding.

8 In this case, we held that the government's interest in the integrity of a continuing criminal investigation, which could be placed in jeopardy by premature disclosure of information in the affidavits supporting the application for the search warrant, was "compelling" and thus we denied immediate access to the sealed documents. *In re Search Warrant*, 855 F.2d at 574.

As with our discussion regarding closure, we find it unnecessary to decide whether a qualified *First Amendment* right of access to the court file attaches in a civil proceeding under the EHA. Whether we apply a constitutional standard or a common law standard, the result is the same: Pulitzer's interest [**17] in access to the records in this case clearly is outweighed by T. B.'s privacy interest and the state's interest in protecting minors from the public dissemination of hurtful information. Even though the judicial proceedings in this matter are completed, T. B. may be stigmatized and humiliated if the sensitive information in the record is made public, and that is reason enough to seal the file and keep it sealed.

We agree with the District Court's assessment that there is no reasonable alternative to sealing the file. We cannot unseal the record and then restrict dissemination of the sensitive information therein. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Having reviewed the transcript and other sealed documents, we agree with the District Court's conclusion that redaction of the file would be virtually impossible because it is "replete with documentation, evaluations, and other information regarding T. B.'s

learning disabilities and other personal information." Memorandum in Support of Order Denying Intervention at 4.

We see no reason, however, why the procedural information in the docket sheet in this cause should [**18] not be disclosed. See *In re Search Warrant*, 855 F.2d at 575.⁹ We do not believe it would be burdensome to review and redact a copy of the docket sheet so that Pulitzer could have access to information about the procedural status of the case. We order the District Court to release a copy of the docket sheet in this case, with appropriate redaction of identifying or sensitive information. The original, unaltered docket sheet will remain under seal.

9 Pulitzer contends that "the Eighth Circuit has specifically ruled that the sealing of the docket sheet is improper," Brief of Appellant at 6 n.3, and that *In re Search Warrant* sets forth a "clear admonition that the sealing of the docket sheet is improper." Reply Brief of Appellant at 14. Pulitzer misreads the case. Although we are ordering release of a redacted copy of the docket sheet in this case, we do not do so because this Court has declared a *per se* rule forbidding the sealing of docket sheets. The Court in *In re Search Warrant* actually said, "As a final matter, we note that the district court docket sheets have been sealed, no doubt out of an abundance of caution. We think this was improper and so direct the district court to unseal the docket sheets." *In re Search Warrant*, 855 F.2d at 575. The Court's holding in that opinion was limited to that case, as is ours here, and our order is based on our conclusion that a redacted copy of the docket sheet can be released without compromising T. B.'s privacy interests.

[**19] Finally, Pulitzer suggests that its motion to intervene, made pursuant to *Federal Rule of Civil Procedure* 24(b), was improperly denied. Such intervention is discretionary with the trial court, with its ruling to be reviewed only for abuse of discretion. See *NAACP v. New York*, 413 U.S. 345, 365-66, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973). The purpose of Pulitzer's motion was to gain access to the proceedings, and the District Court gave Pulitzer a full and fair opportunity to be heard on its arguments as to why it should have such access. Moreover, at the time of the District Court's

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17 Media L. Rep. 1633

ruling on Pulitzer's motion, the School District already had taken a voluntary dismissal of its suit, and there remained no case in which to intervene. We see no abuse of discretion in the District Court's denial of this motion.

To sum up, we direct the District Court to release a copy of the docket sheet in *Webster Groves School District v. T. B.*, No. 89-0022(C)(3), with appropriate

redaction to remove identifying or sensitive information. In all other respects, the order of the District Court is affirmed. In so affirming, we find it unnecessary to decide [*1378] whether [**20] the *First Amendment* establishes a right of public access to civil trials or to court records in civil cases.

In re Du Pont
1997 Del. Ch. LEXIS 100
(Del. Ch. June 20, 1997)



IN THE MATTER OF JOHN E. du PONT, a disabled person

C.M. No. 8091-NC

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

1997 Del. Ch. LEXIS 100; 25 Media L. Rep. 2436

December 17, 1996, Date Submitted

June 20, 1997, Date Decided

SUBSEQUENT HISTORY: [*1] Released for Publication by the Court July 2, 1997.

Attorneys for Gannett Co., Inc. And Philadelphia Newspapers, Inc.

DISPOSITION: Motion for reargument denied and file remain sealed.

JUDGES: ALLEN, Chancellor

OPINION BY: ALLEN

COUNSEL: Grover C. Brown, Esquire, Kent A. Jordan, Esquire and Peter A. Pietra, Esquire, of MORRIS, JAMES, HITCHENS & WILLIAMS, Wilmington, Delaware; Attorneys for the Alleged Disabled Person.

OPINION

MEMORANDUM OPINION

ALLEN, [*2] Chancellor

Johannes R. Kraemer, Esquire, Thomas R. Hunt, Jr., Esquire and Thomas R. Pulsifer, Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: HECKSCHER, TEILLON, TERRILL & SAGER, West Conshohocken, Pennsylvania; Attorneys for Petitioners.

Pending is a motion for reargument by Gannett Co., Inc. and Philadelphia Newspapers, Inc. (collectively, the "Newspapers")¹, asking the court to reconsider its denial of their motion to intervene and have unrestricted access to the guardianship file in the matter of John E. du Pont ("Mr. du Pont"). See *In re John E. du Pont*, Del. Ch., C.A. No. 8091-NC, Allen, C. (Dec. 2, 1996). The guardianship action was filed under 12 Del. C. § 3914 on October 25, 1996 by relatives of Mr. du Pont seeking the appointment of a guardian over property owned by Mr. du Pont in Delaware. Under the longstanding practice in this court all such matters are treated by the clerk's office as confidential and not open to public inspection except on order by the court.

David J. Ferry, Jr., Esquire, of FERRY, JOSEPH & FINK, Wilmington, Delaware; Attorney Ad Litem for John E. duPont.

Peter S. Gordon, Esquire and Patricia H. Basye, Esquire, of GORDON, FOURNARIS & MAMMARELLA; Alan J. Hoffman, Esquire and Megan D. McIntyre, Esquire, of BLANK, ROME, COMISKY & McCAULEY; Wilmington, Delaware; Co-counsel for CoreStates Bank, N.A. and Delaware Trust Capital Management.

¹ These two media companies publish newspapers of general circulation principally in the Pennsylvania and Delaware areas.

Richard G. Elliott, Jr., Esquire and Helen M. Richards, Esquire, of RICHARDS, LAYTON & FINGER;

On November 27, 1996 a hearing with respect to discovery was promptly held *in camera*, despite objection by the media. Thereafter, [*3] a transcript of the hearing was promptly made available to the public after the court determined that nothing of a confidential nature had been revealed during the hearing.² This motion for reargument challenges the court's contemporaneous decision to keep the rest of the guardianship file under seal.

2 Only financial information concerning certain account balances was excluded from a redacted version of the transcript released for public review.

According to the Newspapers, in denying unrestricted access to the file, this court improperly placed the burden on them to prove why the file should be open to the public, and infringed upon their due process rights by failing to articulate with specificity the reasons why the file would remain closed. In response, counsel to Mr. du Pont contends that the court properly exercised its discretion to close the record after weighing the privacy interests of the Mr. du Pont in a guardianship proceeding involving sensitive medical and financial matters against the countervailing [*4] access rights of the public.

The standard of review on a motion for reargument is that the motion will not be granted unless the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected." *Stein v. Orloff Del. Ch., C.A. No. 7276, 1985 Del. Ch. LEXIS 540, *5, Hartnett, V.C. (Sept. 25, 1985)*. After reviewing my earlier decision, the applicable authorities of the federal courts, Delaware's long-standing policy of restricting public access to guardianship files, and the confidential issues at stake in the du Pont proceeding, I confirm the earlier rules although I acknowledge that a mechanical application of language in Supreme Court authority might produce a contrary result with respect to the burden question.

1 BACKGROUND

Mr. Du Pont is 57 years old, divorced, and has no children, other dependents, or living parents. While he was born and raised in Delaware, du Pont has for some years resided in neighboring Pennsylvania. Most of his assets are apparently held in Delaware financial institutions. On January 26, 1996 an Olympic wrestler,

David E. Schultz, [*5] was shot and killed on Mr. du Pont's property. Mr. du Pont was charged with the first degree murder of Mr. Schultz and has received a great deal of publicity ever since that time. Prior to the filing of the Delaware guardianship proceeding, Mr. du Pont was committed to the Norristown State Hospital, having been determined criminally incompetent on September 24, 1996 after a three day public hearing.

While the criminal trial was pending, guardianship proceedings were initiated in both Pennsylvania³ and Delaware, seeking to declare Mr. du Pont incapacitated and appoint a guardian for his person and estate. The Delaware action was filed by four adult relatives of Mr. du Pont who together would inherit his estate under intestacy rules.

3 As of the filing of this motion for reargument, no action had been taken on a request to seal the file in the guardianship proceeding in Pennsylvania although the Pennsylvania Orphans' Court has statutory authority to close the guardianship proceedings under *20 Pa. C.S. § 5511(a)*.

As discussed above, the pending motion for reargument results from the December 2, 1996 decision of this court to keep Mr. du Pont's guardianship file under seal.

[*6] II LEGAL ANALYSIS

This motion for reargument asserts applicants' right to free access to guardianship proceedings and records, claiming that unrestricted access is necessary for the media to serve the public interest in the dissemination of information. Yet, as will be discussed below, the Newspapers recognize that there is no absolute right of unrestricted access under the U.S. Constitution, Delaware Constitution, or common law. In light of this fact, two more specific legal contentions are advanced.

First, it is argued that this court made a legal error in placing the burden on the media to prove good cause to unseal Mr. du Pont's guardianship file. See *Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984)* (stating general rule that party seeking closure has burden of showing "material is the kind of information that courts will protect and that there is good cause for the order to issue"). Second, the media argues that its due process rights were infringed because the December 2

opinion did not properly specify the grounds upon which the file was sealed. The media contends that to satisfy the due process rights afforded to the public by the U.S. Constitution, [*7] prior to sealing a guardianship file, a court must articulate the countervailing interest it seeks to protect, fashion a narrowly tailored restriction, and make specific findings which will enable a higher court to review the decision. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984); *Publicker Indus., Inc.*, 733 F.2d at 1070-71.⁴

4 The media's motion for reargument focuses almost exclusively on access to Mr. du Pont's file, not on the denial of its motion to intervene, providing no "reason to reconsider the media's right of intervention at this time.

A. Access to Court Records

To place the arguments in context, I briefly review the historic treatment of public access to court records. Applicants acknowledge that there is no absolute right of public access to civil proceedings and records. A general right of access, however, has been recognized in the Third Circuit Court of Appeals for the Third Circuit and other courts. In *Publicker Indus., Inc.*, [*8] the Third Circuit Court held that the *First Amendment of the U.S. Constitution* and the common law provide a right of access to civil proceedings.⁵ 733 F.2d at 1070. A general right of access to civil records has been recognized as well. In *C. v. C.*, a case involving public access to divorce proceedings and files, the Supreme Court of Delaware stated that "in general, a member of the public has a right to access to judicial records at common law if he has an interest therein for some useful purpose and not for mere curiosity." *Del. Supr.*, 320 A.2d 717, 723 (1974).⁶

5 The U.S. Supreme Court itself has never articulated a First Amendment right of access to civil proceedings or court files generally, and has had no opportunity to consider the special issue of access to guardianship files.

6 In the same case, the Court interpreted the "open courts" provision of *Article 1, Section 9 of the Delaware Constitution*, finding that it did not guarantee a right to a public trial and that if it created any constitutional right of unrestricted access to records, such a right was limited to parties and their attorneys. *Id.* at 728.

[*9] Although there is a general presumption of

access to civil proceedings and records, courts have the discretion and power to close hearings and keep records under seal when appropriate. *See id.* at 722-23, 727. Delaware and other states have had a long tradition of restricting access to records in certain types of civil cases. 7 Delaware case law, and written policies document the fact that access to guardianship records, in particular, has been restricted in Delaware at least throughout the past few decades,⁸ and presumably from the earliest time.

7 Both the Delaware and U.S. Supreme Court have recognized the significance of tradition and experience in determining whether a First Amendment or common law right of access exists. *See Gannett Co., Inc. v. State, Del. Supr.*, 571 A.2d 735, 744, cert. denied, 495 U.S. 918, 109 L. Ed. 2d 310, 110 S. Ct. 1947 (1990).

8 Delaware is not unique in its policy of restricting access to guardianship and other particularly sensitive types of files. In fact several states which permit electronic coverage of trial court proceedings generally, have blanket exemptions prohibiting coverage of guardianship proceedings. *See Carolyn Dyer & Nancy Hauserman, Electronic Coverage of the Courts: Exceptions to Exposure*, 75 *Geo. L.J.* 1633, 1648-50, n.59 (1987).

[*10] This policy is well-documented because there were extensive discussions among Delaware judges concerning access to court files during the 1970's. In 1973, for example, then Chancellor Quillen wrote a report to the Chief Justice which describes this historical practice of restricted access to fiduciary records in the Chancery Court and recommends the continuation of the policy of restricting access to files concerning non-adversarial fiduciary matters. *See Appendix A.* According to a subsequent letter from Chancellor Quillen to the Chief Justice, this policy is appropriate because "there is simply no reason why the public should have access to private financial affairs of a person and a family because an individual becomes incapacitated by age, disability or illness." *See Appendix B.*

In addition to judicial correspondence concerning this topic, the policy of restricted access to guardianship files is documented in written instructions to the Registrar in Chancery. For example, a February 6, 1970 directive of the Chancellor Duffy instructed the Registrar to permit litigation records to be routinely inspected by

members of the media, but to only allow members of the Delaware [*11] bar and parties to a proceeding to review files in fiduciary matters. *See* Appendix C.

Neither this general policy nor its underlying purpose has changed over time. In the more recent case of *C. v. C.*, the Delaware Supreme Court recognized that:

it is part of a trend in this century in this State to protect the privacy of individual litigants in certain sensitive areas of human relationships. Divorce does not stand alone in this regard. Presently, proceedings and records involving termination of parental rights, and adoptions, as well as matters in the Family Court, for example, are not available for public access. [statute cites omitted] Admittedly, these statutes are specific in regard to record access, but there seems to us to be an intention to create a policy which might well extend beyond the literal language. . . . It is, of course, true that all papers and evidence filed with a Court are records in public custody. But civil litigation is not infrequently merely a means to resolve private disputes. The State provides a forum for the peaceful and binding resolution of those private disputes as part of the process of establishing an orderly and fair society. [*12] Such cases or portions of such cases may or may not be of legitimate and reasonable public interest.

Id. at 722-23.

In my opinion, Delaware's policy of presumptively restricting access to fiduciary files is appropriate and may appropriately be continued. The Delaware Supreme Court has recognized that there is a critical difference between litigation involving adversarial parties who appear voluntarily in court, and guardianship cases in which the parties, presumably incompetents, are in court where their personal medical and financial affairs may form the core of the subject matter of the case. This difference does not mean that courts may in this area work completely free of the healthy review of a diligent press. But it does affect the ways and means in which press

access is made available. Given past practices, it is reasonable for parties involved in guardianship cases to have a higher expectation of confidentiality than voluntary civil litigants -- that expectation should be protected if it is possible to do so within the constraints of the law concerning public access rights, as *in* the case of *Mr. du Pont*.

B. Burden to Show Good Cause

The special factual situation [*13] in which guardianships arise justify the traditional *practice in* Delaware respecting burden to have access to such files and in my opinion are consonant with the Constitution of the United States so long as a judicial officer is available to promptly determine the matter.⁹

9 Applicants remind us that Court of Appeals for the Third Circuit stated in *Publicker Indur., Inc.* that the general rule is that the party seeking the closure of a civil file has the burden of showing good cause for sealing such file. *733 F.2d at 1071*. That rule is however a prudential one, not a constitutional mandate. *Publicker* involved confidential business information, not a guardianship matter. The constitution does not prevent the law from acting on that difference.

C. Due Process

Despite the media's contentions to the contrary, there has, in my opinions, been no violation of the public's due process rights which merits reconsideration of the closure of the file. In the December 2, 1996 opinion, the court recognized and [*14] attempted to comply with the presumptively applicable due process requirements, stating that "any restriction upon [media] access that is justified by some countervailing interest must be narrowly tailored and subject to appellate review." *See In re John E. du Pont, at 2*. To satisfy the due process standard and facilitate any subsequent review of the determination, the opinion stated the reasons why the *du Pont* file should be kept under seal, explaining in relevant *part* that:

[a] guardianship matter [involves] a legitimate interest of the ward that justifies some intrusion into the normal practice of open access by the press of court records absent a specific judicial determination that good ground exists to limit access. . . .

Medical matters and matters of personal finance are contained in such files. Merely because a person may need the help of a guardian does not ordinarily provide a ground to say that their rights to privacy have been surrendered. Thus, in the ordinary case guardianship files are presumptively closed to the public. Nevertheless access is afforded on the good cause standard

Id. The narrowly tailored remedy in this instance was [*15] providing the media with access to the transcript of the hearing and the ruling, while keeping the file generally sealed, no good cause having been shown to permit media access to Mr. du Pont's personal medical and financial information. ¹⁰

¹⁰ See *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990)(constraining public access to juvenile proceeding).

In my opinion, this determination was well within the court's discretion under both constitutional and common law, creating no grounds for reargument. ¹¹

¹¹ In determining whether a closure order is appropriate, the court has discretion to consider many factors, including "the parties' interest in secrecy, whether the parties seeking secrecy are public entities, the parties' reliance on a standing confidentiality order, potential embarrassment to the parties, and whether the action involves public health or safety. *Doe v. Methacton, Sch. Dist.*, 878 F. Supp. 40, 42 (E.D. Pa. 1995).

[*16] III. CONCLUSION

Where the relevant legal principles were considered and properly understood in reaching the original determination, a motion for reconsideration of that ruling should be denied. See *Stein*, Slip Op. at 5. Since there is no legal support for the contention that the burden to show good cause was placed erroneously on the media, and the earlier decision adequately provided the media with due process, the motion for reargument shall be denied and the file shall remain sealed. ¹²

¹² If at some point in the future the media can establish good cause for access to Mr. du Pont's,

guardianship file, or particular records therein, such access could be granted in the court's discretion.

APPENDIX A

COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM T. QUILLEN

CHANCELLOR

COURT HOUSE WILMINGTON, DELAWARE

December 4, 1973

Honorable Daniel L. Herrmann

Chief Justice, Supreme Court

Public Building

Wilmington, Delaware 19801

Re: Public Access to Court Records

Dear [*17] Chief Justice Herrmann:
INTRODUCTION

Last September, you designated President Judge Albert J. Stifel and me to make a recommendation to the State Judicial Conference on a statewide uniform general policy on public access to court records. Judge Stifel and I did work on the assignment prior to his recent illness in the hope of making a joint recommendation to the conference. We met with the Chief Judges of the various courts and with Mr. Horgan to obtain their views and assistance and we received good cooperation from them. We met with Rodney M. Layton, Esquire and Howard M. Handelman, Esquire in regard to their concern about premature public disclosure particularly in cases involving professional defendants. Based on this experience and some research which I have done, I will report orally to the conference pursuant to your request. The purpose of this letter is to provide you in written form the substance of my report. I emphasize that the recommendation made and the discussions below are mine and Judge Stifel, due to his illness, has not been able to participate with me in this report.

In my response acknowledging your letter of designation, I commented that I [*18] did not know whether a public access policy could be simple, general and uniform due to the various jurisdictions of the different courts. My review of this area lends considerable support to that preliminary comment. This area of public policy is in a state of flux and it does not seem to me that the desire for uniformity should lead us to hasty action in an area where there is established legal background, widely conflicting views as to the appropriate policy among people in general and Delaware judges in particular, current litigation pending in Delaware Courts, confusing lines of demarcation between the various branches of government. Thus, I fear the limited recommendation that I will make at the conclusion of this report will be somewhat of a disappointment to you and the hopes you expressed for an uniform policy at the time of your designation of us to report.

In an effort to put the assignment in perspective, I think it is useful to take a rather complete view of the situation including the immediate origin of the current interest in public access to court records, the common law generally, policies presently existing in the State of Delaware, pertinent [*19] Delaware cases, and the comments made to Judge Stifel and me by the other members of the judiciary and Mr. Horgan.

ORIGIN OF THE CURRENT INTEREST IN PUBLIC ACCESS

In your letter of September 19, 1973 to Judge Stifel and me, you noted the conflict reported by the Delaware State News in regard to public access to court records. In particular the Delaware State News centered its discussion upon the refusal of the Resident Superior Court Judge in Sussex County to permit access to court records. Evidently the newspaper comment was sparked by the refusal of the Prothonotary's Office in Sussex County to permit a newspaper reporter to examine depositions in a particular case.

Shortly thereafter, a second incident occurred in Sussex County wherein a newspaper reporter was reported to have been "escorted from the Sussex County Recorder of Deeds office by Georgetown police ... after a county official objected to the reporter's inspection of public records." This second incident has resulted in a

law suit against the Recorder of Deeds in Sussex County.

Also current is a dispute about a divorce action involving an elected public official, [*20] which divorce case has received unusual publicity in downstate press and which divorce case has given rise to a petition by the News Journal for access to the divorce file. This litigation is presently pending before the Supreme Court of Delaware.

Thus, it should be noted that all of the recent activity which has brought this problem to the fore has been press initiated.

COMMON LAW GENERALLY

It is important to note that this area of public policy is not purely administrative but is one which has been involved frequently in litigation. Specifically, it is important to note the general case law on the subject. The best summary I have found is in an annotation at 175 A.L.R. 1260.

In general, a member of the public has access to judicial records at common law if he has an interest therein for some useful purpose and not for mere curiosity. A leading case is *Re Caswell*, 18 R.I. 835, 29 A. 259 (1893) wherein it was said:

"It is clearly within the rule to hold that no one has a right to examine or obtain copies of public records for mere curiosity, or for the purpose of creating public scandal."

Thus, there is no absolute right of a member of the public to [*21] inspect records barring some constitutional statutory grant. Furthermore, the press has no greater right to information than any other member of the public. *Courier-Journal and Louisville Times Co. v. Curtis*, 335 S.W.2d 934 (Ky. 1960).

Specifically, prior to trial, there are many cases which have held that papers filed are not of a public character as to be open to public inspection. Parties to a suit may, under the direction of the Court, lawfully withhold the records and papers in the case and prevent any statement in regard thereto being made public until they are made public by the consent of the parties or by proceedings in open court.

Thus, under the common law rule, the public did not have an absolute right of access to judicial records.

THE POLICY IN DELAWARE

Article 1, Section 9 of our current State Constitution provides that "all courts shall be open." This language has never been precisely construed. Judge Layton in *Lecates v. Lecates*, 38 Del. 190, 8 W.W. Harr. 190, 190 A. 294 (Super. Ct. 1937) discussed the constitutional provision in the context of whether it required free access to the courts or, in addition to free access to the courts, public trials. He [*22] did not discuss the problem of access to records. He did, however, specifically state the following:

"At the same time it may be admitted, even where statutes exist requiring public trials, that in proper cases, as for example where secret processes of manufacture are involved, or where the evidence to be offered is so foul that witnesses will be disinclined to disclose the truth, or where, for decency's sake, it should not be publicly heard, the Courts are not without power to order trials to be conducted in private."

I have not found any other decided cases in Delaware where the constitutional provision has been relied on by either the court or by counsel to support the proposition that the common law as to public access to court records has been changed.

