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## Privacy Versus Openness: Sealing Guardianship Proceedings

In this Elder Law column, Renee R. Roth and Daniel G. Fish write: Guardianship cases require a careful balancing of the public's right to access to the proceeding and the AIP's right to privacy. It should be observed that these cases are markedly different from ordinary judicial proceedings where the parties voluntarily participate and understand that personal details of their lives may become public.

By Renee R. Roth and Daniel G. Fish | November 16, 2017

Anglo-American jurisprudence has a long unbroken history of open judicial proceedings. From the earliest times in England and colonial America, it has been presumed that the public could attend trials. Secret judicial proceedings are subject to the suspicion that they are unfair or biased or arbitrary and destroy the public's confidence in the law.



Although openness is the presumption, there are situations when restricting public access

is permitted, such as to promote the orderly conduct of a proceeding, the protection of trade secrets, the testimony of an undercover police officer or sometimes where an infant is involved. These situations, which are the exception to the rule, require a balancing of the competing interests of privacy and openness.

Restricting public access in the context of guardianship proceedings raises difficult issues because the alleged incapacitated person (AIP) is drawn into the proceeding through no allegation of fault or voluntary act. The proceeding is based upon allegations that the AIP is at risk and in need of protection. The most revealing personal, financial and medical details of the AIP's life are often at issue.

An investigative report in Newsday alleges that this presumption of open proceedings in guardianship cases in Nassau and Suffolk counties is more honored in the breach than in the observance. Will Van Sant, "Signed, Sealed and Secret; Guardianship cases often sealed, preventing public scrutiny," Newsday, Oct. 3, 2016

## Mental Hygiene Law

This presumption of openness is codified in Mental Hygiene Law §81.14 as follows:

"The court shall not enter an order sealing the court records in a proceeding under this article, either in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof."

Such determination must consider the interest of the public, the orderly and sound administration of justice, the nature of the proceeding, and the privacy of the alleged incapacitated person.

Because §81.07(f) of the Mental Hygiene Law restricts the dissemination of the petition, some have argued that the guardianship statute favors closed proceedings. On the one hand, the statute requires the petition be served only upon the AIP, the court evaluator and the attorney for the AIP. On the other hand, it requires that a separate document, called the "notice of proceeding," be served upon the spouse, parents, adult children, adult siblings

and persons residing with the AIP. This document is very limited and does not contain the allegations of the petition. It contains a list of the powers sought and information such as the date and place of the hearing. In effect, the notice of proceeding seals the details of the petition. It can be argued that the statute initially restricts access to the petition to give the AIP an opportunity to request that the court permanently seal the record.

## Case Law

There are no New York appellate decisions which address the sealing issue, but there are several trial court decisions.

The most famous case involving the sealing of a guardianship record is *Matter of Astor*, 824 N.Y.S.2d 755 (Sup. Ct. N.Y. County, 2006). The plaintiff (the AIP's grandson) filed the petition with a request that the record be sealed. However, before the judge could rule on that request, a newspaper obtained a copy of the petition and the allegations were made public. The court then issued an order that the record be sealed. Not surprisingly, several news organizations moved to unseal the record, relying upon the presumption of openness. Several of the persons involved, including the petitioner and the court evaluator, favored the continued sealing of the record. They argued that sealing was necessary to protect the AIP's privacy and also that sealing was important to the court evaluator so that witnesses would speak freely to him.

The decision acknowledged that the First Amendment grants a qualified right of access to court proceedings. This places the burden upon the proponent seeking to seal the record. The fact that Mrs. Astor had made herself a public figure over decades weakened the privacy argument. The interest of the public in the case was strengthened by allegations of elder abuse and wrongdoing on the part of her attorney as they raised issues of public interest that were beyond mere curiosity. In its decision, the court sealed only Mrs. Astor's medical, mental health and nursing records and the court evaluator's report.

The court in the *Matter of Amelia G*, (County Court, Nassau County, Index No. 32049-I-2016), analyzed in detail the unique nature of guardianship cases and the presumption in

favor of open records. The cross-petitioner moved to seal the record. The petitioners, temporary guardian, court appointed counsel and court evaluator argued that there was no basis to seal the file. The court refused to seal the record finding that:

“The serious allegations in the petition, though merely allegations and never the subject of a hearing, pertain to possible wrongdoing, financial exploitation and overreaching, Svengali like manipulation and control over a vulnerable very wealthy elderly incapacitated person whose real estate holding is worth tens of millions of dollars, are precisely the examples set forth in arguments that favor public scrutiny of guardianship proceedings.”

*Matter of Linda E*, 49 N.Y.S.3d 272 (Sup. Ct., Tompkins County, 2017) is an example of a case where the balancing of the competing interests led to an order sealing the guardianship file. The AIP, Justin B., was under indictment for murder. He was found to be unfit to proceed in the criminal trial and was committed for evaluation. The felony indictment was suspended but not dismissed. The AIP’s mother, Linda E, filed a guardianship petition for him. The Tompkins County District Attorney indicated that he planned to be present at the guardianship hearing, presumably to learn about the AIP’s mental condition and to use that information in the criminal proceeding. Counsel for the AIP filed a motion seeking to seal the record and to exclude the District Attorney.

The court balanced the medical privacy rights of the AIP and the interest of the District Attorney in obtaining information in the criminal case and decided to seal the record and exclude the public (and the District Attorney) from the guardianship proceeding.

*In re Doe*, 696 N.Y.S.2d 384 (Sup. Ct., Nassau County, 1999) is an example of a case where the record was sealed based upon a finding that a disclosure of medical information would be potentially embarrassing and damaging to the AIP and there was no indicated public interest. The AIP’s parents brought the proceeding just as he was about to turn 18. They alleged that he had experimented with illegal drugs. His assets were minimal but his parents intended to transfer their own funds to him as a part of their estate planning.

The Commissioner of the Department of Social Services in the *Matter of A.J.* initiated a guardianship petition for a married couple, alleging that they resided with their adult son who was physically abusive and financially exploitative, 781 N.Y.S. 2d 623 (Sup. Ct., Kings County, 2004). The court evaluator moved to seal the record and close the courtroom based upon the AIPs' fear of their son. Finding that the orderly and sound administration of justice required that the AIPs and other witnesses be able to testify without fear of retaliation, the court directed that the courtroom be closed and the record be sealed.

## The Memo

The ongoing discussions about sealing have not gone unnoticed by the Office of Court Administration. On March 13, 2017, Lawrence K. Marks, the Chief Administrative Judge of New York state, issued a memorandum on the issue of sealing files in civil matters. The memo is short and to the point.

"It has come to my attention that, on occasion, County Clerks may be asked to enter orders or maintain dockets in civil matters in a manner that entails the sealing of civil matter index numbers from public view. As you may know, the sealing of index numbers in civil matters is contrary to longstanding court system policy and raises significant constitutional concerns over the public's right of access to court records. Accordingly, if you receive an order that appears to direct or require sealing of a civil index number for any reason, please bring the matter to the attention of both the judge issuing the order and the Administrative Judge of the Judicial District or Court prior to such sealing."

## Conclusion

Guardianship cases require a careful balancing of the public's right to access to the proceeding and the AIP's right to privacy. It should be observed that these cases are markedly different from ordinary judicial proceedings where the parties voluntarily participate and understand that personal details of their lives may become public.

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