STATE OF MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW COURT DOCKET NUMBER

KEN-16-032

CONSERVATORSHIP OF EMMA

Reported Question from Kennebec County Probate Court

BRIEF OF APPELLANT

CONSERVATOR OF EMMA

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STATEMENT OF THE CASE

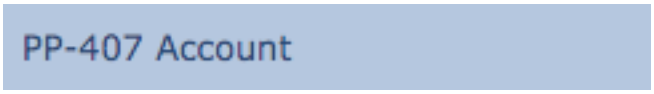
The Maine Probate Courts, pursuant to M.R. Prob. P. 92.1, have made electronic filing available to parties and their counsel. The public portal to this filing system may be found at *www.maineprobate.net*.

Documents filed in the Maine Probate Court electronic filing system are generally accessible to parties, counsel, and members of the public; parties and counsel have access to all files (electronic and nonelectronic) in any given matter, while members of the public only have access to public records. M.R. Prob. P. 92.10. "Public record" is defined by rule as "any record or document that is not a private record and that is not otherwise restricted; "private record" is defined as all adoption records, Certificates of Value, Physician and Psychologist Reports, and any record designated as "private" by the Probate Court. M.R. Prob. P. 8(a)(4); M.R. Prob. P. 92.12.

In actual probate practice, Certificates of Value (DE 401A) are forms only required in probating a decedent's estate. Guardianships and Conservatorships require an Inventory (PP 406) and annual Accounts (PP 407) for the reporting of financial information. Additionally, the Physician and Psychologist Reports that are

considered "private" in the probate system are generally just the two page PP-505 forms required in all guardianship and conservatorship petitions; however physician, psychologist, therapist, social worker and other medical reports and information are consistently included on the public website, either as part of the Petition, the Plan, the Guardian Ad Litem report, or through private statements.

Conservators are required to file an initial Inventory and annual Accounts of the assets of the protected person under conservatorship. While no Maine probate court makes electronic versions of these inventories and accounts available on the electronic filing system, Kennebec County Probate Court does publish a summary of the value contained in the inventories and accounts in its electronic dockets. For example, this is a screenshot of an electronic docket for a case from Cumberland County Probate Court:



and this is a screenshot of an electronic docket for a case from Kennebec County Probate Court:

Appellant, who serves as conservator in this matter, requested that the Kennebec County Probate Court remove the summary of the assets disclosed in inventories and accounts in the matter of *Conservatorship of Emma*. *See* Motion to Remove Financial Information, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (August 10, 2015). That motions was denied, in a handwritten order on the last page of the motion. *See* Order on Motion to Remove Financial Information, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (September 14, 2015).

The appellant renewed her request. *See* Motion to Reconsider and Amend Under Rule 59, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (September 29, 2015). And, while that motion was pending, the appellant sought relief through an alternative channel: as an accommodation under the Americans With Disabilities Act. *See* Request for an Accommodation for Privacy on the Public Probate Court Docket Under the Americans With Disabilities Act of 1990, *In re*

Conservatorship of Emma, Ken. Cty. Prob. Ct., 2011-0102-2 (January 11, 2016).

The Probate Court subsequently certified this question to the Law Court and, pending the outcome of that certification, temporarily granted the disability accommodation sought by the conservator. *See* Ruling on Request for Accommodation, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2015); Certification under M.R. App. P. 24, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2016). This appeal followed.

QUESTION PRESENTED

Pursuant to M.R. App. P. 24(a), the Kennebec County Probate Court (*Mitchell, J.*) reported the following question to the Law Court:

> When a conservator files an inventory and account for the ward, a. should the image of the documents be available online; b. should the summary numbers from the documents be available online while the document images remain as publicly available only in the court (current practice in Kennebec); c. should neither the image of the document nor any summary numbers be available online (current practice in fourteen counties); or d. should the Probate Court adopt a policy different from a, b, or c above?

SUMMARY OF ARGUMENT

Neither the scanned image of a document containing sensitive private information nor a summary of that information should be available online through the Maine Probate Court electronic filing system.[1] The publication of sensitive financial and medical information about people in guardianship and conservatorship proceedings (who are, by definition, vulnerable and, by necessity, forced to use the "protection" of the probate process) needlessly exposes these people to risk without any benefit to them, to their guardians and conservators, to the court, or to the public. The probate court should not extract private information from documents that are not otherwise available to the public. Nor should it publish worldwide the most sensitive private information regarding the "protected person" for the sake of convenience of electronic filing.