The Court of Chancery by the authority of 10 Del. C., § 344 may exercise all its jurisdiction and powers in Chambers. See also Chancery Rule 77(a). By Chancery Rule 90, complaints are not released until service or notice is shown and information related to persons entitled to receive money on deposit cannot be released without Court permission. Under Rule 90(d), examination of court records is "governed [*23] by instructions to the Register in Chancery from the court from time to time." The outstanding current directive is Chancellor Duffy's instructions dated February 6, 1970. Under these instructions, litigation records may be routinely inspected by members of the Delaware bar, press and media representatives, representatives of governmental agencies and parties to the litigation. Other persons need Court permission to inspect the records. Miscellaneous records, such as accountings and other

fiduciary matters, may be routinely inspected only by members of the Delaware Bar and parties to the proceeding. All others need permission of a judge. It is interesting to note that Chancellor Duffy specifically labeled litigation records as "public records" in the directive but he did not so label miscellaneous records. The judge's authority to seal a record is specifically noted in Chancellor Duffy's directive. Thus, the policy of the Court of Chancery has been developed over a period of years and is rather specifically defined.

On October 12, 1973, the Superior Court by a majority vote, with three dissents, adopted a new policy on public access to judicial records. It declared that Superior Court [*24] records, unless otherwise provided by "statute", are public records and open for inspection by adult members of the public upon the giving of names and addressees only. Reasons need not be stated. The policy specifically recognizes the power to seal a particular file but notes that that power will not be exercised merely because the case involves a particular occupation or profession. It is interesting to note that this policy was adopted administratively only by a vote of the judges at a monthly meeting. It should be noted that adoptions, terminations of parental rights, and divorces are governed by special statutes. 13 Del. C., § 924, § 925, § 1111, § 1503 and § 1505.

There are evidently no statutes or rules or written policies governing public access to the records of the Court of Common Pleas or the Municipal Court.

Records of the Family Court are private by statute "except to the extent that the Court may consider publication in the public interest". 10 Del. C., § 972. Under Family Court Rule 370 members of the public must be specifically approved "because they have a legitimate interest in the records" in order to inspect the records. Authority to seal [*25] records is specifically noted in Family Court Rule 420.

There is a statute requiring the criminal docket of each Justice of the Peace to "be at all times open to public inspection and examination". 11 Del. C., § 5924. Moreover, 10 Del. C., § 9208 indicates the records "shall be readily and conveniently available for inspection."

There is a special statute, 11 Del. C., § 4322 governing presentence reports. In general, it provides that the reports of the Superior Court Presentence Officers "shall be under the control of [the courts serviced by

those officers]" and reports prepared by Correctional personnel are "privileged and shall not be disclosed directly or indirectly to anyone" excepting Courts, the Board of Parole, the Board of Pardons, the Attorney General, others statutorily entitled, and with the discretionary permission of the Court, the offender and his attorney or "other persons who in the judgment of the court have a proper interest therein, whenever the best interest of the state or the welfare of a particular defendant or person makes such action desirable or helpful."

The New Castle County Reorganization Act at 9 Del. C., § 1184 contains [*26] a rather detailed provision dealing with the public right to inspect New Castle County records. Because of its specificity, I will reproduce herein in full.

"§ 1184. Public right of inspection of public records

"County records, the disclosure of which would invade a person's right of privacy, hinder law enforcement, endanger the public safety, or breach a legally recognized duty of confidence, or the nondisclosure of which is legally privileged, or which have been prepared for or by the County Attorney for use in actions or proceedings to which the County is or may be a party, shall not be available for public inspection. Except as provided in this

"section, all other County records shall be open or public inspection, but the officer department board or commission, or other governmental agency of the County having the care and custody of such records, may make reasonable regulations governing the time, place and manner of their inspection, and for purposes of archival preservation, copies of County Records may be substituted in lieu of original records."

There are also specific statutes touching upon access to records for other officials. For example, under [*27] 13 Del. C., § 111, Clerks of the Peace have to satisfy themselves as to the validity of certain papers in regard to

divorce, mental hospitalization, probation and parole, and papers submitted by minors and must file such papers with the Recorder, but such papers are "open to inspection of the public only upon the order of the Resident Judge of the proper county, or such person as the Judge may appoint to give such orders." See also 12 Del. C., § 2509 dealing with the transfer of records from the Register of Wills to the Public Archives Commission when "the age and condition of [any volume of probate records] render its continued use by the public inadvisable".

In summary, it should be noted that Delaware does not have a general statute giving the public the right to inspect records. There are, however, various policies adopted for different reasons by statute, rule or directive, which do control access to records held by public officers.

PERTINENT DELAWARE CASES

The reported case of *Lecates v. Lecates*, 38 Del. 190, 8 W.W. Harr. 190, 190 A. 294 (Super. Ct. 1937) has already been commented upon. In addition, in *Soss v. Homeopathic Hospital Association of Delaware*, [*28] 638 C. A. 1961, (Super. Ct., New Castle County) the Court in 1962 ruled in Chambers that the judicial records pertaining to a personal injury lawsuit were not to be open to public inspection before trial but only "when proceedings in the cause have begun in open court." This ruling was evidently made without the filing of an opinion or an order.

Similarly, in Chancery Action No. 3949 in New Castle County, in an opinion by Chancellor fluffy dated September 27, 1972, it was held that the file in a suit against an attorney "should remain sealed until the time when trial begins or until the further order of the court."

It is interesting to note that the Judge in the Soss case required the litigant who wanted the file sealed to support his right in that regard and appointed an attorney as amicus curiae to study the matter, in the Chancery Action No. 3949, the matter came to a head because a newspaper reporter requested access to the file.

In *Eugene duPont, III v. Ridgely, Inc.*, No. 2256 In Chancery in New Castle County, Vice Chancellor Short on March 12, 1971 signed an order permitting the News Journal Company to examine the entire file, which evidently had been sealed, but prohibited [*29]

disclosure of the results of the examination without further order of the court.

There is presently pending in the Superior Court in Sussex County the case of *Campbell, et al. v. Baxter*, 449 C. A. 1973. This is the case which arose from the incident in the Recorder of Deeds Office noted above. I am advised that this case has been continued to the December Term and that there will be an attempt to compromise the lawsuit.

The last Delaware case is the pending case of *Husband, C. v. Wife, C.*, No. 241, 1973 in the Supreme Court. This case concerns the application of the *News Journal* for access to the record in a divorce case involving an elected public official. It is interesting to note that the *News Journal* has cited *Article 1, Section 5 of the Delaware Constitution* which reads in part: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity". This case specifically involves construction of the special divorce statute dealing with public access to divorce records and divorce proceedings.

It should thus be noted that, to the extent Delaware Courts have considered the question of public access to judicial records, [*30] they have followed general common law concepts and have exercised the control recognized by the common law.

COMMENTS BY THE JUDGES

Prior to meeting with the Chief Judges of the various courts and Mr. Horgan, Judge Stiffler and I invited comments in writing from them. It should be noted that these written comments were given prior to the new policy announced by the Superior Court. But I think it is fair from the conversation at the meeting to report that the oral comments were generally consistent with the tone of the written comments.

Chief Judge Wahl of the Court of Common Pleas by letter dated October 9 "opposed in principle . . . general public access to court records." His opposition to access included the press and extended to court records except docket entries. He feared "irreparable damage . . . by the indiscriminate examination of these records and release of information". He thought the press could adequately perform its function by attending the trial and "strongly objected to permitting them access to the files particularly prior to trial."

Chief Judge Fraczkowski of the Municipal Court by letter dated October 11 supported supervised access to the press and general [*31] public of "formal records of Court proceedings excluding confidential documents and Internal Court statistics and records." Each court should have authority to determine what documents are confidential.

Chief Judge Gordon of the Family Court opposed public access to court records because: access is unnecessary since court proceedings are open; access would inconvenience and burden the court; access would endanger the security of the files; access would make available privileged information; access could make available information which may be misleading and taken out of context. But he felt that policies might be developed to permit access to certain records, such as court decisions and opinions, by news media representatives, members of the Bar and representatives of Civic Association organizations, governmental agencies and others with a legitimate public interest. He was concerned that special records such as psychological or psychiatric evaluations, presentence records and counselor reports, should not be available. He suggested perhaps a separate index could be developed for available records. He wanted no change in Family Court's policy of privacy.

Mr. Horgan reported by letter [*32] dated October 9 that public access is permitted by Justices of the Peace if "the persons who are requesting to examine the records indicate a good and sufficient reason to the judge on duty."

I think a fair summary of the views of the Judges contacted would be that they are opposed to unlimited public access to court records, with Judges Fraczkowski and Gordon being somewhat sensitive to the particular need of the press for some access in order to fulfill its public function.

RECOMMENDATIONS

As for the row offices, and particularly the Recorder of Deeds, it is my opinion that it would be inadvisable or the State Judicial Conference to take any action. These offices have always had a peculiar relationship with the Resident Judges of the Superior Court and really most of the judges attending the Judicial Conference are not directly involved with the row offices. Thus, I think it is an inappropriate forum to determine policy. Furthermore,

the row offices are subject to statutory regulation and, specifically in New Castle County, there is a comprehensive statute. In addition, It seems to me inappropriate for judges to pass on a policy question that is currently pending before the [*33] Courts. An additional factor flowing from the existence of current litigation is the active representation of the Sussex County Recorder of Deeds by an attorney who is advocating a particular position. If that case is compromised, in all likelihood, a future policy will be the negotiated result. For all of these reasons, I recommended that the statewide Judicial Conference take no action in relation to public access to the records in the custody of the elected county row officers.

Turning to judicial records, I think it should first be noted that the situation which gave rise to the publicity, an apparent inconsistency within the Superior Court, has been alleviated. The Superior Court has granted broader access than has heretofore been the custom and broader access than is the custom now in the other courts. Moreover, since the publicity concerning the Superior Court arose from newspaper initiation, the Superior Court adopted a policy which was broader than necessary to meet the immediate problem.

But, as a practical matter, it will be very difficult for the Superior Court to retreat from a policy which it adopted less than two months ago. Moreover, insofar as the reported policy [*34] of the Superior Court in Sussex County is concerned, it is my view that that negative policy of denial of access was a mistaken one. In New Castle County, for example, I know the Recorder of Deeds voluntarily opened his records to the newspaper when the newspaper was doing the articles on bail bondsmen. In short, it appears to me that the press may have had a legitimate complaint in regard to the policy in Sussex County. I think it is appropriate for the Judicial Conference to recognize that concern and act affirmatively in regard to it.

I am not ignoring the comments of the judges who feared press access as well as access by the general public. But I think those comments have to be considered in light of the custom in litigation cases in the Court of Chancery and in the Superior Court for New Castle and Kent Counties which has permitted press access to judicial records for many years. Certainly the trend of the times is not toward less press access. Rather, it seems more likely that, as courts of special jurisdiction become

more normally established on a statewide basis, they will begin to feel the press pressures to a greater degree. That is one of the consequences of breaking down [*35] localized courts in control of a single judge or two judges.

Moreover, in my judgment, the representatives of the press are in a special class. They belong to a profession which has a special public responsibility and they are subject to some professional pressures. They constitute a link between the public official and the public. Thus, there is a policy reason for giving the press greater access to judicial records than the general public.

I have also considered the concern of the various judges and indeed the concern of some of the existing policies already operating in the state that certain records should not be released to the public. It seems to me that the clearest line of demarcation is public disclosure for litigation records commonly filed in the Court Clerks' offices. This would exclude presentence reports and most medical reports. As a Superior Court Judge, if I filed a medical report, it was sealed. Except for access in Sussex County, the press has had access to depositions as part of the file for several years. The burden is now on the litigant to ask for a deposition to be sealed. It seems to me that the designation of litigation records commonly filed in Court Clerks' [*36] offices would be a meaningful one.

It is not enough to state why the press is a special category. The question is whether there is any good reason not to permit the general public routinely to examine litigation files as the Superior Court has done.

In my judgment, there are several reasons why the general public should not be given the same access as the press. First, mere curiosity has never been recognized in the law as a basis for access to judicial records. Second, there is a mounting problem of control of court records. The records are more voluminous and there are more requests, including group requests, to see such records. Some Clerks' offices are run by one or two persons on a daily basis and the control problem is even more severe. Third, as has been indicated, certain courts have existing written policies in various forms which have been developed over a period of time by thoughtful people and should not be lightly ignored. Fourth, the views of the judges whom we contacted unanimously opposes such general access. Fifth, where permission to examine judicial records has been required, such permission has

been freely granted to the public at large and the power to control [*37] as been exercised generally as a reasonable regulation to assure the safety of the records and the orderly and efficient operation of the Clerks' office. Sixth, members of the general public already have a legal right to access to court records when they have a legitimate interest therein.

It is therefore my recommendation that the State Judicial Conference act affirmatively in support of a broad press access to court litigation cases. In order to avoid a confrontation with the policy of the Superior Court, it is my recommendation that the Conference take no action in regard to access by the general public as distinct from the press. Access by the general public has not been a problem and each court has special problems of control of its records which might be aggravated by a general policy of access. Is not unreasonable to ask a member of the general public to seek court permission before examining court records. Depending on what record was sought to be examined, the Court might want to make further inquiry into the matter. Of course, court permission should be granted freely. But I do not feel that those courts which require court permission for examination by the general public [*38] should be coerced in changing their policy to be consistent with the new policy of the Superior Court. Similarly, I do not believe the Superior Court should now be coerced in retreating from its policy which has been so publicly announced.

I attach a proposed resolution which I will submit to the Judicial Conference as part of my report.

Very sincerely yours,

William T. Quillen

**PROPOSED RESOLUTION OF THE STATE
JUDICIAL CONFERENCE ON PRESS ACCESS TO
COURT LITIGATION RECORDS**

WHEREAS there has been public comment about access to court litigation records; and

WHEREAS the press in our free society has a special role and obligation to inform and educate the public in all matters of public interest; and

WHEREAS the Courts of Delaware recognize the independent obligation and public function of the press;

and

WHEREAS the press should have the widest possible professional discretion in the exercise of its public responsibility;

NOW, THEREFORE, the following policy is hereby adopted by the Courts of Delaware:

"Court litigation records, commonly filed in various court clerks' offices, except as otherwise provided by law and except fiduciary records of a nonadversary character, and subject [*39] to each Court's inherent power to seal any record for cause shown, may be routinely inspected during business hours by press and media representatives in the offices where such records are filed. Such inspections are subject to reasonable regulation to assure the safety of the records and the orderly and efficient operation of the office and the Court."

In adopting this policy, the State Judicial Conference notes that it does not imply that all court records available to the press are appropriate for public publication. Rather, the State Judicial Conference by the above policy relies on the independent, professional discretion of the press in determining appropriate matters for publication.

APPENDIX B

**COURT OF CHANCERY OF THE STATE OF
DELAWARE**

WILLIAM T. QUILLEN

CHANCELLOR

COURT HOUSE

WILMINGTON DELAWARE

April 11, 1974

The Honorable Daniel L. Herrmann

Chief Justice of the State of Delaware

Supreme Court Chambers, Public Building

Wilmington, Delaware 19801

Re: Freedom of Information Act, Your Memo Dated
April 5, 1974

Dear Chief Justice Herrmann:

The problem area in Chancery is basically fiduciary matters.

I am not reluctant to suggest what the policy [*40] should be in regard to fiduciary matters such as guardianships for aged persons, the mentally infirm, the physically incapacitated, trustees for the mentally ill, guardianships for children, corporate receiverships, and trusts both testamentary and those coming within Chancery jurisdiction for some other reason.

There is simply no reason why the public should have access to the private financial affairs of a person and a family because an individual becomes incapacitated by age, disability or illness. There is no reason why the personal affairs of beneficiaries of testamentary trusts should be open to the public simply because Chancery has certain supervisory jurisdiction over trustees. The same is true of corporate receiverships which involve private investments of numerous individuals for many reasons, some of which they may not want disclosed. I think the issue is very fundamental in regard to fiduciary matters and that is the right to privacy.

I do note that, under the proposed law, the courts retain the right to seal records by specific court order. But reliance on that provision of the statute may be open to different interpretations, and I think there should be a specific [*41] statutory exception for all fiduciary matters within the Court of Chancery. Needless to add, I feel very strongly about this and I would, if it is consistent with the overall position of the judiciary, urge the Governor to veto this bill unless the exception I suggest is specifically added.

Very sincerely yours,

William T. Quillen

APPENDIX C

IN THE COURT OF CHANCERY OF THE STATE
OF DELAWARE

Inspection

of

Court Records

TO: REGISTERS IN CHANCERY

(1) Records of the Court of Chancery filed in the office of the Register are, for present purposes, of two kinds—litigation and miscellaneous.

(2) "Litigation" records are those which pertain to or are filed in any civil action or in a cause or suit litigated between adversaries. "Miscellaneous" records are those filed pertaining to non-adversarial matters, such as accountings, proceedings involving fiduciaries, and the like.

(3) Litigation records are public records and may be routinely inspected during business hours by any of the following:

(a) Members of the Delaware Bar

(b) Press and media representatives known as such to personnel in the office of the Register

(c) Representatives of Federal and State agencies [*42] presenting appropriate identification

(d) Parties to the litigation to which the records relate

(e) Other persons with the permission of a Judge of the Court.

(4) Miscellaneous records may be routinely inspected during business hours by any of the following:

(a) Members of the Delaware Bar

(b) Parties to the proceeding to which the records relate

(c) Other persons with the permission of a Judge of the Court.

(5) A charge shall not be made by the Register for inspection of any record unless specifically authorized or required by Court Rule or policy. If the Register is of the view that a charge should be made in a specific case, then the matter is to be discussed by him with a Judge of the Court.

(6) A Judge from time to time orders sealed a part or all of a litigation or miscellaneous record. When this has been done it is imperative that a record ordered sealed be plainly marked and labeled as such, and that it does not get into the hands of persons not authorized to have or to examine it.

(7) Nothing contained herein is intended to in any way change or modify the announced policy of the Court concerning inspection of a complaint prior to service [*43] and inspection of documents listing persons entitled to receive money on deposit. Attached hereto are statements of those policies.

(8) If the Register has doubt about the application of this policy to a given request or if any person is prejudiced by it, he is directed to discuss the matter with a Judge of the Court, who will take such action as is appropriate.

William Duffy

Chancellor

February 6, 1970

Matter of Astor
13 Misc. 3d 1203A
(N.Y. Sup. Ct. 2006)



[*1] In the Matter of the Application of Phillip Marshall for the appointment of a Guardian for the Person and Property of Brooke Astor An Alleged Incapacitated Person.**

500095/2006

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

13 Misc. 3d 1203A; 824 N.Y.S.2d 755; 2006 N.Y. Misc. LEXIS 2325; 2006 NY Slip Op 51677U

August 29, 2006, Decided

NOTICE: [**1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Matter of Astor, 13 Misc. 3d 862, 2006 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct., Sept. 18, 2006)*

HEADNOTES

[*755] [***1203A] Records--Sealing of Records--Mental Health Records. (Sup Ct, NY County, Aug. 29, 2006, Stackhouse, J.)

JUDGES: JOHN E.H. STACKHOUSE, J.S.C.

OPINION BY: John E.H. Stackhouse

OPINION

John E. H. Stackhouse, J.

In this *Article 81* proceeding pertaining to Brooke Astor, the 104-year old New York philanthropist and socialite who has been at the center of New York society for decades, the court is called upon to determine whether an interim order sealing the court file should be vacated at the request of several news organizations and over the

opposition of every party to this proceeding. The question of whether a trial judge has exercised his discretion properly in sealing records under *Mental Hygiene Law § 81.14(b)* arises infrequently, but requires a careful balancing of the public's *First Amendment* rights against the privacy rights of the alleged incapacitated person (AIP). After a full and fair opportunity to all concerned to address the issue, the court vacates the interim sealing order, except for confidential personal information concerning the AIP as outlined herein.

[2] BACKGROUND**

On July 20, 2006, Philip Marshall filed, by order to show cause, a petition seeking to remove his father (and Mrs. Astor's son), Anthony Marshall, as primary care giver of Mrs. Astor, and to void the power of attorney over her finances and health care proxy he obtained in 2004. Petitioner seeks to name a long-time friend of Mrs. Astor, Annette de la Renta, as guardian of her person, and JP Morgan Chase Bank, as guardian of her property. The petition contains serious and disturbing allegations of a pattern of neglect and mistreatment of Mrs. Astor over the last several years. The petition alleges that Anthony Marshall has not provided for his elderly mother and, instead, has allowed her to live in less than adequate living conditions and has cut back on necessary medication and doctor's visits, while enriching himself with income from her estate.

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The petition was supported, in part, by the AIP's confidential medical records. Concerned that the privacy rights of Mrs. Astor may be violated before the parties had been served with process, hired counsel and given an opportunity to address the issue, the order to show cause directs that "access to [the file] be [**3] limited to counsel for the parties to the proceeding and the court evaluator." Despite this order, the *Daily News* appears to have obtained a copy of the unsigned order to show cause that was filed with the County Clerk's office,¹ and the allegations [***2] in the petition were extensively reported in the local, national and even international press. This court then issued a second, "interim" order on July 25, 2006, directing the County Clerk to seal the file. This interim order was always intended to be temporary, and in place only until all interested persons had been given a full and fair opportunity to address the issue.

1 Whenever a special proceeding is commenced by order to show cause, one copy of the proposed order to show cause, petition and supporting papers is required to be filed with the County Clerk in order to purchase an index number, while the original papers are presented to the Ex Parte Office for judicial assignment and processing.

The publishers of three daily newspapers ([**4] *New York Post*, *Daily News* and *The New York Times*), along with the Associated Press (the News Organizations), move for leave to intervene in this *Article 81* proceeding, pursuant to *CPLR 1012*, and to the July 25th Interim Order temporarily sealing the file in this proceeding. The News Organizations argue that court files are presumptively open in New York State and that embarrassment of the parties alone is not a sufficient justification to seal court records. They contend that the public has a bona fide interest in this proceeding because Mrs. Astor is a well-known and respected public figure and that it is the extensive attention that she has received for the past several decades as a leader of New York society that makes her allegedly distressed living conditions today that much more of a public interest, as a most extreme example of potential elder neglect and mistreatment that is possible among all members of society.

In opposition to this motion, petitioner Philip Marshall has filed a cross motion seeking an order permanently sealing the court file and excluding the public from all court hearings in this proceeding.

Petitioner and the court evaluator, [**5] Samuel Liebowitz, who supports the cross motion, argue that good cause exists to seal the record and close the courtroom for two reasons. First, they contend that because guardianship proceedings necessarily involve the most personal and sensitive issue about an AIP's well-being, excluding the public is necessary to protect the privacy and dignity of the AIP. Second, they argue that keeping the media out of this proceeding is necessary to preserve the free and unfettered flow of accurate information to the court about the AIP from potential witnesses.

Mr. and Mrs. Anthony Marshall oppose unsealing the file, and support the cross motion to permanently seal the file and close all court hearings. Susan Robbins, court-appointed counsel to Mrs. Astor, requests that any and all documents and testimony concerning medical, nursing and healthcare issues be sealed and that the courtroom be closed during any testimony concerning the same to protect Mrs. Astor's privacy regarding such matters. Annette de la Renta, the temporary guardian of the person of the AIP, supports sealing the file and closing the courtroom. She avers that Mrs. Astor would be dismayed by the recent media coverage of these [**6] proceedings and that Mrs. Astor always kept her personal finances private. JP Morgan Chase Bank, who has been appointed the temporary guardian of the property of the AIP, takes no position on this application.

DISCUSSION

The News Organizations request leave to intervene in this proceeding "as of right" pursuant to *CPLR 1012*. While there is no doubt that the public and the press have the right to be heard before the court rules on questions of closure or sealing of records (*Matter of Herald Co. v Weisenberg*, 59 N.Y.2d 378, 383, 452 N.E.2d 1190, 465 N.Y.S.2d 862 [1983]; *Matter of Gannett Co. v De Pasquale*, 43 N.Y.2d 370, 381, 372 N.E.2d 544, 401 N.Y.S.2d 756 [1977], *aff'd* 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 [1979]), in this court's view, intervention is not the proper mechanism whereby such opportunity is given. *Accord Visentin v Superintendent of the Haldane Cent. [***3] School Dist.*, 4 Misc. 3d 918(A), 798 N.Y.S.2d 349, 782 N.Y.S.2d 517 (*Sup Ct. Putnam County* 2004); *Coopersmith v Gold*, 156 Misc. 2d 594, 600, 594 N.Y.S.2d 521 [*Sup Ct. Rockland County* 1992].² Intervention as of right pursuant to *CPLR 1012* is not appropriate since the News Organizations will

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[**7] not be bound by any judgment in this action. Similarly, permissive intervention pursuant to CPLR 1013 is not warranted since the News Organizations do not have "a real and substantial interest in the outcome of the proceeding" (*Osman v Sternberg*, 168 A.D.2d 490, 562 N.Y.S.2d 731 [2d Dept 1980]), and merely seek access to the files and to cover any hearings in the matter. Thus, the proper procedural mechanism is to acknowledge, as the court has done, their standing to seek vacatur of the temporary sealing order. See *Matter of Crain Communications, Inc. v Hughes*, 74 N.Y.2d 626, 628, 539 N.E.2d 1099, 541 N.Y.S.2d 971 (1989); *Coopersmith, supra*.

2 Although the denial of a motion to intervene in a civil proceeding was reversed by the First Department in *Danco Laboratories v Chemical Works* (256 A.D.2d 62, 681 N.Y.S.2d 751 [1st Dept 1998]), the motion was granted only to the extent of remanding the matter to the trial court to determine whether "good cause" existed to seal the court file.

[**8] The *First Amendment*, as applied to the states by the *Fourteenth Amendment*, grants to the public and the press a qualified right of access to civil court proceedings. *Danco Labs v Chemical Works of Gedeon Richter*, 274 A.D.2d 1, 6-7, 711 N.Y.S.2d 419 (1st Dept 2000); *Matter of Ruben R.*, 219 A.D.2d 117, 121-23, 641 N.Y.S.2d 621 (1st Dept), lv denied 88 N.Y.2d 806, 670 N.E.2d 227, 646 N.Y.S.2d 986 (1996). "While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. Thus, in some civil cases the public interest in access, and the salutary effect of publicity may be as strong as, or stronger than, in most criminal cases." *Gannet Co. v De Pasquale*, 443 U.S. 368, 386-87, 99 S. Ct. 2898, 61 L. Ed. 2d 608 n 15 (1979) (citations omitted).

"The statutory and common law of this State have long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly." *Matter of Conservatorship of Brownstone*, 191 A.D.2d 167, 168, 594 N.Y.S.2d 31 (1st Dept 1993); see also *Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V.*, 28 A.D.3d 322, 324, 814 N.Y.S.2d 110 (1st Dept 2006). [**9] "Confidentiality is clearly the exception, not the rule" *In re Will of Hofmann*, 284 A.D.2d 92, 93-94,

727 N.Y.S.2d 84 (1st Dept 2001). The strong presumption in favor of openness places the burden on the party seeking to seal records and close hearings to show that the public's right of access is outweighed by competing interests. *Danco Labs v Chemical Works of Gedeon Richter*, 274 A.D.2d at 8; *Coopersmith v Gold*, 156 Misc. 2d at 606.

Section 81.14(b) of the Mental Hygiene Law provides that a court may only seal a court file in an *Article 81* proceeding upon a "written finding of good cause, which shall specify the grounds thereof." Likewise, *section 81.14(c)* provides that "the court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown." ³ The *Mental Hygiene Law* provides further, that "in determining whether good cause has been shown, the court shall consider the interest of the public, the [***4] orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated." *MHL § 81.14(b)* [**10] and (c).

3 *Judiciary Law § 4* provides that "the sittings of every court within this state shall be public, and every citizen may freely attend the same," except for certain enumerated criminal and civil matters wherein the trial court has discretion to exclude persons not directly interested.

There is no appellate authority interpreting *MHL § 81.14*. Petitioner argues that the most analogous statute is that which governs child protective proceedings under *Article 10 of the Family Court Act*, namely *Family Court Act § 1043*, and sections 205.4 and 205.5 of the Uniform Rules for the Family Courts. However, these statutes utilize different language and different procedures. The factors that a judge must consider in order to exclude the press from a child protective hearing include whether one of the parties objects and the need to protect from harm the children who are the subject of the proceeding. 22 *NYCRR 205.5(b)(3)* [**11]. According to the Law Review Commission Comments to *MHL § 81.14*, the standards for closing a guardianship hearing or sealing the records is the same as that in *section 216.1* of the New York Code of Rules and Regulations, 22 *NYCRR 216.1*, pertaining to court records in general. Thus, while guardianship files are routinely sealed at the parties' request, the Legislature chose not to create a presumption that guardianship matters are protected from public

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scrutiny.

The first factor to be considered is the interest of the public in this proceeding. There is an important societal interest in conducting this proceeding in an open forum. *Anonymous v Anonymous*, 263 A.D.2d 341, 345, 705 N.Y.S.2d 339 (1st Dept 2000). "Open hearings are more conducive to the ascertainment of truth. The presence of the public historically has been thought to enhance the integrity and quality of what takes place." *Anonymous*, supra, quoting *Richmond Newspapers v Virginia*, 448 U.S. 555, 578, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). Open trials promote confidence in the judicial system by avoiding the suspicions which always attend [**12] secrecy. *United States v Consolidated Laundries Corp.*, 266 F.2d 941, 942 (2d Cir 1959); *Matter of Ruben R.*, 219 A.D.2d at 122. Judges "should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which public duty is performed." *Cowley v Pulsifer*, 137 Mass 392, 394 (1884). The public needs to know that all who seek the court's protection will be treated evenhandedly, that justice is dispensed in the same manner to the rich as to the poor. Indeed, there may be no stronger *First Amendment* interest in freedom of the press than that of an open court system, for the press and public to see that persons are treated properly and fairly by the courts. As Abraham Lincoln once counseled:

"There is danger in abridging the liberties of the people. Nothing but the sternest necessity can ever justify it." You must go to "the very extreme of toleration rather than do anything to jeopardize in any degree the common rights of our citizens."

Goodwin, *Team of Rivals*, at 523 (2005).

There is no dispute that Brooke Russell Astor is a well-known [**13] public figure who has captivated the public's imagination for five decades. She is a figure of international interest and renown. Mrs. Astor has described herself as a "public monument," and has been described by others as the "grand dame of American philanthropy" and "the patron saint of New York society." Mrs. Astor is the widow of Vincent Astor, heir to the fortune of John Jacob Astor, a fur trader and financier, who at the time of his death in 1848 was the richest man in America. Mrs. Astor inherited over \$ 120

million dollars upon her husband's death in 1959, and she then spent the next four decades giving over \$ 200 million to deserving charitable organizations in New [***5] York City through the Vincent Astor Foundation. Mrs. Astor gave money only to New York-based charities, having reportedly stated that the money was made in New York City, so it must be spent here. For her decades of public service, she has been honored by everyone from the Boy Scouts to President Bill Clinton, who presented her with the Medal of Freedom in 1998.

Mrs. Astor has actively sought the public's attention. She has published two volumes of memoirs, "Patchwork Child" and "Footprints," in addition [**14] to works of fiction and poetry. In her memoirs, Mrs. Astor details her early life growing up, her three marriages and her charitable work with the Vincent Astor Foundation. Of particular note to the court, is the fact that Mrs. Astor has been very open and forthcoming about her first marriage to John Dryden Kuser, which was punctuated by her husband's alleged physical abuse, alcoholism and adultery.

Petitioner argues that although a public figure, Mrs. Astor retains a private life, particularly in her waning years, which a guardianship court should honor and respect. He further argues that the News Organizations are only seeking to gain access to what they hope will be personal details about the Astor/Marshall family that they can publish. He relies on (*Gannett Co., Inc. v De Pasquale*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756, supra), in which the New York Court of Appeals held in a highly-publicized murder case that where the public's interest "was chiefly one of active curiosity with respect to a notorious local happening," it was appropriate for the court to close a pretrial suppression hearing to the media because "widespread public awareness kindled by media saturation does not legitimize [**15] mere curiosity."

The News Organizations have shown a legitimate public concern, as opposed to mere curiosity, to counter-balance the interests of the parties in keeping this matter private. There is great public interest in this case because it focuses the spotlight on the problem of the neglect and mistreatment of the elderly in our society. The contrast between Mrs. Astor's extensive wealth and public importance and her living conditions at the time of the commencement of this proceeding show that elder abuse can be present in all socioeconomic communities in

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the United States. Moreover, it is a matter of increasingly public concern as the demographics promise a greater percentage of older Americans in the next thirty years. New York Congressman Peter King has stated: "This is one case I hope to use to focus attention on a national issue that we don't like to think about or talk about in polite conversation."

In addition, the proceeding may well involve allegations of undue influence or overreaching on the part of legal or other professionals acting in a fiduciary relationship to Mrs. Astor. *In re Will of Hofmann*, 284 A.D.2d at 94 (holding that judicial proceedings [**16] involving the propriety of acts of court-appointed fiduciaries and their attorneys are matters of legitimate public concern).

That the public, particularly the citizens of this city, have a keen interest in the welfare of this very public figure can be attested by the extensive media coverage the matter has engendered. This is not surprising since Mrs. Astor has spent her long life giving to the people of New York City. "The press, acting responsibly, and not the courts, must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable." *Gaeta v New York News, Inc.*, 62 N.Y.2d 340, 349, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984).

The second factor that must be considered is the orderly and sound administration of justice. The court's role in this proceeding is to act in the best interests of the AIP, and, thus has [***6] appointed a court evaluator pursuant to *MHL § 81.09*. "The court evaluator plays a critical role by gathering detailed information regarding the circumstances of the case to assist the court in reaching its decision. [**17] " Bailly, *Practice Commentaries*, McKinney's Cons. Laws of NY, Book 34A, *Mental Hygiene Law § 81.09* at 112; *see also Matter of Lichtenstein*, 171 Misc. 2d 29, 652 N.Y.S.2d 682 (1st Dept 1996) (recognizing the "crucial" role of a court evaluator, which is to act as an independent investigator and assist the court in independently assessing the totality of circumstances affecting the AIP). The court evaluator's duties consist of interviewing and consulting with the AIP, investigating the AIP's medical and psychological condition, financial situation, and personal and family history, and making a written report of his findings and recommendations to the court. *See*

MHL § 81.09(c). Not only is the court evaluator's role critical, it is unique to all other court proceedings, and the court must therefore evaluate how opening this matter to the press will affect his ability to gather information and report to the court about the AIP.

The court evaluator advises that opening the file is hindering his ability to perform his statutory duties. Mr. Liebowitz avers that people he has sought to interview have been reluctant to speak, [**18] because of the fear that their conversation would become public. He states that the concern expressed by these potential witnesses is either protecting the privacy of Mrs. Astor or protecting their own privacy and fear of being hounded and besieged by the media. It is of the utmost importance that the court evaluator be able to gather accurate information to aid the court in reaching a just and fair determination, and the media attention this matter has engendered cannot be allowed to hinder his work. Thus, the court finds that, at the very least, the court evaluator's reports must remain sealed. *See Matter of Eggleston*, 1 Misc. 3d 910(A), 781 N.Y.S.2d 623 (Sup Ct, Kings County 2004), (good cause to close the courtroom and seal the file in a guardianship proceeding found where AIPs and potential witnesses were afraid to speak to court evaluator for fear of retribution from the AIP's abusive son).

As to the third and fourth factors, the nature of the proceedings and the privacy rights of the AIP, both petitioner and the court evaluator argue that closure is warranted because guardianship proceedings center around a judicial examination of the most personal and intimate [**19] aspects of the lives of those who have been involuntarily subjected to those proceedings as a result of their helplessness and vulnerability. The News Organizations argue that embarrassment to the parties alone is not enough to close a guardianship proceeding.

Mrs. Astor has always been a very open and candid person, who invited the world into her living room, and is not new to publicity, even when it concerns abuse at the hands of family members. She clearly has nothing to hide in this proceeding. There is no evidence or even suggestion that the extensive media coverage of this dispute is causing Mrs. Astor any significant emotional or physical distress. The court has been informed that she is resting comfortably, and has not been disturbed by the media coverage of the dispute because she neither reads the papers, nor watches television. Thus, this matter must be distinguished from (*Matter of P.B. v C.C.*, 223 A.D.2d

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294, 647 N.Y.S.2d 732 [1st Dept 1996], *lv denied* 89 N.Y.2d 808, 678 N.E.2d 500, 655 N.Y.S.2d 887 [1997]), where a child custody proceeding was closed for the protection and preservation of the children's health and welfare. See also *Matter of Katherine B.*, 189 A.D.2d 443, 596 N.Y.S.2d 847 (2d Dept 1993) [**20] (child protective proceeding closed based on an affidavit from the 10-year old of victim of sexual abuse and her doctor attesting to the fact that opening the courtroom to the public and press would re-victimize the child and have a [***7] negative impact on her emotional well-being).

Even if Mrs. Astor were aware of the proceeding, the fact that she or other parties might experience dismay about being involved in this court proceeding and the attendant publicity, the potential embarrassment, stigma or humiliation suffered by the parties is not sufficient to justify sealing the file. *Liapakis v Sullivan*, 290 A.D.2d 393, 393, 736 N.Y.S.2d 675 (1st Dept 2002); *Will of Benkert*, 288 A.D.2d 147, 734 N.Y.S.2d 427 (1st Dept 2001); *In re Will of Hofmann*, 284 A.D.2d at 94.

However, the court is mindful that the issues in this proceeding will necessarily involve the AIP's medical and psychological condition, her physicians' assessment of her condition, her interaction with her closest relatives, friends and advisors, as well as her finances.

The AIP's medical and psychological records are clearly confidential (CPLR 4504(a), 4507), and should remain [**21] so. Accord *Matter of Robin Garson*, Index No. 400941/01 (Sup Ct, NY County May 7, 2003); *Matter of Doe*, 181 Misc. 2d 787, 794, 696 N.Y.S.2d 384 (Sup Ct, Nassau County 1999) (guardianship file sealed to protect disclosure of confidential medical and treatment of alcohol and substance abuse information). AIPs are almost always unwilling and involuntary participants in a court proceeding which centers upon their welfare. Mrs. Astor cannot be compared to other voluntary civil litigants, for example, plaintiffs in personal injury cases who place their medical condition in issue in the case and must, therefore, waive all evidentiary privileges that attach to medical and mental health records. As Gov. Mario Cuomo noted in 1984, in approving legislation strengthening the confidentiality of psychiatric information, "at the very heart of the client-professional relationship in mental health care is its confidentiality." Mem. of Governor Cuomo, 1984 McKinney's Session Laws of NY, at 3654.

Information about the AIP's personal finances,

however, does not have the same privacy protections. While trade secrets are routinely afforded confidential treatment, in (*Norkin v Hoey*, 181 A.D.2d 248, 586 N.Y.S.2d 926 [**22] [1st Dept 1992]), the First Department ruled that bank customers have no privacy or proprietary interest in records kept by banks in which they do business. Petitioner relies on (*Dawson v White & Case*, 184 A.D.2d 246, 584 N.Y.S.2d 814 [1st Dept 1992]), however in that case, the defendant law firm moved to seal an accounting that had been performed to value a partner's interest in the firm, and which revealed financial information about other partners of the firm and, more importantly, its clients. Accordingly, the court does not find any of the information concerning the AIP's finances that is likely to be revealed at the trial of this action must be protected by a sealing order. This does not mean that identifying information such as account numbers need be disclosed, and such information should always be redacted to protect the AIP from mischief such as identity theft.

One final point. The News Organizations argue that the interim sealing order should be vacated, because the media has already disclosed the allegations in the petition, (*People v Harris*, 57 N.Y.2d 335, 442 N.E.2d 1205, 456 N.Y.S.2d 694 [1982], *cert denied* 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 [1983]), upon which they rely, is readily [**23] distinguishable. In that case, the trial court refused the defense's request to close a pre-trial suppression hearing in the well-publicized murder trial of Jean Harris, finding that the statements which were the subject matter of the hearing had been known to the public for months and that defense counsel himself had been listed as the source of some of the commentary on the case, and thus it had not been shown that closure of the suppression hearing was necessary to ensure a fair trial. 57 N.Y.2d at 346. Here, in contrast, the petitioner intended for the court file to be sealed from the outset, and the parties cannot be precluded from seeking to seal the file and close the [***8] courtroom pursuant to MHL § 81.14 solely because the press got hold of a copy of the unsigned order to show cause and supporting papers shortly after the commencement of the case. Nor do the allegations in the petition sum up the entirety of this dispute, and the precise details of what may have occurred in the last several years of Mrs. Astor's life have yet to be explored.

CONCLUSION AND ORDER

13 Misc. 3d 1203A; 824 N.Y.S.2d 755, *755;
2006 N.Y. Misc. LEXIS 2325, **23; 2006 NY Slip Op 51677U, ***8

Thus, after balancing the rights of the public against [**24] the privacy interests of Mrs. Astor and the need for the court evaluator to function effectively, the court finds that the parties have demonstrated good cause to seal portions of the court's file in this matter. The file shall be sealed only with respect to medical, mental health and nursing records pertaining to the AIP, and all of the court examiner's reports. In addition, all documents containing the AIP's social security number, bank and brokerage account numbers, and other similar personal identifying financial information shall be redacted before submission to the court. An in-camera review will be held at the request of any party, including the News Organizations, to appeal any item filed under seal or redacted by the parties. Finally, any court hearings whereby testimony concerning any documents filed under seal is to be presented shall be closed to the public and the press.

It is argued that partial sealing and partial closure of the hearings may prove unworkable and impracticable, because confidential and sensitive information is likely to be interspersed throughout the entire record. However, the First Department has cautioned both in *Danco Labs Ltd.*, 274 A.D.2d at 8-9, [**25] and (*Anonymous v Anonymous*, 263 A.D.2d 341, 344, 705 N.Y.S.2d 339 [1st Dept 2000]), that less restrictive alternatives to full closure should be employed whenever possible.

It should be noted that *MHL § 81.14* specifically provides that documents obtained through disclosure and not filed with the County Clerk remain subject to protective orders under the CPLR, and are not the subject of the present application. In addition, motions that are sub judice before the court will not be filed with the County Clerk until the court has ruled on the matter.

Accordingly, it is hereby

ORDERED that the motion to vacate the July 25th

Interim Order is granted in part, and denied in part; and it is further

ORDERED that the cross motion is denied in part, and granted in part; and it is further

ORDERED that all medical, mental health and nursing records pertaining to the AIP, and all of the court examiner's reports, shall be filed under seal, with access only to the parties, their counsel and the court evaluator; and it is further

ORDERED that all documents containing the AIP's social security number, bank and brokerage account numbers, and other similar personal [**26] identifying financial information, shall be redacted before submission to the court; and it is further

ORDERED that any party filing papers containing information subject to this sealing order shall prepare an additional set of the papers with the information subject to this sealing order removed (including all documents previously filed, such as the petition), and that both sets of papers shall be delivered to the courtroom at 80 Centre Street, Rm. 308; and it is further

ORDERED that any testimony concerning any documents filed under seal shall be closed to the public; and it is further

ORDERED that this order stayed is stayed until August 31, 2006 at 5:00 p.m. to allow any party or the News Organizations the opportunity to seek any appropriate relief in the [***9] Appellate Division.

Dated: August 29, 2006

ENTER:

JOHN E.H. STACKHOUSE, J.S.C.

In re Estate of Carpenter
127 Ohio Misc. 2d 22
(Ohio P. Ct. 2004)



In re ESTATE OF CARPENTER.* In re Guardianship of Carpenter. In re Trust of Carpenter. In re Estate of Thomas. In re Guardianship of Thomas. In re Trust of Thomas.

* Reporter's Note: No appeal has been taken from the judgment of the court.

Nos. 1999991701, 2003004681, 2003004991, 2001001928, 200300494 and 2003004680.

STATE OF OHIO, PROBATE COURT, HAMILTON COUNTY

127 Ohio Misc. 2d 22; 2004 Ohio 830; 804 N.E.2d 1059; 2004 Ohio Misc. LEXIS 103

February 10, 2004, Decided

PRIOR HISTORY: *Carpenter v. City of Cincinnati, 2003 U.S. Dist. LEXIS 7105 (S.D. Ohio, Apr. 17, 2003)*

DISPOSITION: Motions to seal granted in part.

COUNSEL: Terrie Sherman, for the estates.

David Montgomery, for the guardianship and wrongful death trusts.

Alphonse A. Gerhardstein, Scott T. Greenwood, and Kenneth L. Lawson, for the plaintiffs in the civil rights actions.

Donald Hardin, for the individual defendants in the civil rights actions.

Julie Bissinger, for the city of Cincinnati.

Colleen Laux, guardian ad litem for the minors.

JUDGES: JAMES CISSELL, Judge.

OPINION BY: JAMES CISSELL

OPINION

[*24] [***1061] JAMES CISSELL, Judge.

[**P1] In May 2003, 16 civil rights lawsuits pending in the United States District Court for the Southern District of Ohio involving 22 plaintiffs, 44 individual defendants, and the city of Cincinnati were settled by establishing a qualified settlement fund¹ of \$4.5 million through the United States District Court for the Southern District of Ohio. See "Order Establishing Qualified Settlement Fund, Appointing Fund Administrator, and Conditionally Dismissing Claims with Prejudice," attached as Exhibit A to the Amicus Brief of Civil Rights Attorneys in support of the motions to seal the records filed in both the Thomas and Carpenter estates. The 468B process allows multiple defendants to pay to multiple plaintiffs on multiple claims by making a single payment through an administrator. The defendants are not involved in the division or distribution of the funds among the plaintiffs. That is left to the administrator of the 468B federal fund and the various plaintiffs. Although the overall settlement was published, the federal court sealed whatever agreements were ultimately concluded by the various plaintiffs and the 468B administrator.

¹ Section 1.468B-1(c), Title 26, C.F.R. sets forth the requirements for establishing a qualified settlement fund. This section will be referred to as "468B."

127 Ohio Misc. 2d 22, *24; 2004 Ohio 830, **P1;
804 N.E.2d 1059, ***1061; 2004 Ohio Misc. LEXIS 103

[**P2] Two of the cases involved in the settlement fund are before this court because Ohio law mandates that this court approve settlements of wrongful death cases and division of settlement funds among next of kin. *R.C. 2125.03(A)(1)*. Further, as part of the settlement, distributions were to be made to two minor children of deceased parents. Consequently, guardianships and wrongful death trusts were established for these children, pursuant to *R.C. 2125.03(A)(2)*.

[**P3] The first case involves the estate of Michael Demon Carpenter, whose family alleged that his death on March 19, 1999, was the result of excessive use of force by members of the Cincinnati Police Department as they attempted to arrest him. The second case involves Timothy Thomas, who was fatally shot by a [*25] Cincinnati police officer on April 7, 2001, after a foot chase in the Over the Rhine section of Cincinnati. Both of these deaths were highly publicized and led to civil rights claims in the federal court and were two of the cases involved in the qualified settlement fund.

[**P4] The administrator of the estate of Michael Carpenter and the administrator of the estate of Timothy Thomas, together with the guardians and the trustees appointed in the estates and wrongful death trusts of the decedents' minor children, Tyeisha Carpenter, the minor child of Michael Carpenter and Tywon Thomas, the minor child of Timothy Thomas, moved to seal all records in the respective estates, guardianships, and trusteeships. Their [***1062] various motions to seal were supported by Alfonso A. Gerhardstein, Scott T. Greenwood, and Kenneth L. Lawson, the trial attorneys for the plaintiffs in the civil rights cases in the United States District Court; by Donald Hardin, defense attorney for individual defendants in those actions; by Julie Bissinger, attorney for the city of Cincinnati; and by Colleen B. Laux, guardian ad litem of the minor Tyeisha M. Carpenter and the minor Tywon Thomas.