[1] The specific case that brought this matter to the attention of the Law Court is a conservatorship, and, as such, the specific concerns addressed primarily involve financial matters. But, nearly identical concerns are present in guardianship matters, where the most private, sensitive, and personal matters involving medical, living, and family situations are now publicly published worldwide. Conservator urges the Court to answer the reported question in a manner that addresses, to the extent possible, these overlapping areas of privacy.

The Law Court ought to recognize that, as a matter of law, protected persons have a right to privacy in their personal information that must not be violated by the government without adequate justification. Currently, under Maine Probate Court practice, certain documents are categorically excluded from public access, but those categories have not been updated to provide adequate privacy protection and to guard against the dangers of identity theft and financial exploitation. For conservatorship and guardianship matters, the presumption ought to be that only the parties and their attorneys have access to electronic and paper files, and that other interested individuals may apply to the Probate Court for access, which should be granted only for good cause shown.

At a minimum, the Law Court ought to take the opportunity provided by this matter to integrate and update its own prior rulings on the right to privacy in personal information, and to apply those rules to the Maine Probate Court's transition from a paper-based to electronic-based court records system. Electronic records are not indistinguishable from paper records, because they are available more easily to more people, and because they are more susceptible to processing in ways

that could substantially undermine the privacy of the "protected person," as well as their health and safety.

This case presents a reported question of law, and there are no facts in dispute. When a court reports a question of law to the Law Court, the Law Court conducts "an independent examination to decide if answering the question is consistent with [its] basic function as an appellate court." *Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 8, 61 A.3d 1242, 1244. If the Law Court decides to accept the question, it conducts *de novo* review of the question presented.

ARGUMENT

I. THE LAW COURT SHOULD ACCEPT THE REPORTED QUESTION FROM THE KENNEBEC COUNTY PROBATE COURT.

The Maine Supreme Judicial Court, sitting as the Law Court, ought to accept the reported question propounded by the Kennebec County Probate Court in this matter, pursuant to M.R. App. P. 24(a). All parties in this case have requested this report. *See* Certification under M.R. App. P. 24, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2016). The Probate Court, and the parties, believe that the question is of sufficient importance and doubt to justify a report. *See id.* The decision sought will finally dispose of this action. *See id.* And, the facts in this matter are not in dispute. *See id.*

The answering of reported questions is a departure from the Law Court's basic function as an appellate court. Though this role is sanctioned by court rule and by precedent, it is not to be undertaken lightly, lest the Law Court become an advisory board. *See Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 8, 61 A.3d 1242, 1244; *Baker v. Farrand*, 2011 ME 91, ¶ 7, 26 A.3d 806. To guard against this danger, the Law Court has identified three factors to consider in determining

whether to accept and answer a reported question: 1) is the question reported of sufficient importance and doubt to outweigh the policy against piecemeal litigation; 2) might it not be necessary to decide the question because of other possible dispositions; and 3) would a decision on the question, in at least one alternative, dispose of the action. *See id.*

Here, the reported question is important, and its answer is in doubt. Conservator believes that electronically publishing the summary of financial information contained in documents that are not otherwise publicly available electronically creates an unnecessary and unjustified risk for people in guardianship and conservatorship proceedings. There are thousands of conservatorship and guardianship matters in Maine, and all the protected persons involved in these proceedings are, by definition, vulnerable. Identity theft, elder abuse, and financial exploitation are all pressing dangers that are made more dangerous by the free availability of sensitive financial information, sensitive health information, and elaborate family histories.

But, there is an inconsistency among the Maine Probate Courts, concerning the electronic publication of these financial summaries. In fourteen counties, the probate court does not electronically publish

summaries of financial information on the Maine Probate Court electronic record system. In Kennebec County Probate Court, such summaries are routinely published, and in Penobscot County Probate Court, such summaries are published unless there is a request to do otherwise. *See* Certification under M.R. App. P. 24, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2016).

It is necessary for the Law Court to answer the certified question. In the absence of direction from the Law Court, Appellant believes that the Kennebec County Probate Court (and the Penobscot County Probate Court) will persist in their practice of publishing summaries of otherwise confidential financial documents on the electronic filing system, violating the right to privacy of protected persons who are involuntarily brought into those courts.

The Kennebec County Probate Court has acknowledged as much in its denial of the conservator's Motion to Remove Financial Information, in its certification of this question to the Law Court, and in its subsequent granting of the conservator's request to remove the information as a disability accommodation "pending the result of [this]

certification." *See* Ruling on Request for Accommodation, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2015).

A decision by the Law Court that Kennebec County Probate Court and Penobscot County Probate Court are correct (or incorrect) in their determination that it is permissible to publish the value of the assets of a protected person (though the original documents containing those values are not published) would resolve the concerns originally raised by the conservator in this matter. And, in certifying this question to the Law Court, the Kennebec County Probate Court has recognized that this question has an impact well beyond the particularities of this case.