[**P5] All the motions request that every record in each of the estates, guardianships, and trusts be sealed for the reason that the federal district court sealed the division of the qualified settlement fund. The motions argue further that disclosure in this court of the respective settlement amounts from the qualified settlement fund would violate the district court's order.² These figures appear in the applications to approve the settlement and distribution of the wrongful death proceeds in both estates. In effect, the applicants are asserting that this is

derivative information from the sealed agreements and, as such, must be sealed in this court, also. In addition, the motions argue that any division of these funds to adult next-of-kin from the two wrongful death claims is potentially embarrassing and harmful to them. Finally, the fiduciaries argue on behalf of the minors that revealing the amounts being distributed to the minor's trusts and subsequent spending of funds from those trusts will be harmful to the children.

2 The district court did not issue a separate order sealing the division of the settlement fund. Rather, the district court order that established the fund states that the district court would oversee compliance with the terms of settlement fund. See "Order Establishing Qualified Settlement Fund, Appointing Fund Administrator, and Conditionally Dismissing Claims with Prejudice," at 11, attached as Exhibit A to the Amicus Brief of Civil Rights Attorneys in support of the motions to seal the records filed in both the Thomas and Carpenter estates. The terms of the settlement fund provide that "those agreements between the plaintiffs and the fund administrator are confidential between those parties." See "Collaborative Agreement Global Damage Claims Settlement," at 3, paragraph 9, attached as Exhibit B to the Amicus Brief of Civil Rights Attorneys in support of Motion to Seal Records filed in both the Thomas and Carpenter estates. Thus, the applicants are asserting that because the district court ordered compliance with the terms of the settlement, and because the terms of the settlement provide that the division of the funds is confidential, to reveal the division would be to violate the district court order.

[**P6] [*26] The Cincinnati Enquirer published a story on September 27, 2003, in which it listed settlement amounts presumably agreed to between the qualified settlement fund administrator and the fiduciaries of the estates of Michael Carpenter and Timothy Thomas. The article included a proposed distribution of each estate's settlement as these proposals appeared on the applications to approve the settlement and distribution of wrongful death proceeds that were filed in these two estates. The court assumes that settlement figures published in each case were the amounts that were agreed upon by the qualified settlement fund administrator and the fiduciaries of the estates.³ However, the "agreed"

127 Ohio Misc. 2d 22, *26; 2004 Ohio 830, **P6;
804 N.E.2d 1059, ***1062; 2004 Ohio Misc. LEXIS 103

distribution amounts of these funds are merely proposals offered to this court for its review. This court can accept, reject, or deviate from these proposals and divide the funds in a different manner. *R.C. 2125.03(A)(1)*.

3 How the newspaper received this information has not been determined.

[**P7] Generally, court documents and proceedings are public records subject to disclosure under Ohio's Public Records Act. *R.C. 149.43 et seq.*; *State ex rel. Mothers Against Drunk Drivers v. Gosser* [***1063] (1985), 20 Ohio St. 3d 30, 20 OBR 279, 485 N.E.2d 706; *State ex rel. Cincinnati Enquirer v. Dinkelacker* (2001), 144 Ohio App.3d 725, 761 N.E.2d 656. The Public Records Act must be construed liberally in favor of broad access with doubt being resolved in favor of disclosure. *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 2002 Ohio 7117, 781 N.E.2d 180; *State ex rel. Cincinnati Enquirer v. Dinkelacker* (2001), 144 Ohio App.3d 725, 761 N.E.2d 656.

[**P8] Under federal common law and the *First Amendment to the United States Constitution*, trials and court records are presumptively open and available for public inspection. See, generally, *Richmond Newspapers v. Virginia* (1980), 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973; *Nixon v. Warner Communications* (1978), 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570; *Washington Post v. Robinson* (C.A.D.C. 1991), 290 U.S. App. D.C. 116, 935 F.2d 282; *Publisher Industries, Inc. v. Cohen* (C.A.3, 1984), 733 F.2d 1059; *State ex rel. Plain Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas* (2000), 90 Ohio St.3d 79, 2000 Ohio 35, 734 N.E.2d 1214. This legal maxim is subject to a *Fourteenth Amendment* limited right to a privacy balancing test, where the court must determine whether the right to access is outweighed by the individual's privacy interest. See *Nixon v. Admr. of Gen. Serv.* (1977), 433 U.S. 425, 97 S. Ct. 2777, 53 L.E.2d 867. Any sealing of records should be "narrowly tailored to serve the competing interests of protecting the individual's privacy without unduly burdening the public's right of access." *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. [*27] Network, Inc. v. Winkler*, 149 Ohio App.3d 350, 2002 Ohio 4803, 777 N.E.2d 320, opinion after remand, *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler*, 151 Ohio App.3d 10, 2002 Ohio 7334, 782 N.E.2d 1247 (an appeal to the Supreme Court of Ohio is pending in this case,

which is case No. 2003-0157). See, also, *Kallstrom v. Columbus* (C.A.6, 1998), 136 F.3d 1055, rehearing and suggestion for rehearing en banc denied (May 19, 1998). The "open courts" provisions of the *Ohio Constitution, Section 16, Article 1*, have been interpreted as being co-extensive with the right to open courts and court records pursuant to the *First Amendment to the United States Constitution*. *State ex rel. Beacon Journal Publishing v. Bond*, 98 Ohio St.3d 146, 2002 Ohio 7117, 781 N.E.2d 180; *Cleveland v. Trzebuckowski* (1999), 85 Ohio St. 3d 524, 1999 Ohio 285, 709 N.E.2d 1148; *In re T.R.* (1990), 52 Ohio St.3d 6, 556 N.E.2d 439.

[**P9] To seal a record, a court must find that the risk of harm to the individual's privacy rights outweighs the public's interest in maximum public access to court records, governmental accountability, public safety, and the use of the courts to resolve disputes and the effective use of the court's staff. See, e.g., *Kallstrom v. Columbus* (C.A.6, 1998), 136 F.3d 1055, rehearing and suggestion for rehearing en banc denied (May 19, 1998).

[**P10] Applying the principles to the facts in these two cases, the court hereby finds as follows:

1. Disclosure of the Gross Settlement Figures

[**P11] The court rejects the suggestion that the records of these proceedings must be sealed because the [***1064] United States District Court sealed the agreements between the plaintiffs and the 468B fund administrator. Those agreements have never been revealed to this court and as such this court is in no position to seal or unseal such agreements. Even acknowledging that the gross amounts in the settlement proposals may be derived from figures agreed to by various parties in the United States District Court, that does not change *this* court's duties under Ohio law. Disclosure of these matters is necessary to the ongoing business of this court, and specifically to the decisions that it must render in these two cases. One of the stated goals of the settlements reached in those civil right's cases was to foster an atmosphere of mutual respect and trust among community members, including the police. See "Order Establishing Qualified Settlement Fund, Appointing Fund Administrator, and Conditionally Dismissing Claims with Prejudice," at 7-8, attached as Exhibit A to the Amicus Brief of Civil Rights Attorneys in support of the motions to seal the records filed in both the Thomas and Carpenter estates. Disclosing the gross settlement figures in these two cases promotes the goals

of fostering mutual respect and trust among community members. Further, since the proposed settlement figures were already disclosed in the Cincinnati Enquirer prior to the hearing in [*28] this court, there remains nothing to protect in the way of privacy interests as it relates to these gross settlement figures.⁴

4 To the extent that the various attorneys and parties involved in these matters may have an obligation to secure any information that pertains to the individual settlement agreements, those obligations have been fulfilled by the parties' aggressive arguments in support of the motions to seal these records.

[**P12] Accordingly, the request to seal the filings in these cases through October 27, 2003, the date of the hearing in this court, is denied.

Future Filings

[**P13] The question of whether the court's future rulings in these cases, including the ultimate distribution of the funds and whether future reports of the guardians ad litem and future accounts and other records of the trustee's of the minors should be sealed, is more problematic. It requires further consideration of the balance between the public's right to access and the privacy rights of the minors involved.

[**P14] The public's right to access has been discussed above. The relevant analysis is the risk of harm to the individuals who would be affected by the disclosure. See *Kallstrom v. Columbus (C.A.6, 1998)*, 136 F.3d 1055, rehearing and suggestion for rehearing en banc denied (May 19, 1998).

[**P15] At the hearing, there was testimony that continuing newspaper attention causes one of the children to suffer flashbacks, potential safety problems, and the reliving of the death of the child's father. The grandmother of the other child testified that she had particular safety concerns for her grandchild because of his current living environment where there are constant drug sales, random acts of violence, gang graffiti, and reference in the neighborhood to the minor as the "million dollar baby." People wish to constantly touch her grandson. He has become a curiosity piece and may become a target for opportunists.

[**P16] Witness Greg Taliaferro, M.D., a specialist

in children with trauma history, testified that continued attention on these settlements creates unresolved issues for the children, re-traumatization with an increase in depression and anxiety, including the recurrence or re-emergence of nightmares, as well as increased behavioral problems. As a result, he testified in his expert opinion that there is a psychological risk in the children having significant changes in their financial status being made publicly available. He opined that the child could become a target of the community not just because the child is perceived as a person with money but [***1065] because of community response concerning whether or not the community thinks the compensation is fair. The doctor testified that open, unrestricted access to sensitive information would increase the probability [*29] of harm to the child. Further, unlike most trusteeships arising out of wrongful death cases, the fact that these matters have received extensive media attention, not only in the immediate community but throughout the country, suggests that as expenditures may occur from the trusts, there will be continued publicity that would tend to shine a spotlight on the children and, in turn, "could interfere" with the child's development and cause re-traumatization. Thus, the result of the attention to these cases, which is far beyond the attention in other cases involving wrongful death settlement, is that the child "would be traumatized and an exacerbation of behavioral problems as well as re-emergence of emotional distress." The knowledge of the specific application of these funds over the years would be more harmful than other similar cases due to the "public traumatic nature, the public reaction to it, the reaction of the peers following the death in the neighborhood and re-emergence of the trauma reaction."

[**P17] Based on the foregoing, the court finds that the public interest in these cases is satisfied by the knowledge of the overall settlement of the \$4.5 million involving the 22 plaintiffs and specifically by the knowledge of the gross amounts distributed in these two cases. Accordingly, the court finds that the privacy interests of the individuals receiving a division of the settlement figures outweighs the public interest in disclosure of the specific allocation of the funds. Such disclosure of the division of the settlement fund satisfies only a voyeuristic interest. The court finds that protecting the privacy interests of the children to develop as normally as possible under their tragic circumstances outweighs any public right to know this specific information.

127 Ohio Misc. 2d 22, *29; 2004 Ohio 830, **P17;
804 N.E.2d 1059, ***1065; 2004 Ohio Misc. LEXIS 103

[**P18] Therefore, the specific division of the settlement funds, the reports of the guardian ad litem and the continuing reports, filings, inventories, and accounts of the trusts of the minors should be and are hereby sealed. Separate entries consistent with this opinion have

been journalized in all related cases.

Motions to seal granted in part.

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR
DAVIDSON COUNTY, TENNESSEE

FILED

2012 JUN 19 PM 3:34

RICHARD R. ROOKER, CLERK

 D.C.

IN RE:)
)
CONSERVATORSHIP OF)
)
JOHN DRAPER WITHERSPOON,)
)
Respondent.)

NO. 12P-759

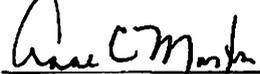
**RESPONDENT'S RESPONSE TO EMERGENCY MOTION OF
THE TENNESSEAN AND WSMV-TV CHANNEL FOUR**

Comes now the Respondent, John Draper Witherspoon, through counsel, and files this Response to the Emergency Motion of *The Tennessean* and WSMV-TV Channel Four ("Media") to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings Under Tenn. R. Sup. Ct. 30 ("Media's Motion"): As his response to the Media's Motion, the Respondent joins in the Response of the Petitioners, John Draper Witherspoon, Jr. and Reese Witherspoon.

DATED this the 19th day of June, 2012.

Respectfully submitted,

BONE McALLESTER NORTON, PLLC

BY: 

Anne C. Martin, #015536

Richard J. Nickels

Union Street, Suite 1600

Nashville, TN 37219

Phone: (615) 238-6300

Fax: (615) 238-6301

Attorneys for Respondent John Draper
Witherspoon

CERTIFICATE OF SERVICE

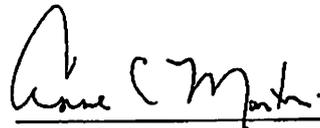
I hereby certify that on June 19, 2012, a true and correct copy of the foregoing was served upon the following via e-mail and U.S. Mail, postage pre-paid, to:

William T. Ramsey
Neal & Harwell, PLC
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219

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Nashville, TN 37219



Anne C. Martin

IN THE SEVENTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
(PROBATE DIVISION)

FILED

2012 JUN 20 PM 3:44

RICHARD H. ROOKER, CLERK

[Signature] D.C.

IN RE:)
)
CONSERVATORSHIP OF) No. 12P-759
JOHN DRAPER WITHERSPOON,)
)
Respondent.)

RESPONSE OF GUARDIAN AD LITEM TO EMERGENCY MOTION OF
THE TENNESSEAN AND WSMV-TV CHANNEL FOUR

The Tennessean and WSMV-TV Channel Four have filed an Emergency Motion to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings [“the Motion”].

For response to the Motion, the Guardian *Ad Litem*, Winston S. Evans, states as follows:

1. The Guardian *Ad Litem* concurs in the response of John Draper Witherspoon, Jr. and Reese Witherspoon to the Motion.
2. It is in the best interest of the Respondent that the Motion be denied.

Respectfully submitted,

Winston S. Evans
Winston S. Evans (#6281)
Evans, Jones & Reynolds, P.C. *by*
710 SunTrust Plaza *Phillip B Jones*
401 Commerce Street
Nashville, TN 37219-2405
(615) 259-4685
Guardian Ad Litem

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE OF GUARDIAN AD LITEM TO EMERGENCY MOTION OF THE TENNESSEAN AND WSMV-TV CHANNEL FOUR** has been served via **Hand-Delivery** upon:

Andra J. Hedrick
Gullett, Sanford, Robinson & Martin, PLLC
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Nashville, TN 37201

William T. Ramsey
Neal & Harwell, PLC
150 4th Ave. N., Suite 2000
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Bone McAllester Norton, PLLC
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Nashville, TN 37219

Rob Harvey
Waller Lansden Dortch & Davis, LLP
511 Union St., Suite 2700
Nashville, TN 37219

this 20th day of June, 2012.


Winston S. Evans

by


371800.003

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE, TENNESSEE

FILED

2017 JUN 21 PM 4:06

RICHARD R. ROOKER, CLERK

Richard R. Rooker D.C.

IN RE: Conservatorship petition regarding)
Dr. John Witherspoon)
)
REQUESTED BY CHILDREN:)
Reese Witherspoon aka Reese Witherspoon) Case No. 12P759
Toth and John Witherspoon, Jr.) Judge Kennedy

[MEDIA ASK/MOVE THAT THIS REPLY BE FILED PUBLICLY]

**REPLY OF THE TENNESSEAN AND WSMV-TV CHANNEL FOUR
IN SUPPORT OF EMERGENCY MOTION TO INTERVENE**

As outlined in the Media-Intervenors' Motion, the procedures for closing public access to court proceedings and sealing judicial records are well-settled by Tennessee Supreme Court precedent, and apply to all Tennessee judicial proceedings. The Motion simply asks the Court to apply these same procedures required of *all cases* here; procedures that the Petitioners misinterpret in their Response and would have the Court misapply. Although is it not part of the public "record" in this case, the Media-Intervenors understand that there was entered in this matter a restrictive Order closing and sealing any and all pleadings.¹

- 1. The Court should order that the courtroom remain open and judicial records be unsealed, because the public's right of access may only be trumped if there is an overriding interest that is likely to be prejudiced and which is shown by clear and convincing evidence.**

¹ The Court has, at the request of the Media-Intervenors, unsealed a few of the pleadings which relate to the requests to open these proceedings and judicial records. This matter was initiated with a hearing but no filings on Friday afternoon, May 11. On information and belief, either during or after that closed hearing, the Court received some written submissions from the Petitioners which were filed. On Monday, May 14, the Media-Intervenors filed their "Emergency Motion to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, to Oppose Further Sealed Filings and Closed Proceedings, and to Request Camera Access to Hearings Under Tenn. R. Sup. Ct. 30" (the "Emergency Motion").

The seminal Tennessee case on court closures and sealing of judicial records is *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985). *Drake* set forth the now well-settled procedure for closure proceedings and other restrictive orders *for all cases*. *Id.* at 608 (“These are the principles *that must be applied in Tennessee* when a closure or other restrictive order is sought.”)(emphasis added). *Drake* is not limited to criminal cases, or to preliminary hearings in criminal cases, as claimed by the Petitioners. When a party requests a closure or other restrictive order, “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” *Id.* (citing *Waller v. Georgia*, 104 S. Ct. 2210, 2212 (1984)).

The Petitioners’ Response² improperly attempts to place the burden on the Media-Intervenors to seek access to each hearing independently. (Resp. of Pet’rs at 2) (“Media access at a hearing is to be determined...on a case-by-case basis for each hearing before the Court.”). This flies in the face of well settled precedent. *See Drake*, 701 S.W.2d at 608; *State v. James*, 902 S.W.2d 911, 914 (Tenn. 1995). To support this contention, the Petitioners and their allies rely on Tenn. Sup. Ct. R. 30 (Resp. of Pet’rs at 2) – however, the Petitioners fail to recognize that Sup. Ct. R. 30 applies only to *camera* access to the courtroom. Tenn. R. Sup. Ct. 30(A)(1) (governing “media coverage”); Tenn. R. Sup. Ct. 30(B)(1) (defining “coverage” as recording and broadcasting). The procedures implemented to limit *camera* access have no bearing on the *public’s right of access to courtroom proceedings and judicial records*. Supreme Court Rule 30 was never meant to “protect[] the Media as to its opportunities to request access” and cannot be

² Counsel for Dr. Witherspoon, and the Guardian, both adopted the Petitioners’ Response in opposition to the Media-Intervenors’ Emergency Motion.

relied upon to bar the courtroom from observers. (Resp. of Pet'rs at 2). Any future motion to close the courtroom must be considered under the specific procedure defined in *Drake*.³

Given the failure of any effort to comport with well-settled procedures, and the absence of evidence presented by the Witherspoons of an overriding interest likely to be prejudiced, the courtroom must remain open.

II. Judicial records should be unsealed because the *Drake* procedures apply to judicial records, and the Petitioners have failed to demonstrate an "overriding interest" sufficient to restrict the public's right of access to the judicial record.

The procedures required by the Tennessee Supreme Court are not limited to an effort to close the court. Those same procedures equally apply to restrictions on access to judicial records. "These are principles that must be applied in Tennessee when a closure *or other restrictive order* is sought." *Drake*, 701 S.W.2d at 608. The public's right to access the documents and papers produced by judicial proceedings is no less important than the public's right to attend those proceedings. *See Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Ct. App. 1998) (discussing the public's right both "to attend judicial proceedings and to examine the documents generated in those proceedings."). Submitted with this Reply are the decisions by two Tennessee trial judges, Circuit Judge (now Court of Criminal Appeals Court Judge) Jeff Bivins and Circuit Judge Lee Russell, each of whom has recognized that, when addressing a sealing motion, that the *Drake* procedures apply. *See State v. Koulis*, No. 1-CR111479 (Trial Tr. 64-68) (decision issued by Tenn. Crim. Ct. Williamson County May 31,

³ The Media-Intervenors have followed, and intend to continue to follow, the requirements of Tenn. Sup. Ct. R. 30 in relation to camera access to court proceedings.

2006) (Bivins, J.) (hearing on media's motion to intervene);⁴ *In re Justin A. Hansen*, No. 12062 (Cir. Ct. Bedford County Nov. 14, 2011) (submitted order unsealing records).⁵

In this case, no party claims that the *Drake* procedures were followed. On information and belief, this case began with the representation that there was an "emergency" requiring a Friday afternoon hearing on May 11, which was conducted with no public notice and not even any filings—even though they had been prepared in advance of the hearing.⁶ The Court granted the Petitioners' oral motion to exclude cameras and close the courtroom to the media, and granted the relief requested by the Petitioners in their Orders which had been previously prepared (see docket sheet prepared by Petitioners' counsel, filed as Exhibit 5 with simultaneously-filed Notice). The Orders are under seal – and the sealing provision itself which required that all filings be placed under seal -- itself remains a secret. Petitioners' counsel also arranged two additional supposedly "emergency" hearings, the second such hearing on Monday, May 14 and the third on Friday, May 25. The main justification given for failing to comply with *Drake* was that the case involved an "emergency." Now, nearly six weeks after the original "emergency" filing, however, no conservatorship hearing has been scheduled.⁷ The annulment case filed prior in time to this case (*Witherspoon v. Witherspoon*, Davidson Co. Third Circuit Court, No. 12D1447, filed May 8, 2012) had been scheduled to have a substantive hearing, but that hearing was postponed indefinitely and now that case has been dismissed. (See Exhibit 3 of Notice). Regrettably, circumstances and the passage of nearly six weeks (with no hearing on the

⁴ A copy of the Order in *Koulis* and a portion of the hearing transcript incorporated therein are submitted as Exhibit 6 attached to the contemporaneously filed Notice.

⁵ A copy of submitted Order in *Hansen* is attached hereto as Exhibit 7 attached to the contemporaneously filed Notice

⁶ This procedure failed to comport with Section 8 of this Court's "Chamber Rules and Practice and Procedure Manual" governing Seventh Circuit (Probate) Court, which requires that a verified Petition (Local Rule 39.05) be "filed first with the Probate Clerk. Next, counsel should inform the clerk that it is an emergency and ask the clerk to walk it up to the Judge's office for processing."

⁷ On information and belief, the Court initially set the hearing on the conservatorship petition for May 21, 2012. Then, that hearing was rescheduled to June 25. Then, that hearing was indefinitely postponed at the request of Petitioners' counsel, who preferred to deal with the Emergency Motion first.

conservatorship petition even on the Court's schedule) belie the claimed "emergency" that the Court was under the impression it had to deal with.

A. The Petitioners' claimed interests have not been proven to be "overriding."

Throughout the hurried push to obtain Court rulings free from public view, the Petitioners have failed to follow the required procedures and have failed to identify an "overriding interest" sufficient to support sealing records, close courtroom proceedings or exclude cameras. In their Response, Petitioners identify two purported "interests" that they claim justify limiting access to the judicial record: 1) they claim that they intended to conduct the proceeding in secret, and therefore had some "reliance" that their submissions to the Court (via filings and testimony) would be shielded from public view; and 2) they claim in their Response that they have an essential need for nondisclosure of all information pertaining to the "health, finances, marriage, and employment/business interests of the Respondent and/or Mrs. Witherspoon." (Resp. of Pet'rs at 7). Neither of these interests is sufficient to support sealing the record, closing courtroom proceedings, or excluding cameras.

First, as a matter of law the Petitioners have no right to "rely" upon some unreasonable expectation that they can proceed with a private court proceeding. The dictates of the Tennessee Supreme Court are clear -- the trial court must conduct a thorough, independent review to consider the claimed justification for depriving the public of its rights to open courts. Lawyers cannot presume that a Court will permit all pleadings and all hearing in a case to be conducted out of the public view. Lawyers should not deign to presume that a Court will "do" what is requested of the Court, even if it is by "agreement" -- particularly when it involves divesting the

public of fundamental, protected interests (founded in the United States and Tennessee Constitutions, Tennessee statute, and common law).⁸

To support their claim that they “relied” on proceeding in secret, the Petitioners cite to *Ballard v. Herzke*, 924 S.W.2d 652, 659 (Tenn. 1996) -- which does not support their argument. *Ballard* involved a request to modify a protective order which had allowed wholesale confidentiality designations of thousands of documents, and a request by the media and others to open access to the documents which had been filed with the Court. The Tennessee Supreme Court affirmed the decision of the trial court (and reversed the Court of Appeals’ decision) to modify the protective order and permit disclosure of most documents. The *Ballard* parties had exchanged discovery for *years* under a court-approved Order permitting confidential exchanges before a motion to intervene was filed by *The Tennessean* and The Society of Professional Journalists seeking to rescind the protective order. *Id.* The Supreme Court noted that “reliance” by parties is one factor a court must consider in considering whether to modify a protective order. In describing that interest, the *Ballard* Court stated, “[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow

⁸ The Media-Intervenors submit that their Emergency Motion is founded in the following:

- the First Amendment to the United States Constitution;
- the Tennessee Constitution, Article I, Section 17 (“all courts shall be open”), Article I, Section 19 (“the printing presses shall be free to every person to examine the proceedings....of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty...”), Article I, Section 8 (“No person shall be deprived of his life, liberty, or property. but by the judgment of his peers or the law of the land.”), Article XI, Section 16 (“everything in the bill of rights [the Declaration of Rights, Article I of the Tennessee Constitution]...shall forever remain inviolate.”);
- the Tennessee Public Records Act, T.C.A. §§ 10-7-501 *et seq.*, (The Attorney General in Tenn. Op. Att’y Gen. No. 95-085 (Aug. 15, 1995) noted: “The common law right to inspect and copy public records, including judicial records and documents antedates the United States Constitution. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1978). Only the legislature can declare certain records in Tennessee to be confidential. *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital Board of Directors*, 621 S.W.2d 763 (Tenn. App. 1981). Absent a specific confidentiality provision, court records and documents are open to public inspection. See T.C.A. § 10-7-503.” [i.e., part of the Public Records Act].

; and

- the common law.

discovery.” *Id.* at 660 (internal quotations and citations omitted). The Supreme Court considered the “good cause” standard applicable to modification of protective orders, and determined that the Court of Appeals had erred in reversing the trial court’s opening of judicial records.

In the instant case, based upon the docket summary prepared by Petitioners’ counsel (submitted as Exhibit 5 to the Notice), the docket consists of less than two dozen entries--none of which were “induced” by a protective order (certainly not the original filings).⁹ None of those filings are *discovery*. Clearly, the Petitioners could not justifiably expect that they could file a petition and conduct hearings which would be conducted in secret. Such an unreasonable expectation -- expressed for the first time in their Response submitted weeks after they initiated this matter -- does not constitute an “overriding interest” required to restrict the public’s right of access.

The Petitioners’ second justification is a generalized “privacy” interest in the “health, finances, marriage, and employment/business” records or testimony submitted to Court regarding Dr. Witherspoon (the Respondent) and Betty Witherspoon (a non-party). Even dealing with the far lower “good cause” standard for modifying a protective order, the *Ballard* Court recognized that “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning,” are insufficient to establish “good cause.” 924 S.W.2d at 658. Conservatorship proceedings regularly involve considerations of “health, finances, marriage, and employment/business” -- and neither the Tennessee Supreme Court nor the Tennessee General Assembly has seen fit to exempt probate/conservatorship/guardianship matters from the strict procedural requirements of the Supreme Court’s decisions in *Drake* and *James*. A recent Tennessee Court of Appeals decisions addressing a conservatorship addressed not only the standard to be applied but also

⁹ As noted above, at the request of the Media-Intervenors, some of the filings relating to opening court proceedings or providing access to judicial records have been unsealed pursuant to Court order. These have been posted on the Probate Court’s website. (See Exhibit 5 to Notice).

considered the type of proof routinely considered. 2012 WL 2244812 (Tenn. Ct. App. June 15, 2012) (submitted with the simultaneously-filed Notice). 2012 WL 2244812 (Tenn. Ct. App. June 15, 2012) (submitted with the simultaneously-filed Notice). The appellate court in *Lawton* discusses in detail the respondent's finances and mental state (including the substance of medical examinations of three physicians), and his sudden marriage to Mrs. Lawton-Kite. *See id.* at *2. The Court of Appeals saw no need to provide the sort of blanket sealing that the Petitioners advocate. In this case, the Petitioners have done nothing more than advance a generalized claim of harm (i.e., potential embarrassment). Their Opposition should be rejected.

Last, the Petitioners attempt to flip the standard on its head by arguing that because the Court granted their request on May 11 for a complete sealing of the judicial record, the Media-Intervenors must now establish a "legitimate" interest in the judicial record. (Resp. of Pet'rs at 3).¹⁰ Respectfully, they misstate the standard. The burden is on the party seeking closure or other restrictions to establish an "overriding interest" compelling the restriction. The Petitioners rely on an appellate decision, *In re NHC-Nashville Fire Litigation*, 293 S.W.3d 547 (Tenn. Ct. App. 2008), which was certainly unique in that involved thirty consolidated lawsuits and voluminous discovery. The decision recites the principle of long-standing that the standard of review of a trial court's decision regarding a protective order is "abuse of discretion." *Id.* at 566. However, for the modification of a protective order, the burden remains with the party seeking to maintain the seal on the record to demonstrate "good cause" for maintaining the seal. *Ballard*,

¹⁰ Petitioners repeatedly make the pejorative charge -- supported only by the *ipse dixit* claim of their counsel -- that the Media-Intervenors are motivated solely by "a voyeuristic interest," attempting to pursue economic interests. While the celebrity status of Academy Award-winning actress Reese Witherspoon certainly raises public interest in this case, the coverage by *The Tennessean* and WSMV-TV Channel Four is not voyeuristic nor does it sensationalize the news story here. (See news stories submitted with Notice as Exhibit 1). The Media continues to cover this and other cases involving conservatorships, which is an issue of public concern. In addition, there is certainly a matter of public concern regarding the well-being of a prominent physician who, as evidenced by public records, maintains an active medical license and staff privileges at multiple local hospitals. (See Exhibit 4 to Notice).

924 S.W.2d at 660. In this case, the Petitioners have the burden of proving an “overriding interest” that persuades the trial court that the public’s constitutional, statutory and common law interests may be overcome.¹¹

III. Conservatorship cases are not exempt from the procedural requirements of *Drake and James*, and the out-of-state cases cited by Petitioners do not compel a different result.

To the best of the undersigned’s knowledge, there is not a reported Tennessee decision dealing with a closure or sealing order in a conservatorship case. However, the Tennessee Supreme Court did not limit the application of *Drake* to its specific facts; instead, the rules apply to judicial proceedings and records generally. In addition, the Tennessee General Assembly has not attempted to exempt this Court, or guardianship proceedings in general, from the *Drake* procedures. The Petitioners cite a few cases from other jurisdictions to support their closure request. Those cases are distinguishable, as discussed below -- but more importantly because Tennessee courts and the General Assembly vociferously espouse open courts and open records principles. In addition, the Petitioners fail to inform the Court about the decision of the Georgia Court of Appeals in *Sharpton v. Hall*, 296 Ga. App. 251 (Ga. Ct. App. 2009).

In *Sharpton*, the Georgia appellate court upheld the unsealing of records of a guardianship proceeding, despite a statute governing access to sealed conservatorship records. The guardianship proceedings of *Sharpton*, since deceased, contained property-related records that potentially had high evidentiary value in the litigation over the estate of *Sharpton*’s deceased brother. *Id.* at 251. The administrator of that estate moved to unseal the records of *Sharpton*’s guardianship proceedings. *Id.* In applying the Georgia statute governing requests to examine sealed records,

¹¹ Petitioners’ reliance on *In re NHC* for support of a blanket seal of the record and proceedings that takes effect from the initial hearing is misplaced. The Court of Appeals simply agreed with the trial court that the massive scale of the case, including the number of parties and the thousands of pages of filings, led to a situation where an individualized review of every filing could not be administered. *In re NHC*, 293 S.W.3d at 567-68.. In the instant case, there are few parties and few filings. The blanket sealing order proposed by Petitioners, under a purportedly “emergency” situation, was improper.

the court balanced the privacy interests of Sharpton against the evidentiary value of the records in the estate litigation. *Id.* at 252. Finding the evidentiary value “high,” the Court unsealed the financial documents. *Id.* The court unsealed the record even under the requirement from the governing statute that the public interest “clearly outweigh” the privacy interests. As this Court well knows, Tennessee has the opposite requirement -- namely, that the private interests must be sufficient to “override” the public interests. In this case, Petitioners have not presented such evidence.

As noted above, the Petitioners rely upon a few out-of-state decisions, each of which is distinguishable:

- *In the Matter of du Pont*, 1997 WL 383008 (Del. Ch. June 20, 1997). Petitioners quote: “Delaware case law, and written policies [that] document the fact that access to guardianship records, in particular, has been restricted in Delaware at least through the past few decades, and presumably from the earliest time...” *Id.* at *3. There is no such similar case law or “written policies” in Tennessee.
- *In re Marshall*, 13 Misc.3d 1203 (N.Y. Sup. Ct. 2006) (cited in Petitioners’ brief as *In re Astor*). Petitioners fail to discuss the New York statute that specifically provides for a consideration of the privacy of the person alleged to be incapacitated. N.Y. Mental Hygiene Law § 81.14(b) and (c). Tennessee has no similar statute and therefore there exists no similar rationale to close the current proceedings under Tennessee law.
- *In re Estate of Carpenter*, 127 Ohio Misc.2d 22 (Ohio Prob. Ct. 2004). Here again, Petitioners fail to point out a significant difference. The party seeking to seal the record demonstrated the serious potential for harm from unsealing the record to the minor parties involved in the case, including testimony from a medical specialist in children with trauma history. *Id.* at 28. Serious mental and physical harm to minor parties is clearly an overriding interest sufficient to limit access to the record, an interest lacking in the current case.

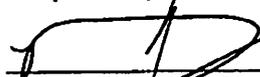
Petitioners have not pointed to any comparable law in Tennessee providing for “increased” privacy rights in conservatorship cases as exists in New York and Delaware, nor have they demonstrated the kind of serious potential for trauma to minors as was shown in *In re Estate of Carpenter*. Without such a demonstration, none of these cases supports the Petitioners’ insistence upon a blanket seal of the record in this case.

Last, Petitioners in the Response cite to what is characterized as a "practice" in this Court of sealing records. That argument should be disregarded. First, there is no proof in the record. Second, there is nothing indicating whether the Court followed, or was asked to follow, the applicable Drake procedures regarding those 34 cases over a 5 year period. And third, Petitioners recite that 16 of those cases involved minors--who generally receive greater privacy recognition -- and which is not applicable in this case.

Conclusion

The Media-Intervenors respectfully submit that they have a right of access to judicial records under United States and Tennessee constitutional law, the Tennessee Public Records Act, and common law. The Media-Intervenors ask that the sealed pleadings be unsealed, that the Court rescind its Order requiring a blanket sealing of filings, and the Court announce its intention to conduct further proceedings in public.

Respectfully submitted,



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CERTIFICATE OF SERVICE

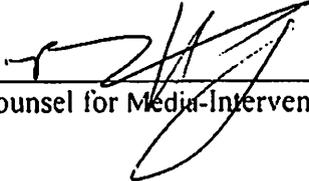
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IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE, TENNESSEE

FILED

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RICHARD B. ROOKER, CLERK

 D.C.

IN RE: Conservatorship petition regarding)
Dr. John Witherspoon)
)
REQUESTED BY CHILDREN:)
Reese Witherspoon aka Reese Witherspoon) Case No. 12P-759
Toth and John Witherspoon, Jr.) Judge Kennedy

NOTICE OF FILING

The undersigned respectfully submits the following exhibits in support of the simultaneously filed Reply of the *The Tennessean* and WSMV-TV Channel Four In Support of Emergency Motion.

The specific exhibits are as follows:

- Exhibit 1: Articles appearing in *The Tennessean* and WSMV.com
- Exhibit 2: Screen Shot of Probate Court webpage with link to unsealed records
- Exhibit 3: Docket Report of *Witherspoon v. Witherspoon*, Docket No. 12D-1447 (Davidson County Third Circuit Court) and selected filings.
- Exhibit 4: State of Tennessee Medical Board license information for Dr. John D. Witherspoon
- Exhibit 5: List of filed documents (prepared by Petitioners' counsel - annotated to reflect unsealed filings) *In re Conservatorship of John Draper Witherspoon*, No. 12P-759
- Exhibit 6: Order in *State v. Koulis*, No. I-CR111479 (Tenn. Crim. Ct. Williamson County May, 31, 2006) (Bivins, J.) (including transcript).
- Exhibit 7: Submitted Order in *In Re Hansen*, Docket No. 12062 (Circuit Court for Bedford County, Tennessee) (Russell, J.)
- Exhibit 8: *In re Lawton*, 2012 WL 2244812 (Tenn. Ct. App. June 15, 2012)
- Exhibit 9: *Sharpton v. Hall*, 296 Ga. App. 251 (2009)

Respectfully submitted,



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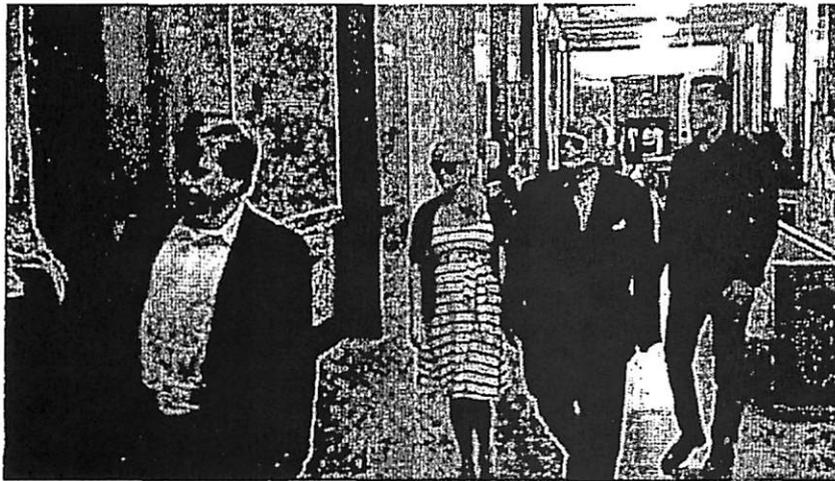
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Reese Witherspoon appears with parents before Davidson County judge

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Reese Witherspoon's family appears in court: Reese Witherspoon's family appears in Davidson County court.

Written by Duane W. Gang The Tennessean

Hollywood actress Reese Witherspoon and her parents appeared in a Davidson County courtroom Friday afternoon for an emergency hearing before Probate Judge Randy Kennedy.

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Kennedy handles conservatorship cases and determines mental competency.

Earlier this week, her mother, Betty Witherspoon, filed a lawsuit saying that her husband John D. Witherspoon had married another woman even though they are still married.

The lawsuit against John D. Witherspoon and Patricia Taylor says their Jan. 14 marriage in Gatlinburg is illegal.

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In court documents, Betty Witherspoon has said she fears her husband suffers from

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Reese Witherspoon and her brother asked the judge to place her father under a conservatorship.

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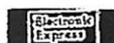
Blocking access enables abuse, say reform advocates

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Reese Witherspoon, her husband, Jim Toth, left, and her father, John D. Witherspoon, leave Davidson County Court on May 11, 2012. / Dipti Vaidya / The Tennessean

Written by
Walter F. Roche Jr. and
Duane W. Gang
The Tennessean

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When a Davidson County judge closed his courtroom to the public during a conservatorship case involving actress Reese Witherspoon's father last week, he didn't just close a day's proceedings: He sealed the entire case history, something he has done in only a handful of other recent cases.

In sealing the case from public view, 7th Circuit Court Judge Randy Kennedy said the prejudice that would befall the Witherspoon family outweighs the public's right to know. Kennedy sealed the entire case file — not just individual medical or financial records — and required the media to leave the courtroom.

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Reese Witherspoon's family appears in court: Reese Witherspoon's family appears in Davidson County court.

But completely blocking access can hinder efforts to curb guardianship abuse and prevents the public from performing its watchdog role over the court system, conservatorship reform advocates and a First Amendment expert said.

"Sealed records or hearings are giant red flags," said Elaine Renoire, head of the National Association to Stop Guardian Abuse.

"Many times, the families involved in these cases think their privacy is being protected by this practice, but in fact, what is happening is the scrutiny of the public and/or the media is compromised or completely blocked, leaving the wards and their families open to court-sanctioned abuse."

Conservatorships are a legal mechanism the courts use when someone cannot care for himself. In such cases, which often deal with mental capacity, the court appoints a conservator to oversee the person's affairs — every detail from paying bills to deciding how much money is spent on personal items.

Of the first 528 probate and conservatorship cases filed in the first three months of 2012 in Davidson County, only five have been sealed, a review of court docket records shows. Kennedy handles both types of cases.

Kennedy said in court May 11 that there was a precedent for closing the Witherspoon hearing and sealing the records.

"There are numerous conservator cases that this court and courts across the state have placed under seal," Kennedy said before ordering reporters from the courtroom Friday.

"The primary overriding justification for that has, in my estimation, been the protection of the private interests of those private citizens whose health records, financial records and personal courses of conduct would otherwise be laid open to the scrutiny of the public, thereby jeopardizing them."

Cases differ

Reese Witherspoon went to court last week with her brother for an emergency hearing on whether her father, Dr. John D. Witherspoon, should be placed in a conservatorship.

The family contacted Kennedy's assistant directly about having the case addressed before filing any paperwork with the court. The hearing took place at 3 p.m. May 11 in a nearly empty courthouse and not on the judge's regular 10 a.m. docket.

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The outcome remains unknown because even the judge's order is sealed. Kennedy decided to seal the entire case, rather than redact only the most sensitive private information.

The hearing came the same week Betty Witherspoon filed a lawsuit saying that her husband had married another woman even though Betty Witherspoon says she is still married to John Witherspoon.

In the lawsuit, Betty Witherspoon said her husband has early-onset dementia and has problems with alcohol, hoarding and overspending. She seeks to have that new marriage annulled.

John Witherspoon, an ear, nose and throat specialist, remains licensed to practice medicine, according to the state Board of Medical Examiners.

Kennedy also has sealed the files in the case of Lisa Arnold, 20, a woman with Down syndrome who was placed in a conservatorship over the objections of her mother, Renate Arnold.

His actions in that case have been challenged in a pending federal court suit.

In contrast to those two cases, the records in the case of Jewell Tinnon have remained open. Tinnon, 82, was placed in a conservatorship by Kennedy and saw her house and all her belongings auctioned off, primarily to pay the costs of lawyer fees.

Tinnon ultimately got out of the conservatorship after new lawyers presented medical evidence challenging the conclusion that she was incapable of caring for herself.

Tinnon has now filed suit against the court-appointed conservators and one of the attorneys named by the court to represent her.

A time for access, a time for privacy

Rep. Gary Odom, D-Nashville, said a study commission authorized by the General Assembly will consider all aspects of the state conservatorship laws, including the sealing of records. The panel is expected to convene in July.

Odom filed a bill in the recently concluded session in reaction to the Tinnon case. The bill, passed by the legislature and signed into law May 10 by Gov. Bill Haslam, places new disclosure requirements on those petitioning to place someone in a conservatorship.

Renoire said cases like Tinnon's show the need for public access to conservator cases, and sealing records enables exploitation.

"Our vulnerable elderly or disabled who are under conservatorship need every ounce of protection possible because their civil rights and liberties have been legally stripped from them by the proceedings, leaving them vulnerable to abuse and exploitation by the very persons court-appointed to 'protect' them," she said by email.

"Confessed and convicted serial killers have more rights and civil liberties than conservatorship wards."

Gene Policinski, executive director of the Nashville-based First Amendment Center, said the courts are given more leeway to close proceedings in conservatorship and juvenile cases.

What's lost when that happens is the watchdog role the public — often through the media — has over the court system, Policinski said.

Judges should not make blanket decisions on closing conservatorship hearings to the public and they should be handled on a case-by-case basis, he said. Judges must balance the rights of the individual with the public's watchdog role, he said.

Too often, Policinski said, there is a view that access would be harmful to those involved. "The idea of open courts is not harmful," he said.

But others say there are times when the case should be closed or at least portions of the court records kept from public view.

"It is not unusual for guardianship proceedings to be closed to the public upon proper request by a party," said Terry Hammond, an El Paso, Texas-based conservatorship guardian attorney.

Sally Hurme, a project adviser with AARP, said just about every court has a way to handle sensitive information.

She said it can be appropriate under some circumstances to keep information from the public because intimate details are often needed for the court to make a determination on whether to appoint a guardian or conservator.

"In appropriate circumstances it can be important to the individual's well-being that some or all of the proceedings be kept out of the public's eye because of the nature of the personal information that is necessary for the court to know to make a determination about the need for a guardian or a conservator.

"In some courts, by standing court rule, certain medical, mental health or financial information is automatically sealed to protect the privacy and personal information of the respondent," Hurme said.

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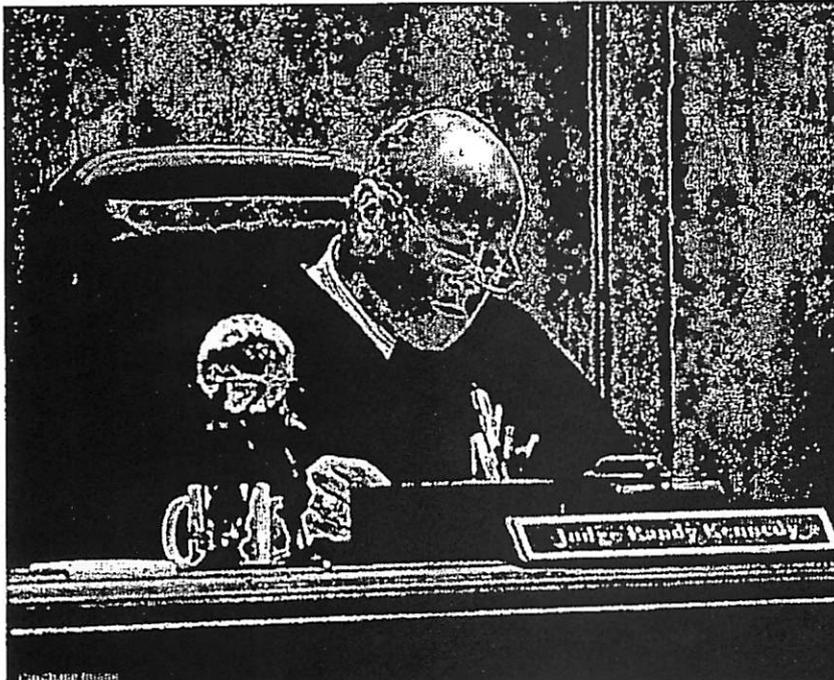
Judge to hear arguments for opening Witherspoon case

1:50 AM, May 22, 2012 | Comments

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Judge Randy Kennedy / Sanford Myers / File / The Tennessean

Written by Brian Haas The Tennessean

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A judge indicated Monday that he may be willing to open at least portions of a conservatorship case involving actress Reese Witherspoon's father.

Davidson County Probate Court Judge Randy Kennedy on May 11 ejected the news media from court and ruled that all files and proceedings involving Dr. John Witherspoon would be closed to the public as his daughter sought to have him placed under a conservator. On Monday, Kennedy set a June 1 hearing to hear arguments from *The Tennessean* and WSMV-Channel 4. Both news organizations are seeking to have the case opened to the public.

Attorney Robb Harvey, representing both media outlets, argued not only that the media and public have a general right to attend court

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hearings under the U.S. Constitution and Tennessee law, but also that concerns by the Witherspoon family about private details being made public were irrelevant when they were made public in a separate lawsuit.

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"You can't exactly unring a bell," Harvey argued.

Kennedy acknowledged that the separate lawsuit, filed after John Witherspoon was accused of marrying Tricianne Taylor while still married to Mary Elizabeth "Betty" Witherspoon, might change his mind about sealing the case. "It adds a different light to what we started out with," he said.

The legal wrangling began earlier this month when Betty Witherspoon filed a lawsuit protesting her husband's marriage to Taylor, arguing that he was suffering from depression and possibly early onset dementia. According to the lawsuit, he didn't even recall marrying Taylor.

She is seeking to have the second marriage annulled and to prevent Taylor from gaining access to his finances and property.

The Witherspoons then sought to have John Witherspoon, an otolaryngologist, placed under a conservator to protect his legal and financial interests, amid questions about his competency. Attorney Winston Evans, who has been named temporary guardian over John Witherspoon's interests, declined to comment after Monday's hearing. The Witherspoons' attorney, Andra Hedrick, also declined to comment.

Whether John Witherspoon will be placed under a permanent conservatorship is expected to be discussed in late June.

Contact Brian Haas at 615-726-8968 or bhaas@tennessean.com.

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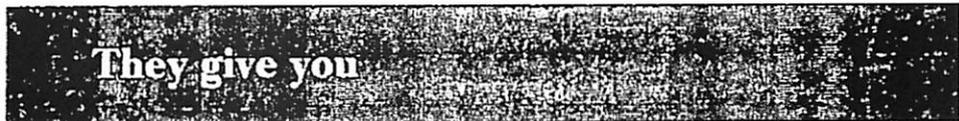
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Posted: Jun 20, 2012 4:58 PM CDT Updated: Jun 20, 2012 5:23 PM CDT Reported by Demetria Kalodimos - email

NASHVILLE, TN (WSMV) - A bigamy lawsuit against actress Reese Witherspoon's father and his new wife has been dropped.

Mary Elizabeth Witherspoon sued her husband John Witherspoon after she learned John had married his second wife, Tricianna Taylor, in January.

The Witherspoons had separated in 1996 but never divorced.

"Dismissal of the lawsuit by the Witherspoons speaks volumes as to the innocence of Ms. Taylor," said Taylor's attorney, Joe Brandon. "With that said, their malicious and intentional allegations are simply unacceptable."

Since word of the second marriage, Reese Witherspoon has been trying to gain conservatorship over her father.

Records of those proceedings are sealed.

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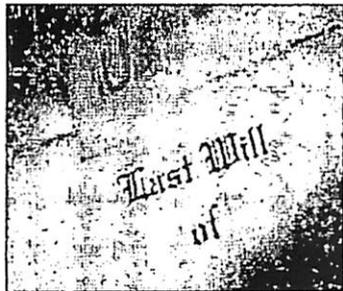
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Court.

The Probate Court also has concurrent jurisdiction over the creation and supervision of conservatorships and guardianships. To a lesser degree, the Probate Court also handles other types of cases, including, but not limited to, adult and minor name changes, emancipations, legitimations and various legal matters involving trusts.

Judge Randy Kennedy is the judge of the Seventh Circuit Court and presides over all matters filed in the Probate Court. He is assisted by Bob Bradshaw, who serves as Probate Master for Davidson County.



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(3) 1 WITHERSPOON, JOHN DRAPER
TAYLOR, TRICIANNE PATRICIA
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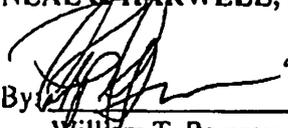
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3	05.08.12	E	EXHIBIT AS "B-E" COPY ANNOUNCEMENTS;M/CERT;LTR;WEBB(TO DC)		
4	05.09.12	AP	AMENDED PETITION OF P TO MAKE CORRECTIONS TO D NAME		
5	05.09.12	ROM	RESTRAINING ORDER A/G D1		
6	05.09.12	SCO	SHOW CAUSE ORDER 05.31.12 - 3 - 09:00AM		
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8	05.09.12	SP	SUMMONS PERSONAL SERVICE-D2 W/DC,E,SCO,RO,AP		
9	05.25.12	NAP	NOTICE OF APPEARANCE (J.BRANDON/M.PARKER) FOR D2		
10	05.29.12	AO	AGREED ORDER SUBSTITUTION OF P1 COUNSEL		
11	05.30.12	N	NOTICE OF 3rd CT OF REQUEST FOR MEDIA COVERAGE		
12	05.31.12	C	CONTINUANCE IND - OF 09:00AM 3		
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By: 

Anne C. Martin, Esq., #015537

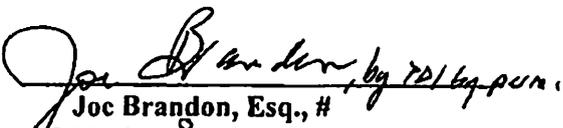
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By: Winston S. Evans by P.H. [unclear]
Winston S. Evans, Esq., #006281
401 Commerce Street, Suite 710
Nashville, TN 37219-2449
Guardian Ad Litem

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IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

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2012 JUN 15 PM 3:39

RICHARD R. ROOKER, CLERK

No. 12D1447

[Handwritten Signature]

MARY ELIZABETH WITHERSPOON,)
Petitioner)

v.)

JOHN DRAPER WITHERSPOON)
And)
TRICIANNA (PATRICIA) TAYLOR)

Respondents.)

NOTICE OF VOLUNTARY NONSUIT

Pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, Petitioner, Mary Elizabeth Witherspoon, by and through counsel, hereby gives notice of her voluntary nonsuit of this cause of action against Respondents John Draper Witherspoon and Tricianna (Patricia) Taylor, without prejudice. A proposed Order of Voluntary Nonsuit is submitted herewith.

Respectfully submitted,

NEAL & HARWELL, PLC

By: *William T. Ramsey*
William T. Ramsey, #009248

2000 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile

Counsel for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via first class mail, postage prepaid to:

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Winston S. Evans
Evans, Jones & Reynolds, P.C.
401 Commerce Street, Suite 710
Nashville, TN 37219
Guardian Ad Litem

On this the 15th of June, 2012.

W. J. Ramsey

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

MARY ELIZABETH WITHERSPOON,)
Petitioner)

v.)

JOHN DRAPER WITHERSPOON)
And)
TRICIANNA (PATRICIA) TAYLOR)

Respondents.)

No. 12D1447

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ORDER OF VOLUNTARY NONSUIT

Pursuant to Petitioner's Notice of Voluntary Nonsuit without prejudice, it is hereby,
ORDERED, ADJUDGED AND DECREED that this lawsuit is dismissed without
prejudice pursuant to Tenn. R. Civ. P. 41.01. Costs shall be assessed to the Petitioner for which
execution may issue if necessary.

.DATED this 20 day of June, 2012.



JUDGE PHILLIP ROBINSON

Copy

APPROVED FOR ENTRY:

NEAL & HARWELL, PLC

By: Wm J Ramsey
William T. Ramsey, #009245

2000 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
(615) 244-1713 – Telephone
(615) 726-0573 – Facsimile

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via first class mail, postage prepaid to:

Anne C. Martin
Richard J. Nickels
Bone McCallester Norton, PLLC
Nashville City Center, Suite 1600
511 Union Street
Nashville, TN 37219
Counsel for John Draper Witherspoon

Joe Brandon
119 North Maple Street
Murfreesboro, TN 37130
Counsel for Tricianna (Patricia) Taylor

Mary Frances Parker
The Higgins Firm
116 Third Avenue, South
Nashville, TN 37201
Counsel for Tricianna (Patricia) Taylor

Winston S. Evans
Evans, Jones & Reynolds, P.C.
401 Commerce Street, Suite 710
Nashville, TN 37219
Guardian Ad Litem

On this the 15th of June, 2012.

Wm J Ramsey

Search Results

FILED

2012 JUN 21 PM 4: 07

You are viewing page 1 of 1... << First < Prev Next > Last >>

1. WITHERSPOON, JOHN D
NASHVILLE, TN 37203

License Number: 6986
Status: Active: Licensed

RICHARD F. ROOKER, CLERK

Practitioner Profile (Practitioner.aspx?
ProfessionCode=1060&LicenseNumber=6986&FileNumber=5798)

Profession: Medical Doctor
Rank: Medical Doctor
Specialties:
Otolaryngology

Original Date: 01/01/1970
Expiration Date: 04/30/2014

[Signature]
D.C.

You are viewing page 1 of 1... << First < Prev Next > Last >>



Practitioner Profile Data

This information is provided by the licensee as required by law.

While searching for information on a particular health care professional, consumers should be aware that there are several locations available to aid them with their research. ([Licensure Verification \(default.aspx\)](#), [Abuse Registry \(/AbuseRegistry/index.html\)](#) and [Monthly Disciplinary Actions \(/Boards/disciplinary.htm\)](#)) Links to various Internet sites are available from the Department of Health Website [home page \(http://state.tn.us/health/\)](http://state.tn.us/health/) and from the [Health Related Boards Website \(/Boards/index.htm\)](#)

WITHERSPOON, JOHN D

PRACTICE ADDRESS: JOHN D WITHERSPOON MD/WILLIAMSON TOWERS
2011 CHURCH STREET/SUITE 603
NASHVILLE, TN 37203

LANGUAGES: (Other than English)	ARABIC
LANGUAGES: (Other than English)	CHINESE
LANGUAGES: (Other than English)	FRENCH
LANGUAGES: (Other than English)	GERMAN
LANGUAGES: (Other than English)	SPANISH

SUPERVISING PHYSICIAN: None Reported

GRADUATE/POSTGRADUATE MEDICAL/PROFESSIONAL EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	DATE OF GRADUATION	TYPE OF DEGREE
UNIV OF TENNESSEE	MEMPHIS TN	06/01/1968	MD

OTHER EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	FROM	TO
ROTATING MEDICINE GOOD SAMARITAN HOSPITAL	PHOENIX AZ USA	01/01/1969	01/01/1970
GEN SURG UNIV OF TENN	MEMPHIS TN USA	01/12/1970	07/10/1971
OTOLARYN TULANE UNIV	NEW ORLEANS LA USA	07/01/1973	06/30/1976

SPECIALTY BOARD CERTIFICATIONS

CERTIFYING BODY/ BOARD/ INSTITUTION	CERTIFICATION/ SPECIALTY/ SUBSPECIALTY
AMERICAN ACADEMY OF OTOLARYNGOLOGY	OTOLARYNGOLOGY

FACULTY APPOINTMENTS

TITLE	INSTITUTION	CITY/STATE
INSTRUCTOR (OTOLARYNGOLOGY)	VANDERBILT	NASHVILLE TN

STAFF PRIVILEGES

This practitioner currently holds staff privileges at the following hospitals

BAPTIST HOSPITAL
CENTENNIAL MEDICAL CENTER
NASHVILLE MEMORIAL HOSPITAL
SOUTHERN HILLS HOSPITAL
ST THOMAS HOSPITAL

~~CENTENNIAL~~
NASHVILLE TN
NASHVILLE TN
NASHVILLE TN
NASHVILLE TN
NASHVILLE TN

This practitioner currently participates in the following *TennCare* plans

BC BS

FINAL DISCIPLINARY ACTION

ACTIONS BY STATE REGULATORY BOARD

AGENCY	VIOLATION	ACTION
None Reported	None Reported	None Reported

RESIGNATIONS IN LIEU OF TERMINATION

HOSPITAL	ACTION
None Reported	None Reported

ACTIONS BY HOSPITAL

HOSPITAL	VIOLATION	ACTION
None Reported	None Reported	None Reported

CRIMINAL OFFENSES

OFFENSE	JURISDICTION
None Reported	None Reported

LIABILITY CLAIMS

Some studies have shown that there is no significant correlation between malpractice history and a doctor's competence. At the same time, the Legislature believes that consumers should have access to malpractice information. In these profiles, the Department has given you information about both the malpractice history of the physician's specialty and the physician's history of payments. The Legislature has placed payment amounts into three statistical categories: below average, average, and above average. To make the best health care decisions, you should view this information in perspective. You could miss an opportunity for high quality care by selecting a doctor based solely on malpractice history.

When considering malpractice data, please keep in mind:

- Malpractice histories tend to vary by specialty. Some specialties are more likely than others to be the subject of litigation. This report compares doctors only to the members of their specialty, not to all doctors, in order to make individual doctor's history more meaningful.
- The incident causing the malpractice claim may have happened years before a payment is finally made. Sometimes, it takes a long time for a malpractice lawsuit to move through the legal system.
- Some doctors work primarily with high risk patients. These doctors may have malpractice histories that are higher than average because they specialize in cases or patients who are at very high risk for problems.
- Settlement of a claim may occur for a variety of reasons which do not necessarily reflect negatively on the professional competence or conduct of the provider. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.

You may wish to discuss information provided in this report, and malpractice generally, with your doctor. The Department can refer you to other articles on this subject.

The Health Department started getting reports for claims paid after May, 1998.

In accordance to TCA 63-51-105A5A:

Settlements valued below \$10,000 for all professions (with the exceptions of \$25,000 for Dentist, \$50,000 for Chiropractors and \$75,000 for Medical Doctors and Osteopaths) are not included here.

DATE	Settlement amount was:
None Reported	None Reported

OPTIONAL INFORMATION

COMMUNITY SERVICE / AWARD / HONOR

AIR FORCE ACHIEVEMENT METAL
AIR FORCE COMMENDATION MEDALS
AIR FORCE MERITORIOUS SERVICE MEDAL
COMMANDER 118 TAC HOSPITAL-DESERT STORM 1991-1992
GRADUATE CITIZENS POLICE ACADEMY 1997
MEMBER-BETA EPSILON
MILITARY SERVICE 1971-2001
TENNC DISTINGUISHED SERVICE AWARD 1992

USAF
USAF
USAF
TN ANG
DAVIDSON COUNTY
NAT MED HONORARY SOC

PUBLICATIONS

TITLE

PUBLICATION

DATE

None Reported

None Reported

None Reported

In re Conservatorship of John Draper Witherspoon (No. 12P-759)

FILED

1.	5/11/12	Petition For Conservatorship	
2.	5/11/12	Fiduciary Oath	2012 JUN 21 PM 4: 07
3.	5/11/12	Cost Bond	
4.	5/11/12	Order - Temporary Conservatorship of Person	RICHARD N. ROOPER, CLERK
5.	5/11/12	Order - Guardian Ad Litem	
6.	5/11/12	Letters of Temporary Conservatorship of Person	<i>[Signature]</i> D.C.
7.	5/11/12	Media's Request For Camera In Courtroom	
8.	5/14/12	Order Submitted by Media (not signed by Judge Kennedy)	
9.	5/14/12	Notice of Personal Service	
10.	5/16/12	Order - Media Coverage and Closing Proceedings	
*	11.	5/21/12	Media's Motion To Intervene w/ 4 Attached Exhibits
	12.	5/21/12	Motion to Amend Previous Order
	13.	5/21/12	Order - Motion to Amend Previous Order
	14.	5/21/12	Order - Temporary Conservatorship of Property
	15.	5/21/12	Letters of Temporary Conservatorship of Property
	16.	5/22/12	Notice of Appearance - William T. Ramsey
*	17.	5/25/12	Joint Motion For Continuance
*	18.	5/25/12	Response to Joint Motion For Continuance
*	19.	5/25/12	Order - Joint Motion For Continuance
	20.	5/25/12	Notice of Appearance - Anne C. Martin and Richard J. Nickels
*	21.	5/25/12	Order - Setting Hearing on Media's Motion
	22.		
	23.		
	24.		
	25.		

* Unsealed



RECEIVED

6-2-06/AA
CIRCUIT COURT

FILED
IN THE CRIMINAL COURT FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

2012 JUN 21 PM 4:07

STATE OF TENNESSEE

RICHARD A. ROOKER, CLERK

VS.

[Signature]
D.C.

CASE NO. I-CR111479

CHRIST KOULIS

FILED

JUN 05 2006

ORDER TO UNSEAL RECORDS

Debbie McMillen-Barrett

This cause came before the Court on the defendant's motion to seal the records filed by the State of Tennessee in response to the defendant's request for discovery in this case. This Court previously sealed the records on a temporary basis in order for the parties involved to review the records and to advise the Court of the specific records to be included in the request. During that time, this Court received a request from WSMV-TV (the Meredith Corporation) and the Tennessean to intervene in this case for the sole issue of determining whether the records should be sealed. In addition, the victim's family also filed a motion to intervene to allow the family to review the discovery filed in this case. This Court granted the motions to intervene filed by all three parties and heard argument from the parties on May 31, 2006.

In this case, the defendant argues that unsealing the records will jeopardize his right to a fair trial. The media intervenors argue that the public has a qualified right to examine public documents in judicial proceedings. The family believes it has a right to review the file with the prosecution in an effort to assist in prosecution of the case.

In deciding whether or not the records should remain sealed, this Court is guided by the precedents set by the Tennessee Appellate Courts. In *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985), the Court held that the presumption of open access to public records will only be overcome by an overriding interest requiring closure to the public. In considering the defendant's request to seal the records, this Court must consider any reasonable alternatives to

307 918



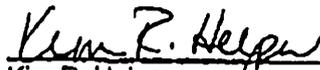
sealing the records and make sure that any order sealing the records is no broader than necessary to protect the defendant's interest. *Id.* at 608.

In this case, the Court finds that the defendant's privacy interest as well as federal regulations requires that the defendant's personal medical records remain under seal. Counsel for the State and the defendant shall file an order with this Court within one week specifically identifying those records.

However, after hearing arguments of counsel, this Court cannot find that the defendant has successfully rebutted the presumption of openness attached to these public records. By filling the entire record, the State may have created a substantial issue of appeal but defendant's argument that the unsealing of the records will impact his ability to choose a fair and impartial jury is too speculative at this time. This Court cannot see into the future. Therefore, with the exception of the defendant's personal medical records remaining under seal, this Court will vacate its Order temporarily sealing the records. The family's motion to intervene is rendered moot by the Court's decision.


Jeff Brivins
Circuit Court Judge 6-4-06

Submitted by:


Kim R. Helper
Assistant District Attorney

1 THE COURT: This matter is before the
2 Court upon the motion of the defendant to place discovery
3 documents under seal in this case. Previously, this Court
4 temporary sealed those documents to afford the parties
5 time to review the documents and to prepare requests for
6 specific documents to be -- to request for specific
7 documents to be sealed in this matter.

8 The Court temporarily sealed these documents
9 because these documents were filed by the State as a part
10 of the entire discovery file and there was no opportunity
11 prior to that filing for the defendant to identify
12 specific documents which may or may not be subject to
13 seal.

14 With that temporary seal, the Court also
15 invited any media interest to intervene in this matter to
16 address the defendant's motion to seal and, in fact, that
17 has occurred. Meredith Corporation on behalf of WSMV TV
18 has sought and been granted by the Court permission to
19 intervene. The Tennessean sought permission to intervene,
20 that permission was granted by this Court. The family of
21 the victim sought to intervene in this matter, and the
22 family is seeking to intervene for purposes of obtaining
23 an order allowing the family to review the documents
24 within the file. The Court granted the motion to
25 intervene and has entertained that motion here today.

1 This Court in rendering its decision on this
2 motion must be guided by precedent established by the
3 Tennessee Supreme Court in this matter. In particular,
4 the Court notes the guidance from the case of State v.
5 Drake which is found at 701 S.W.2d 604. In that case, the
6 Tennessee Supreme Court expressly holds that the
7 presumption of openness may be overcome only by an
8 overriding interest based on findings that closure is
9 essential to preserve higher values and is narrowly
10 tailored to serve that interest. The interest is to be
11 articulated along with findings specific enough that a
12 reviewing court can determine whether the closure order
13 was properly entered.

14 The Court goes on to note that the party
15 seeking to close the hearing must advance an overriding
16 interest that is likely to be prejudiced. The closure
17 must be no broader than necessary to protect that
18 interest. The trial court must consider reasonable
19 alternatives to closing the proceeding and it must make
20 findings adequate to support the closure.

21 The Court must apply -- this Court must apply
22 those standards to the instant case. The Court is to
23 consider the defendant's request to seal the entire
24 discovery file. Based upon the directives of our Supreme
25 Court in Drake, this Court finds that such a closure would

1 not be narrowly tailored and would be broader than
2 necessary to protect the defendant's right to a fair
3 trial, therefore, that request of the defendant is
4 denied.

5 The defendant has also identified specific
6 documents within the discovery file that he request be
7 sealed. The Court must apply the appropriate balancing
8 test as instructed by the appellate courts as to these
9 documents.

10 With regard to the medical records of
11 Dr. Koulis previously discussed in this matter, the Court
12 finds that substantial privacy issues exist as well as
13 substantial issues under Federal laws specifically to
14 HIPAA legislation. Accordingly, the Court finds the
15 defendant has carried his burden of rebutting the
16 presumption of openness as to these documents. Therefore,
17 the Court orders that these records remain and be sealed.

18 The Court directs counsel for the State and
19 counsel for the defendant to work together and identify
20 all such documents in the discovery file and submit an
21 order within one week of this hearing.

22 As to the other documents specifically
23 requested by the defendant to be sealed, based upon the
24 record before this Court, this Court cannot find that the
25 presumption of openness has been successfully rebutted.

1 It may well be that opening these records creates
2 substantial issues at trial directly impacting the
3 defendant's right to a fair trial. By filing the entire
4 discovery file in this matter, the State may well have
5 created a substantial issue for appeal in the event the
6 defendant is eventually convicted of these crimes.
7 However, at this point in time, those issues are too
8 speculative to order that those documents remain under
9 seal.

10 Opening these files will create issues for
11 jury selection, but without the ability to see into the
12 future as to how these documents will be handled and
13 utilized by the media and other interests, the Court
14 cannot conclude at this time that the defendant has
15 carried his burden on this issue.

16 Accordingly, the Court denies the motion to
17 seal with regard to all documents with the exception of
18 the medical records previously noted. The temporary order
19 sealing the discovery file is hereby vacated.

20 As a result of this ruling, the Court finds
21 that the motion of the family to have access to these
22 records is rendered moot and is, therefore, denied
23 accordingly on that basis. The defendant has requested an
24 opportunity to file with the Court a more detailed
25 description and argument for the specific documents that

1 he seeks to have placed under seal. The Court will allow
2 counsel for the defendant one week in which to file the
3 additional information in this matter.

4 Mr. Ofman, is it your representation to the
5 Court that the defendant would intend to take an appeal of
6 this order?

7 MR. OFMAN: Yes, Your Honor, and we would
8 ask that you grant us a Rule 9 and seal the records until
9 that's done.

10 THE COURT: All right. The Court will
11 grant permission under Rule 9 of the Tennessee Rules of
12 Appellate Procedure, allowing the defendant the right to
13 appeal this matter at this time to Tennessee Court of
14 Criminal Appeals.

15 The Court orders that the application to the
16 Court of Criminal Appeals be filed within 10 days of the
17 date of this order.

18 The Court will stay the effective date of this
19 order here today, this ruling here today until such time
20 as the appellate courts have had an opportunity to rule on
21 the Rule 9 application.

22 Are there further matters to come before the
23 Court, Mr. Harvey?

24 MR. HARVEY: Your Honor, I'd like to ask
25 for point of clarification on the medical records. Would

FILED
IN THE CIRCUIT COURT FOR BEDFORD COUNTY TENNESSEE IN THE SEVENTEENTH JUDICIAL DISTRICT, AT SHELBYVILLE

2012 JUN 21 PM 4:08

IN RE: JUSTIN A. HANSEN, born as ARTEM VLADIMIROVICH SAVELIEV, a minor child and citizen of the United States and Russia

RICHARD P. ROOKER, CLERK
[Signature] D.C.

*Proposed
Order
Submitted
for
hearing*

JENNIFER TERHUNE, et al.,

Petitioners,

v.

TORRY HANSEN,

Respondents,

And

Case No. 12062

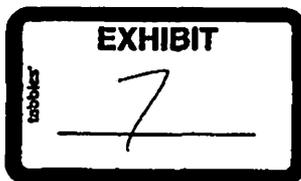
THE TENNESSEAN, SHELBYVILLE TIMES-GAZETTE, TENNESSEE PRESS ASSOCIATION, TENNESSEE COALITION FOR OPEN GOVERNMENT, INC., MIDDLE TENNESSEE PROFESSIONAL CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE ASSOCIATED PRESS, MEREDITH CORPORATION (owner and operator of WSMV-TV Channel Four), and YOUNG BROADCASTING OF NASHVILLE, LLC (owner and operator of WKRN-TV Channel Two),

Movants/Intervenors.

ORDER

This cause came to be heard on November 21, 2011, to consider the Respondents' "Emergency Motion to Uphold the Confidentiality of Proceedings" (the "Emergency Motion"). Respondents' Motion sought the closure of these proceedings. The Respondents' Motion had been set for hearing previously, but at that hearing various media organizations had raised objections and the Court elected to reschedule Respondents' Motion in order to permit applications to intervene and further consider the issues presented.

8186378.3



On November 16, 2011, a Motion to Intervene for the Limited Purpose of Being Heard in Opposition to Respondents' "Emergency" Motion to Close Courtroom Proceedings and to Close Access to Judicial Records was filed by the following media and open government organizations: *The Tennessean*, *Shelbyville Times-Gazette*, Tennessee Press Association, Tennessee Coalition for Open Government, Inc., Middle Tennessee Professional Chapter of the Society of Journalists, and The Associated Press. At the hearing on November 21, two additional media entities sought permission to join in the motion to intervene filed November 16, 2011: Meredith Corporation, owner and operator of WSMV-TV Channel Four, and Young Broadcasting of Nashville, LLC, owner and operator of WKRN-TV Channel Two. The proposed Intervenor's opposed closure of these proceedings and also opposed the continued closure of the entire judicial record.

At the hearing on November 21, 2011, the Court first considered the Motion to Intervene by the eight media and open government organizations. Without objection, the Motion to Intervene was **GRANTED**.

At the hearing, the Court heard argument from all counsel. A blanket seal on the judicial record is currently in place, pursuant to an agreed order submitted by counsel for the Petitioners and the Respondents. Counsel for Respondents argued in favor of keeping that agreed sealing order in place, and cited general statutes in Tennessee regarding adoption records (Tenn. Code Annot. Section 36-1-125) and juvenile court records (Tenn. Code Annot. Section 37-1-153) as providing a basis for confidentiality of those records. Counsel for Petitioners raised a concern about the confidentiality of adoption records under a Washington State statute (which is where World Association for Children and Parents is headquartered), but did not otherwise oppose Intervenor's request to open the Court's records.

The Court heard argument from all counsel. The Court also offered the parties the opportunity to put on evidence. Counsel for the Respondents/Movants relied upon the two

Tennessee statutes cited above, but chose not to offer any evidence in support of the "Emergency Motion." Counsel for the Intervenor, arguing that the Respondents'/Movants' bore a high burden to justify closing proceedings and sealing records and had failed to carry that burden, chose not to present evidence. The Petitioners did not present evidence.

The Court finds that the well-settled procedures for closure of proceedings and other restrictive orders as articulated in State v. Drake, 701 S.W.2d 604, 608 (Tenn. 1985) apply in this matter. When a party requests a closure or other restrictive order (such as an order to seal judicial records), among other procedural requirements stated in the Drake decision, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id. (citing Waller v. Georgia, 104 S. Ct. 2210, 2212 (1984)). If this proceeding was merely an extension of a juvenile court proceeding, then the Court would take into consideration the procedural requirements stated in State v. James, 902 S.W.2d 911, 914 (Tenn. 1995) ("James I") and the progeny of that case.¹

The Court finds that the best interests of the juvenile involved in these proceedings is a paramount consideration. Here, the juvenile in question is represented by counsel for the Petitioners, rather than counsel for the proponents of the "Emergency Motion."

The Court finds that the Respondents/Movants have failed to show any particularized prejudice to the juvenile that would result as a result of maintaining the openness of these proceedings. In addition, and although it is not the appropriate inquiry given the nature of this lawsuit, the Court finds that the Respondents/Movants have failed to show any particularized

¹ State v. James, 1995 WL 468433 (Tenn. Ct. App. Aug. 9, 1995) ("James II") and State v. James, 1995 WL 776692 (Tenn. Sept. 28, 1995) ("James III").

prejudice to themselves that would result as a result of maintaining the openness of these proceedings.

The Court has carefully considered the arguments of counsel, the motions filed by Respondents/Movants and the Intervenors, and the written memorandum submitted by the Intervenors. The Court orders as follows:

1. The public has a qualified constitutional right of access to the courtroom proceedings and to judicial records that only may be overcome by an overriding interest.
2. The parties seeking to restrict public access, in this case the Respondents/Movants, have the burden of rebutting the public's presumptive right of access by demonstrating a particularized prejudice to the juvenile's rights if the courtroom proceedings are open or if the judicial records are made publicly available.
3. The Court finds that the Respondents/Movants have not met their burden. The "Emergency Motion to Uphold the Confidentiality of Proceedings" is denied.
4. The "agreed" order submitted by the Parties and entered by the Court sealing the judicial record is broader than necessary and is dissolved.
5. The Court shall review the judicial record to make a determination whether some documents included therein and which have not previously been made available to the media and/or public would qualify as adoption records as to which a statutory confidentiality provision may apply. With the exception of those particular documents which shall be listed on a schedule for further discussion with counsel for the parties (including the Intervenors), the judicial record shall be made available to the public. The Respondents and the Petitioners bear the burden of establishing that particular documents are required to be maintained as confidential under state law, and shall provide the specific statutory basis for such assertion.
6. Until such time as the conditions of Para. 5 are met, the portions of the file which are currently under seal shall remain under seal.

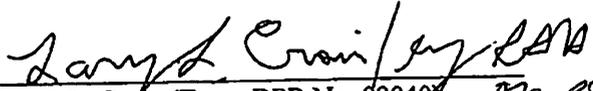
IT IS SO ORDERED.

F. Lee Russell, Circuit Court Judge

APPROVED FOR ENTRY:



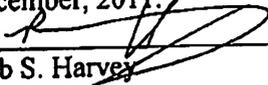
Robb S. Harvey (Tenn. BPR No. 11519)
Keith Randall (Tenn. BPR 30313)
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, Tennessee 37219
(615) 244-6380
Attorneys for Intervenors



Larry L. Crain (Tenn. BPR No. 09040) *with permission*
5214 Maryland Way, Suite 402
Brentwood, TN 37027
(615) 376-2600
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing has been mailed, via email (.pdf format) and via first-class, postage prepaid, to: Sandra L. M. Smith, 201 W. Main Street, Suite 204, Murfreesboro, TN 37130, this 14 day of December, 2011.



Robb S. Harvey

2012 WL 2244812

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

In the matter of Lyle L. LAWTON.

Stephen Lawton

v.

Lyle L. Lawton.

No. M2011-00475-COA-R3-CV. |

Dec. 15, 2011 Session. | June 15, 2012.

Appeal from the Chancery Court of Coffee County, No. 10-22; Vanessa A. Jackson, Judge.

Attorneys and Law Firms

Floyd Don Davis, Winchester, Tennessee, for respondent/ appellant, Lyle L. Lawton.

James C. Thomas, Winchester, Tennessee, for petitioner/ appellee, Stephen Lawton.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Opinion

OPINION

HOLLY M. KIRBY, J.

*1 This appeal involves a conservatorship. After the parties announced in open court that they had reached an agreement on a partial conservatorship, the appellant ward stood up in court and asked to speak. The hearing was adjourned and subsequently the partial conservatorship was ordered in accordance with the agreement. The ward now appeals, arguing *inter alia* that the trial court erred in failing to hold an evidentiary hearing, failing to make the requisite findings, and failing to hear from the ward. We find no error and affirm.

FACTS AND PROCEEDINGS BELOW

On January 20, 2010, Petitioner/Appellee Stephen Lawton, ("Son") filed a petition in the Chancery Court of Coffee

FILED
2012 JUN 21 PM 4:06
RICHARD R. ROBERTSON, CLERK

County, Tennessee, seeking to be appointed conservator for his father, Respondent/Appellant Lyle L. Lawton ("Mr. Lawton"). At that time, Mr. Lawton was approximately 91 years old, legally blind, and had significant hearing loss.

Not long before Son filed his petition, Mr. Lawton had received \$78,000 from the Veteran's Administration. Shortly after Mr. Lawton received these monies, he married Lena Kite ("Mrs. Lawton-Kite"). Son's conservatorship petition alleged that Mr. Lawton's ability to manage his finances and personal affairs had declined due to some form of dementia, and Son asserted that Mr. Lawton was making inappropriate loans and substantial monetary gifts from the monies he had received. Son claimed that the recipients of the gifts and loans were exerting undue influence over his father. It appears that, at some point, Son became alarmed at the rapid disappearance of his father's monies and removed a portion of Mr. Lawton's funds from Mr. Lawton's control. Son deposited his father's funds with a credit union.

After Son filed his petition, the trial court appointed attorney Christopher R. Stanford as the guardian ad litem ("GAL") for Mr. Lawton, pursuant to Tennessee Code Annotated § 34-1-107. The trial court also ordered that Mr. Lawton be examined by a geriatric physician to determine his mental state and his ability to manage his personal and financial affairs. Son was ordered to transfer the credit union funds to the Clerk and Master of the Court for safekeeping. The trial court enjoined the sale of any of Mr. Lawton's real property pending the hearing, scheduled for November 16, 2010.

Mr. Lawton was evaluated by three physicians: Harry Gwirtsman, M.D. ("Dr. Gwirtsman"), a certified geriatric physician chosen by the GAL, osteopath Albert O. Brandon, D.O. ("Dr. Brandon"), and psychiatrist Indira Challa, M.D. ("Dr. Challa").

In order to investigate Mr. Lawton's circumstances, the GAL visited Mr. Lawton and his new wife, Mrs. Lawton-Kite for an approximate one-hour conversation. The GAL's observations and conclusions were summarized in his report to the trial court. He commented on Mr. Lawton's physical infirmities, noting that he used a walker, magnifier, and hearing aids, and also depended on his wife to get around. In the GAL's visit with Mr. Lawton, the report stated, Mrs. Lawton-Kite answered most of the questions "in an angry, irritated and forceful tone while [Mr. Lawton] intermittently, repetitively and angrily accused his son of stealing from him and demanded that he be prosecuted."



*2 The GAL also reported that Mr. Lawton loaned \$70,000 to a friend of Mrs. Lawton-Kite, Barbara Jones ("Ms. Jones"). The loan was to be repaid by Ms. Jones at a rate of \$200 per month with no interest. The GAL report said that Mr. Lawton gave Ms. Jones a \$5,000 gift in addition to the \$70,000 loan. The GAL noted that Ms. Jones and Mrs. Lawton-Kite gave conflicting statements about how the loan and gift came about.

This series of events was what led to Son's involvement in Mr. Lawton's finances, and ultimately to Son filing the conservatorship petition. In August 2009, after Ms. Jones had asked Mr. Lawton for another \$10,000 in addition to the \$70,000 loan she had already received, Mr. Lawton became confused about what to do and asked Son for advice. Son responded by suggesting that Mr. Lawton put the money into a CD to make it less accessible and so that it could accrue interest. Mr. Lawton initially agreed and named Son as his power of attorney that day; Son placed the money in a CD. The next day, apparently after discussing the matter with Mrs. Lawton-Kite, Mr. Lawton revoked Son's power of attorney and withdrew the money from the CD. Mr. Lawton then decided that he wanted his wife to have power of attorney for him going forward. The GAL recounted this incident in his report and described it as "indicative of the ease with which, [Mr. Lawton] is able to be influenced ... [and] to be unable to make his own informed financial decisions." The GAL also reported that Mr. Lawton had spent \$27,500 on a new vehicle for Mrs. Lawton-Kite, wrote her a check for \$19,500, and gave Son a gift of \$20,000 as well.

In his report, the GAL also assessed the medical experts' evaluations of Mr. Lawton's mental state. The GAL recommended that the evaluations of Mr. Lawton by Drs. Brandon and Challa be given less weight than Dr. Gwirtsman's evaluation. The GAL characterized the examinations by Drs. Brandon and Challa as "more limited," in that each relied only on a single short discussion with Mr. Lawton to determine his competency, and neither did any testing beyond the short discussion. After a 25-30 minute interview with Mr. Lawton, the GAL said, Dr. Brandon determined that Mr. Lawton suffered from Lewy Body Dementia, but opined that Mr. Lawton's dementia did not rise to the level necessary to appoint a conservator over his person or finances.¹ The GAL's report noted that Dr. Challa's records did not say how much time Dr. Challa spent with Mr. Lawton and did not indicate that Dr. Challa performed any medical tests on Mr. Lawton. Dr. Challa concluded that Mr. Lawton "is competent to handle his own

affairs," but the GAL's report characterized this opinion as "contradictory" to Dr. Challa's previous diagnosis indicating that Mr. Lawton suffers from mild to moderate dementia and requires medication.²

¹ Dr. Brandon's opinion as to Mr. Lawton's mental state is not contained in the medical records that are in the appellate record. The GAL's report references a deposition given by Dr. Brandon, in which he expresses his opinion on Mr. Lawton, but the appellate record does not include a transcript of the deposition.

² The previous report by Dr. Challa to which the GAL refers is not in the appellate record. The record indicates however that Dr. Challa rated Mr. Lawton's dementia as "Actual FAST staging 5," sufficient for continued use of the dementia medication Galantamine.

In contrast, the GAL report stated, Dr. Gwirtsman first consulted Mr. Lawton's medical records with the Veteran's Administration, and then "performed a battery of tests" on Mr. Lawton, "including an ESR, Apo-E genotype, Vitamin D levels, SED rate, [and a] mini-mental examination." In addition, Dr. Gwirtsman interviewed Mr. Lawton and other family members. The GAL characterized Dr. Gwirtsman's evaluation of Mr. Lawton's data as "extensive." Based on the interviews and the tests, Dr. Gwirtsman concluded that while Mr. Lawton retained the capacity to make personal decisions such as whom to marry, he was physically unable to care for himself and lacked "the capacity to manage finances." Dr. Gwirtsman said that Mr. Lawton's dementia had progressed to the point that "a fiduciary is necessary for the management of [Mr. Lawton's] financial affairs."

*3 Based on his own investigation and the evaluation of Dr. Gwirtsman, the GAL opined in his report that Mr. Lawton "is in need of a conservator and/or a fiduciary to manage his financial affairs." The GAL expressed concern about the "alarming rate" at which Mr. Lawton's assets "disappeared" with Mrs. Lawton-Kite as his caretaker, and also noted the strain in the relationship between Son and Mr. Lawton. For those reasons, the GAL recommended that the trial court appoint a neutral third party as fiduciary for Mr. Lawton.

The GAL's report and the physicians' evaluations of Mr. Lawton were filed with the trial court in advance of the scheduled hearing. Prior to the hearing, there were no objections filed to the trial court's consideration of these materials, and the trial judge reviewed them before the hearing on November 16, 2010.

The hearing took place as scheduled on that date. Present at the hearing were Son and his attorney, Mr. Lawton and his attorney, and the GAL. At the outset, the parties announced that, at "the eleventh hour," they had agreed on a settlement, namely, a limited conservatorship pursuant to Tennessee Code Annotated § 34-7-126. Son's attorney indicated that the parties had agreed as to a finding that Mr. Lawton is a disabled person within the meaning of the statute, and a recommendation that the trial court appoint the county mayor to serve as conservator. The parties agreed that there was no issue concerning Mr. Lawton's testamentary capacity, and that the conservatorship would pertain only to the management of Mr. Lawton's financial affairs. Mr. Lawton's attorney emphasized at the hearing that the criteria in the statute for a finding of disability was not limited to a ward's mental status but also included physical impairments such as those suffered by Mr. Lawton, including Parkinson's disease, sight problems, and hearing difficulties. Mr. Lawton's attorney indicated that the proposed order that the parties would submit to the trial court would not specify the type of disability involved.

After listening to the description of the announced settlement by the attorneys for Son and Mr. Lawton, the trial court asked the GAL to give his opinion regarding the proposed agreement. The GAL told the trial court that he agreed with the proposed settlement and believed that it was in the best interest of Mr. Lawton. At this point in the proceedings, the following exchange took place:

Mr. Thomas [Attorney for Son]: Your Honor, I guess finally I would—

Mr. Lawton: (Interposing) Does the victim have any chance to say a word? The Court: Mr. Kirkpatrick [Attorney for Mr. Lawton], you want to talk with him for just a moment? I hate for people just to speak in court without having an opportunity to consult with counsel. I certainly will hear from him, but if you want to take a few moments and—

Mr. Kirkpatrick: (Interposing) Can we take a break?

The Court: Yes, let's take just a quick break and then I'll come back and hear from Mr. Lawton if he has something that he wants to say to the Court.

*4 Mr. Thomas: Your Honor, real quickly before the break, I believe I'm correct in stating that number one. Mr.

Stanford's report that he filed as guardian ad litem is in the court file—

The Court: (Interposing) Yes.

Mr. Thomas:—as well as I believe delivered to you is a copy of Dr. Brandon's deposition and Dr. Gwirtsman's assessment.

The Court: I read all of those last night.

Mr. Thomas: Very well, Judge.

The Court: Okay. Let's take a break, and we'll come back in—let's take about a five- or tenminute break and we'll come back, and then if Mr. Lawton still has something that he wants to address to the Court, I'll be happy to hear that, okay?

(Thereupon a recess was taken.)

Mr. Kirkpatrick: Thank you, your honor.

Mr. Thomas: Thank you, Judge.

The Court: Okay. I understand we're adjourned. It's a little bit informal, but you-all are free to go. Thank you for your patience today. We appreciate you-all being here.

The record does not indicate what occurred during the recess of the hearing after Mr. Lawton's interjection. Approximately two weeks after the hearing, on November 30, 2010, the trial court entered a consent order establishing a partial conservatorship as to Mr. Lawton, as described in the hearing. The order was signed by the attorney for Son, the attorney for Mr. Lawton, and by the GAL.³

³ The signatures of Son's attorney and the GAL were signed with permission by Mr. Lawton's attorney.

On December 29, 2010, Mr. Lawton filed a motion pursuant to Rule 59 of the Tennessee Rules of Civil Procedure, in which he sought a rehearing as to the November 30, 2010 order and dismissal of the partial conservatorship ordered by the trial court. The Rule 59 motion was filed on behalf of Mr. Lawton by attorney Floyd Davis, who had not previously appeared to represent Mr. Lawton. Citing Tennessee Code Annotated § 34-1-126, Mr. Lawton's motion argued that the trial court was required to find by clear and convincing evidence that Mr. Lawton was fully or partially disabled and in need of assistance. The motion noted that the November 30, 2010 order did not state that the trial court held an

evidentiary hearing, only that it heard statements from the parties' counsel and the GAL, and that they had reached an agreement regarding a partial conservatorship. On January 5, 2011, the trial court entered an order permitting attorney Davis to be substituted as counsel for Mr. Lawton, to replace Mr. Kirkpatrick.⁴ The order did not indicate the reason for the substitution of counsel.

⁴ The record does not include a written motion for substitution of counsel.

On February 1, 2011, the trial court held a hearing on Mr. Lawton's Rule 59 motion. The appellate record does not contain either a transcript of the February 1, 2011 hearing or a statement of the evidence for it. The record indicates, however, that the hearing included testimony by Mr. Lawton's former attorney Mr. Kirkpatrick, and statements and arguments by the parties' counsel and the GAL.

On February 23, 2011, the trial court entered an order on Mr. Lawton's Rule 59 motion. This order clarified and augmented the trial court's November 30, 2010 order, and denied the Rule 59 motion. It stated:

*5 1. That in approving the agreement of the parties as evidenced by this Court's previous Order dated November [30], 2010, the Court, in addition to approving said agreement, also considered the report of the Guardian ad litem, the report of Dr. Harry Gwirtsman and the deposition of Dr. Albert Brandon prior to the announcement of the parties' agreement and that said reports were given to the Court by stipulation of the parties that said reports would be evidence in this matter and that said reports were filed with the clerk of the Court. Respondent argues that the report of Dr. Harry Gwirtsman was not sworn to according to law. The Court finds that the parties hereto by agreement selected said Dr. Gwirtsman to conduct the examination of respondent, not the Court, and that the parties stipulated that such report would be entered into evidence without objection. The Court further finds that the report of Dr. Gwirtsman was attested to when submitted to the Court by stipulation of the parties.

2. That although the aforesaid agreed order did not specifically use the term "clear and convincing evidence", that said terminology was implied in said order due to the fact that said order stated "That pursuant to T.C.A. 34-1-126, there is sufficient evidence that by virtue of the aforementioned disablement that the respondent is in need of partial supervision" and that said T.C.A. 34-1-126 is the standard of proof required in such matters.

3. That as concerns respondent's argument that the Court did not specifically state in its order that it found the appointment of a conservator to be in the best interest of the respondent, the court did consider T.C.A. 34-3-103 which deals with the proper party to be appointed as conservator and which also mandates that such conservator shall be appointed only if the Court finds that it is in the best interest of the respondent that a conservator be appointed. The Court further finds that in the announced settlement by and between the parties that it was stated on the record that the appointment of a conservator in this matter was in the best interest of the respondent.

4. The court further finds that based upon the foregoing that the Court is of the opinion that there was presented unto the Court on the day of said announcement that there existed clear and convincing evidence that the appointment of a partial conservatorship in this matter was proper and that such appointment was and is in the best interest of the respondent and imposed the least restrictive alternatives upon respondent.

Thus, the trial court stated that it considered the GAL report and the physicians' records and reports pursuant to a stipulation by the parties that these items be submitted as evidence. It also said that its finding that Mr. Lawton was partially disabled and in need of partial supervision was made based on clear and convincing evidence. The trial court acknowledged that its prior order did not include a best interest finding, and stated that it in fact found by clear and convincing evidence that a partial conservatorship would be in Mr. Lawton's best interest. On this basis, the trial court denied Mr. Lawton's Rule 59 motion. Mr. Lawton now appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

*6 On appeal, Mr. Lawton presents the following issues for review:

1. The trial court erred by failing to hold an evidentiary hearing on the need for a conservatorship because the Order of November 30, 2010 establishing a partial conservatorship states that the court heard statements of counsel and the Guardian ad Litem and that an agreement had been reached and there was no finding by clear and convincing evidence that the Respondent was fully or partially disabled and in need of assistance before a fiduciary was appointed.

2. The evidence that was considered by the trial court was not properly introduced into evidence.

3. The trial court erred by refusing to hear from the Respondent after the Respondent requested to be heard in open court.

4. The trial court erred when it denied the Respondent's motion pursuant to Rule 59 of the Tennessee Rules of Civil Procedure because the court made additional findings of fact in its Order of February 23, 2011, that were not contained in the record.

This Court recently summarized the standard for the appellate court in reviewing an order appointing a conservator:

[A] petition for the appointment of a conservator requires the lower court to make legal, factual, and discretionary determinations, each of which requires a different standard of review. On appeal, a trial court's factual findings are presumed to be correct, and [a reviewing court] will not overturn those factual findings unless the evidence preponderates against them. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. [The appellate court] review[s] a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. [The appellate court] review[s] discretionary determinations under an abuse of discretion standard. A trial court abuses its discretion when it has applied an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining.

In the Matter of the Conservatorship of Todd ("In re Todd"), E2009-02346-COA-R3-CV, 2010 WL 2350568, at *8; 2010 Tenn.App. LEXIS 383, at *23-24 (Tenn. Ct.App. June 14, 2010) (internal citations omitted).

ANALYSIS

Background

"The purpose of a conservatorship is to protect the person and the property of a disabled person." *AmSouth Bank v. Cunningham*, 253 S.W.3d 636, 641 (Tenn.Ct.App.2006). "Conservators are court appointed fiduciaries who act as agents of the court and their rights and responsibilities are set forth in the court's orders." *Id.* In every conservatorship proceeding, the trial court is to determine whether the respondent to the conservatorship petition is fully or partially disabled and in need of assistance and, if so, whether a full or partial conservatorship is in the respondent's best interest. See *In re Todd*, 2010 WL 2350568, at *8; *In the Matter of the Conservatorship of Groves ("In re Groves")*, 109 S.W.3d 317, 330 (Tenn.Ct.App.2003). Under Tennessee Code Annotated § 34-1-126, the petitioner seeking the conservatorship must prove by clear and convincing evidence that the respondent is a "disabled person."⁵ See *In re Todd*, 2010 WL 2350568, at *7, 10; *In re Groves*, 109 S.W.2d at 330 (citing Tenn.Code Ann. § 34-1-126). Once the petitioner meets his burden of proving that the respondent is fully or partially disabled and in need of assistance from the court, the trial court is then charged with responsibility for determining whether the appointment is in the respondent's best interest. See *In re Todd*, 2010 WL 2350568, at *8. Recognizing the value society places on individual autonomy and self-determination, the court is statutorily required to choose the least restrictive alternative that will sufficiently protect the respondent. Tenn.Code Ann. § 34-1-127; see *In re Groves*, 109 S.W.3d at 330; *In re Todd*, 2010 WL 2350568, at *7.

⁵ Tenn.Code Ann. § 34-1-101(7) defines a "disabled person" as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity."

Respondent's Interjection at Hearing

*7 Initially, Mr. Lawton argues that, from his interjection at the November 16, 2010 hearing, in which he referred to himself as a "victim" and asked to be heard, "the trial court should have realized immediately that there were problems with the parties' alleged agreement." He contends that the outburst at the November 2010 hearing amounted to a demand for his rights under Tennessee Code Annotated § 34-3-106. That statute provides that, in a conservatorship proceeding, the respondent to the conservatorship petition has the right to:

- (1) On demand by respondent or the guardian ad litem, a hearing on the issue of disability;
- (2) Present evidence and confront and cross-examine witnesses;
- (3) Appeal the final decision on the petition;
- (4) Attend any hearing; and
- (5) Have an attorney ad litem appointed to advocate the interests of the respondent.

Tenn.Code Ann. § 34-3-106 (2007). By adjourning the hearing after Mr. Lawton's outburst, he contends, the trial court denied him his rights.

After reviewing the transcript of the November 16, 2010 settlement agreement, we must respectfully disagree. Nothing in Mr. Lawton's statement at the hearing indicated that he either disagreed with the statements made by the attorneys for the parties in open court or that Mr. Lawton wished to withdraw his consent to the agreement. Moreover, the trial court did not deny Mr. Lawton's request to be heard. To the contrary, the trial judge stated clearly that she would be happy to hear from Mr. Lawton if he wished to address the court, and called a brief recess in order to give Mr. Lawton an opportunity to confer with his attorney. Upon recommencement of the hearing, Mr. Lawton did not further address the trial court, and neither Mr. Lawton nor his attorney indicated that he wished to withdraw his consent to the proposed conservatorship agreement. Indeed, the trial court's November 30, 2010 order is signed by Mr. Lawton's attorney.

Furthermore, Mr. Lawton's Rule 59 motion does not refer to his interjection at the November 16, 2010 hearing. It refers to the parties having reached an agreement as to a partial conservatorship but contains no indication that Mr. Lawton desired to withdraw his consent to that agreement. Instead, the gist of the Rule 59 motion was that, despite the parties' agreement, the trial court was required to conduct a full evidentiary hearing, and asks for dismissal of the order granting a partial conservatorship on that basis. This being the case, we find that the issue of Mr. Lawton's consent to the agreement was never raised in the trial court. As such, we decline to hear it for the first time on appeal. See *Lobertini v. Brown*, No. M2006-01485-COA-R3-JV, 2008 WL 275883, at *3; 2008 Tenn.App. LEXIS 57, at *7-8 (Tenn.Ct.App. Jan.

31, 2008) ("If an issue is not properly raised in the trial court, it cannot be raised for the first time on appeal.").

Accordingly, we consider the remaining issues raised on appeal in light of Mr. Lawton's agreement to the partial conservatorship on the terms outlined by the attorneys at the November 16, 2010 hearing.

Evidentiary Hearing

*8 Mr. Lawton argues next that the trial court erred by failing to hold an evidentiary hearing on the need for a conservatorship. Mr. Lawton notes that the trial court's November 30, 2010 order refers only to the trial court having heard statements of counsel and of the GAL, and does not reflect a finding by clear and convincing evidence that Mr. Lawton was fully or partially disabled and in need of court assistance.

In support, Mr. Lawton cites *In re Todd*, in which the parties agreed to the appointment of a conservator after the trial court heard testimony from the GAL. *In re Todd*, 2010 WL 2350568, at *2-4. However, prior to the entry of the trial court's order, the respondent in *In re Todd* withdrew consent to the conservatorship. *Id.* at *3, 10. Nevertheless, the trial court entered an order of conservatorship, in accordance with the revoked agreement. *Id.* at *3, 11. The respondent appealed. The appellate court vacated the conservatorship order, finding that the truncated evidence at the hearing was insufficient to support a finding that the respondent was disabled and in need of assistance. *Id.* at *13. In addition, the appellate court found that the trial court was required to make a finding on the respondent's best interest, and had not done so. *Id.* at *10.

We must respectfully reject Mr. Lawton's argument for a number of reasons. First, the trial court held not one, but two hearings, both of which must be considered evidentiary hearings. The trial court's February 23, 2011 order makes it clear that, prior to the November 16, 2010 hearing, the parties stipulated that the report of the GAL and the physicians' records and reports would be considered by the trial court as evidence at the November hearing. The trial court's February 23, 2011 order also makes it clear that the February 2011 hearing on Mr. Lawton's Rule 59 motion was an evidentiary hearing, and that the trial court heard testimony from at least one witness. As the appellate record does not include either a transcript of the Rule 59 hearing or a statement of the evidence submitted at the hearing, we must presume that the evidence presented at the hearing supports the

findings of the trial court. *In re M.L.D.* 182 S.W.3d 890, 895 (Tenn.Ct.App.2005); *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn.Ct.App.1992).

Moreover, the parties stipulated in open court that Mr. Lawton was disabled and in need of the court's assistance. As noted above, this agreement was never revoked by Mr. Lawton. While this Court in *In re Todd* held that the trial court may not defer to the parties' agreement on the issue of best interest, it did not rule that the trial court may not accept the parties' stipulation that the respondent is disabled and in need of assistance.⁶ *In re Todd*, 2010 WL 2350568, at *10.

⁶ In *In re Todd*, the respondent withdrew his consent prior to entry of the trial court's order. Therefore, in contrast to the case at bar, in *In re Todd* there was no stipulation that the respondent was disabled and in need of the court's assistance.

Mr. Lawton also notes that the trial court's November 30, 2010 order does not include a finding by clear and convincing evidence that Mr. Lawton was disabled and in need of assistance. As discussed above, the parties stipulated as to this fact, and Mr. Lawton has cited no Tennessee authority indicating that the trial court cannot rely on such a stipulation. Regardless, however, the trial court's February 23, 2011 order makes it clear that the trial court did in fact find that Mr. Lawton was disabled and in need of the court's assistance, based on the clear and convincing evidence presented to the trial court.

Evidentiary Objections

*9 Mr. Lawton also challenges some of the evidence that was considered by the trial court. Specifically, Mr. Lawton contends that the medical report of Dr. Gwirtsman did not comply with the requirements set forth in Tennessee Code Annotated § 34-3-105 which lists criteria for a physician's report in a conservatorship proceeding. He also notes that Dr. Brandon's deposition was not made a part of the trial court record. Mr. Lawton argues that all of the evidence considered by the trial court was not made a part of the record because it was neither submitted as evidence nor orally read to the trial court at the hearing. Mr. Lawton also claims that the trial court erred in relying upon this evidence to make additional findings of fact in its February 23, 2011 order, and in denying his Rule 59 motion on this basis.

The appellate record indicates that Mr. Lawton's objection that the physicians' medical reports did not comply with

Section 34-3-105 was not raised until the hearing on his Rule 59 motion. Indeed, no evidentiary objections were raised prior to the hearing on the Rule 59 motion.⁷ Therefore, on appeal, we may consider only whether the trial court erred in denying Mr. Lawton's Rule 59 motion on this basis. This Court reviews the denial of a Rule 59 motion under an abuse of discretion standard. *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn.2003). A Rule 59 motion should only be granted "when controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice" and "should not be used to raise or present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.* 182 S.W.3d at 895.

⁷ The written Rule 59 motion filed by Mr. Lawton does not mention any evidentiary objections. However, the trial court's February 23, 2011 order denying Mr. Lawton's Rule 59 motion refers to an argument made by Mr. Lawton that the report of Dr. Harry Gwirtsman was not sworn to according to law.

All of Mr. Lawton's evidentiary objections, of course, could have been raised before the trial court entered the November 30, 2010 order. Instead, the admissibility of all of this evidence, including Dr. Brandon's deposition, the GAL report, and Dr. Gwirtsman's assessment, was stipulated to by all the parties prior to the November 2010 hearing. Accordingly, we find no abuse of the trial court's discretion in denying Mr. Lawton's Rule 59 motion on this basis.

Mr. Lawton also contends that the trial court erroneously relied on this evidence to make additional findings of fact in its February 23, 2011 order on the Rule 59 motion. We must disagree with this argument as well. As discussed above, Mr. Lawton stipulated to the submission of this evidence to the trial court for its consideration. In its February 23, 2011 order, the trial court referred to factual findings that Mr. Lawton is disabled and in need of assistance, and that the appointment of a conservator was in his best interest. The extent to which these findings are new or are clarifications of the November 30, 2010 order is unclear. Regardless, in view of the parties' stipulation as to the admissibility of the evidence in question, we see no error in the trial court's reliance on the evidence to make its findings. This issue is without merit.

*10 Finally, Mr. Lawton argues that the parties' agreement in this case "prevented any additional evidence, pro and con, on the subject matter of the Respondent's best interest from being introduced" and thus the trial court "could not make a determination as to the respondent's best interest as statutorily

required." Mr. Lawton analogizes the facts in this case to those presented in *In re Todd*, in which this Court held that the trial court has a statutory obligation to make an independent analysis of the respondent's best interest, and not simply accept the parties' agreement regarding the appointment of a conservator. *In re Todd*, 2010 WL 2350568, at *10.

We must respectfully disagree. In its February 23, 2011 order, the trial court stated expressly that it considered the statutory requirement that it make an independent finding on best interest, and then found that the appointment of a conservator was in Mr. Lawton's best interest:

That as concerns respondent's argument that the Court did not specifically state in its order that it found the appointment of a conservator to be in the best interest of the respondent, the court did consider T.C.A. 34-1-103 which deals with the proper party to be appointed as conservator and which also mandates that such conservator shall be appointed only if the Court finds that it is in the best interest of the respondent that a conservator be appointed. The Court further

finds that in the announced settlement by and between the parties that it was stated on the record that the appointment of the conservator in this matter was in the best interest of the respondent.

The trial court stated that its best interest finding was based on the clear and convincing evidence submitted prior to the November 16, 2010 hearing, showing "that the appointment of a partial conservatorship in this matter was proper and that such [an] appointment was and is in the best interest of [Mr. Lawton] and imposed the least restrictive alternatives upon [him]." Thus, we find the trial court made an independent best interest determination, consistent with *In re Todd*, and that there is clear and convincing evidence in the record to support the finding that the appointment of a conservator was in Mr. Lawton's best interest.

CONCLUSION

The decision of the trial court is affirmed. Costs on appeal are assessed against Appellant Lyle L. Lawton and his surety, for which execution may issue if necessary.

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SHARPTON et al. v. HALL et al.

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COURT OF APPEALS OF GEORGIA, FOURTH DIVISION

296 Ga. App. 251; 674 S.E.2d 105; 2009 Ga. App. LEXIS 185; 2009 Fulton County D. Rep. 675

February 20, 2009, Decided

PRIOR HISTORY: Guardianship records. Gwinnett Probate Court. Before Judge Clarke.

DISPOSITION: [***1] Judgment affirmed.

COUNSEL: James B. McGinnis, for appellants.

Webb, Tanner, Powell, Mertz & Wilson, Anthony O. L. Powell, James E. Carlson, for appellees.

JUDGES: SMITH, Presiding Judge. Mikell and Adams, JJ., concur.

OPINION BY: SMITH

OPINION

[*251] [**105] Smith, Presiding Judge.

In this case of first impression, we are called upon to construe *OCCA* § 29-9-18, governing the granting of access to sealed records of a conservatorship or guardianship. The probate court did not abuse its discretion in interpreting the statute and granting limited access to the records at issue here. We therefore affirm.

Stan L. Hall, as administrator of the estate of Raymond Sharpton, filed a petition in the Probate Court of Gwinnett County to open the guardianship records of Avolee Sharpton, an incompetent adult. As the facts were

stated in the motion and at the hearing on the motion, Raymond, Avolee, and Billy J. Sharpton were siblings. Billy Sharpton was also the guardian of Avolee. As the probate court noted in its order, "the Sharpton family tradition was to execute a deed as a [w]ill substitute and to keep the deed in a safe deposit box until the death of the grantor," and deeds were executed in favor of Billy Sharpton by both Raymond and Avolee. Before his death, Raymond filed suit in Gwinnett County Superior Court to set aside the deed he executed, alleging that Billy Sharpton [***2] wrongfully recorded it instead of keeping it until Raymond's death, and that suit remains [**106] pending. Billy Sharpton also recorded a deed from Avolee, who has since also died, at approximately the same time.

Hall filed the motion to open the guardianship records of Avolee's estate, contending that Billy Sharpton may have committed a breach of fiduciary duty in recording Avolee's deed. ¹ Hall represented that the premature recording of both deeds would have severe estate tax consequences, and also expressed concern that other undisclosed matters, such as a possible will, might be revealed by an inventory of the Avolee guardianship.

¹ At the hearing, Billy Sharpton dismissed his caveat to Raymond's will.

[*252] The probate court ruled that the ward retained a privacy interest in her medical records despite her subsequent death, but concluded that the



296 Ga. App. 251, *252; 674 S.E.2d 105, **106;
2009 Ga. App. LEXIS 185, ***2; 2009 Fulton County D. Rep. 675

property-related records of the guardianship "have high evidentiary value" in the pending litigation, which "will have severe tax consequences for Raymond Sharpton's estate." The court therefore retained the seal on Avolee's medical records but allowed access to certain enumerated property records of the guardianship. From this order, Billy Sharpton appeals. [***3] ²

2 Hall's motion to dismiss the appeal is without merit, as the probate court correctly observed. No matter remains pending below in the guardianship of Avolee, which ended upon her death. A direct appeal therefore is authorized by *OCGA* § 5-6-34 (a) (1), and a discretionary application is not required. See *State v. Clark*, 273 Ga. App. 411, 413-414 (1) (615 SE2d 143) (2005) (appeal of order granting post-conviction DNA testing). And the production of the records does not render the matter moot because the use of the information in the pending action could be forbidden by the court.

OCGA § 29-9-18 (b) provides in pertinent part:

A request by other interested parties to examine the sealed records shall be by petition to the court. . . . The order allowing access shall be granted upon a finding that the public interest in granting access to the sealed records clearly outweighs the harm otherwise resulting to the privacy of the person in interest, and the court shall limit the portion of the file to which access is granted to that which is required to meet the legitimate needs of the petitioner.

The operative language is identical to that found in *Uniform Superior Court Rule 21.2* and *Uniform Probate Court Rule 17.2*, [***4] dealing with the limiting of access to court files: the court balances "the public interest" against "the harm otherwise resulting to the privacy of a person in interest." Ordinarily, the presumption is that "[a]ll court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below." *USCR 21*; *UPCR 17*. In those cases, the "trial court must set forth factual findings that explain how a privacy

invasion that may be suffered by a party or parties seeking to seal a record differs from the type of privacy invasion that is suffered by all parties in civil suits. Otherwise, the trial court is not justified in closing the record from public scrutiny." (Citations and footnote omitted.) *In re Motion of the Atlanta-Journal-Constitution*, [*253] 271 Ga. 436, 438 (519 S.E.2d 909) (1999). While *OCGA* § 29-9-18 limits the access to guardianship files as contemplated in the Uniform Rules, the standard remains the same. As Billy Sharpton acknowledges in his brief, we review the probate court's weighing of these competing interests for abuse of discretion only. "The trial court judges of Georgia have been granted extremely broad discretionary [***5] and supervisory powers with regard to their courts and the records in their courts." *Atlanta Journal & c. v. Long*, 259 Ga. 23, 28 (376 SE2d 865) (1989).

The probate court did not abuse its discretion. It considered the ward's attenuated privacy interest as a result of her death, concluding that her medical records should remain sealed. It also considered the tax consequences to the Raymond Sharpton estate as well as the discovery of material of "high evidentiary value" for pending litigation in ordering that the property records of the guardianship be disclosed. See *OCGA* § 9-11-26 (b) (1) (material discoverable which is relevant or "appears reasonably calculated to lead to the discovery of admissible evidence"). We note, as does Hall, that the public interest in protecting incompetent [**107] adults from chicanery on the part of their guardians outweighs any potential privacy interest of the ward. See *In re Boles*, 172 Ga. App. 111, 112 (322 SE2d 319) (1984).

Billy Sharpton argues that the transactions are not sufficiently similar and that two transactions are in any event insufficient evidence of habit to be admissible evidence. However, evidentiary issues which may arise in the separate pending [***6] action to set aside Raymond's deed are not before the probate court or this court. No issues of admissibility are implicated in a decision to unseal records under *OCGA* § 29-9-18. The probate court did not abuse its discretion in unsealing a portion of the guardianship records, and we therefore affirm.

Judgment affirmed. Mikell and Adams, JJ., concur.

FILED

IN THE SEVENTH CIRCUIT (PROBATE) COURT FOR
DAVIDSON COUNTY, TENNESSEE

2012 JUN 29 PM 3:03

RICHARD R. ROOKER, CLERK
 B.C.

IN RE:)
)
CONSERVATORSHIP OF)
) No. 12P-759
JOHN DRAPER WITHERSPOON,)
)
Respondent.)

ORDER DENYING
MEDIA'S REQUEST TO UNSEAL JUDICIAL RECORDS

This matter came to be heard by the Court on June 25, 2012 upon the "Emergency Motion to Intervene for the Limited Purpose of Being Heard to Request Unsealing of Judicial Records, To Oppose Further Sealed Filings and Closed Proceeding and to Request Camera Access to Hearings under Tenn. R. Sup. Ct. 30" ("Media's Motion").

By Order of the Court dated May 25, 2012, *The Tennessean* and WSMV-TV Channel Four ("Media") were allowed to intervene for the limited purposes stated in the Media's Motion. No further ruling is required as to the issue of intervention.

The Media also sought access and to allow cameras in the courtroom at the June 25, 2012 hearing pursuant to Tenn. R. Sup. Ct. 30. There being no opposition, the Court allowed media access and cameras in the courtroom at the June 25, 2012 hearing.

The disputed issue before the Court at the June 25, 2012 hearing was the Media's request to unseal the judicial records previously placed under seal by the Court's Order of May 11, 2012. Upon consideration of the Media's Motion, responses thereto filed by the Petitioners, the Respondent and the Guardian Ad Litem, and the reply thereto filed by the Media including a

Notice of Filing with Exhibits 1-9, the arguments of counsel, and the entire record, the Court finds:

1. In determining whether to seal or unseal judicial records, the Court must apply a balancing test and weigh the competing public and private interests.

2. The Court has considered the factors set forth in *Ballard v. Hertzke*, 924 S.W.2d 652 (Tenn. 1996) as they are applicable to this case and finds that:

a) None of the parties in this case is a public entity or official;

b) This case does not involve matters of public concern, except to the extent that the public does have a legitimate interest in conservatorships and the judicial process generally, which the Court has addressed in excluding from the sealed records the Media's Motion and other related filings as specifically identified below;

c) The Court is not aware of any other litigation pending at this time which involves these same parties and wherein the information currently under seal with this Court would be relevant and sharing it would promote fairness and efficiency;

d) This case involves private litigants;

e) This case involves issues of private concern and release of documents in the record, particularly those listed in footnote 2 on Page 7 of the Petitioners' response brief, would not advance the education of the public as to conservatorships; and

f) Release of documents in the record, particularly those listed in footnote 2 on Page 7 of the Petitioners' response brief, would cause undue harm or embarrassment to the parties in this case.

3. The Media's purpose in pursuing this matter does arguably come into the realm of tabloid type of journalism. The Court recognizes the Media's right to engage in such journalism, as well as the general presumption of open judicial records. But the Court also recognizes that this presumption of open records is not absolute and the Court has discretion to control its own records and to restrict or deny public access in cases such as this one where the Court, after consideration of the factors laid out in *Ballard*, has determined that protection of the privacy rights of private litigations is paramount to the interest of the public.

4. The Court is mindful of the differences between this case, which is predominantly a private family matter, and *In re NHC*, 293 S.W.3d 547 (Tenn. Ct. App. 2008), a case of strong public concern involving issues of fire and nursing home safety. The Court is also guided by the *In re NHC* court's statement that: "We do not address a situation in which media intervention serves only voyeuristic purposes, as in litigation involving a celebrity."

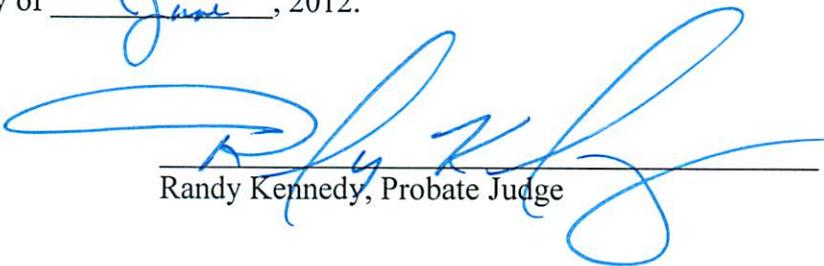
5. Consistent with *Ballard*, *In re NHC*, and *State v. Drake*, 701 S.W.2d 604 (Tenn. 1985), the case on which the Media principally relies, the Court finds that the Media's Motion and request to unseal judicial records should be denied.

6. Notwithstanding the foregoing, the Court further confirms its prior ruling that the Media's Motion and certain related documents in which there is a legitimate public interest shall not be placed under seal and shall be made available for view by the public on the website for the Clerk of this Court. Such unsealed documents shall include the Media's Motion, the Responses to the Media's Motion filed by the Petitioners, the Respondent, and the Guardian Ad Litem, the Media's Reply to the Petitioners' Response to the Media's Motion and Notice of Filing with Exhibits 1-9, and this Order Denying Media's Request to Unseal Judicial Records.

It is, therefore, Ordered by the Court as follows:

1. The Media's Motion and request to unseal judicial records is denied.
2. The Media's Motion and certain related documents as specifically named above shall not be placed under seal and shall be made available for view by the public on the website for the Clerk of the Court.

Entered this 29 day of June, 2012.



Randy Kennedy, Probate Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via e-mail and U.S. Mail, postage prepaid, upon:

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This 26th day of June, 2012.



Andra J. Hedrick

ESSEX COUNTY
REGISTERED
DEED