II. NEITHER THE ESTATE ACCOUNTING IMAGE NOR ANY SUMMARY NUMBERS FROM THE ACCOUNTING SHOULD BE AVAILABLE ONLINE.

Kennebec County Probate Court and Penobscot County Probate Court should cease their practice of publishing summary numbers of Inventories and Accounts filed on the probate court's electronic filing site. Inventories and Accounts provide much of the same, but much more detailed private financial information compared to Certificates of Value, which are private by rule and which only apply to the deceased.

In other words, the dead are given significantly greater privacy rights than living persons with disabilities. Every Guardian and Conservator Petition and Plan provides names, addresses, dates of birth, family members' names and addresses, medical condition, disability, living situation and much more. When put together with even just the summaries of the Inventory and/or Account assets (by class) of the person under protection—everything that a hacker or identity thief would need to commit fraud and abuse against a vulnerable person is made available with just a few clicks of the mouse.

Extracting and publishing the information contained in the inventories and accounts is in stark contrast to the privacy purpose of the rule that makes Certificates of Value confidential for decedents. And, publishing Conservator and Guardian Petitions and Plans is in stark contrast to the privacy purpose of the rule that makes Physician and Psychologist Reports confidential: the protection of the privacy, health, and safety of protected persons in guardianship and conservatorship matters.

A. Inventories and Accounts Filed by Conservators Contain Private Information That Could Place Protected Persons At Risk.

Even though they contain much more detailed financial information than a Certificate of Value (which is confidential as a matter of law), inventories and accounts are not confidential unless the probate court makes a specific order. A Certificate of Value contains a broad estimate of the decedent's estate: the net value of real estate holdings in Maine; the value of any tangible personal property in Maine; the value of any intangible property anywhere; and estimate of the total value of the estate; the total non-mortgage debt held by the estate; and an estimation of taxes owed.[2]

Conservator's Inventories, on the other hand, require precise detailed statements of each of the protected person's financial and real estate holdings, including specific bank account and investment information. Accounts, in addition to the information contained in an

[2] According to the leading treatise on Maine Probate Procedure, "the information on the [Certificate of Value] form is confidential" and it is either kept in a separate confidential folder or returned to the conservator, whether or not the conservator requests such protection. Maine Probate Procedure, §4.8.5 (Hon. James Mitchell). Yet, inventories and accountings are not kept private and are, according the Certification Order in this matter, "available routinely to anyone who comes to court to ask for it as a public record." *See* Certification under M.R. App. P. 24, *In re Conservatorship of Emma*, Ken. Cty. Prob. Ct., 2011-0102-2 (January 13, 2016).

Inventory, require detailed statements of all income, expenses, and market changes that have taken place over the course of the year. This information, combined with the name, address, names and addresses of relatives, and date of birth, results in a very detailed economic portrait of a person.

Casefiles on the Maine Probate Court's electronic portal now provide detailed information about a person's identity, which are accessible to anyone in the world with internet access. This information, in the wrong hands, would be useful for committing identity theft or financial exploitation. Combined with the summaries of assets, the Maine Probate Website becomes not just a tool for committing abuse, but also a screening tool for identifying potential victims with high net worth. While elder abuse is committed against people in all economic strata, individuals with assets are more likely to be victims of theft. *See* "Why Some Older Adults Fall Victim to Financial Exploitation, U.S. Dep't of Justice," http://www.justice.gov/elderjustice/research/why-older-adults-are-financially-exploited.html (last visited April 19, 2016). In addition, individuals with diminished mental capacity, including people with Alzheimer's Disease and other forms of dementia, and people with

brain injury to the area of the prefrontal cortex that helps filter dubious from accurate information, are particularly vulnerable to scams and fraud. *See id.*

The Federal government advises people to take steps to safeguard their personal financial information in order to minimize the likelihood of identity theft and fraud.[3] These steps include locking your financial documents in a safe at home; electronically wiping a computer or mobile device of financial information before disposing of it; encrypting financial information that is sent over the internet; and not sharing too much personal information on social media, especially information that can be used to answer "challenge questions" from banks and credit card companies that are used to verify identity.

Yet, the Maine Probate Court requires conservators to submit detailed information about a person's identity and assets to the court, which the court then affirmatively publishes on the internet. Neither a protected person nor the conservator who is acting in their best interest can object to this. The least that should be required is that the probate

[3] *See* "How to Keep Your Personal Information Secure," Federal Trade Commission, https://www.consumer.ftc.gov/articles/0272-how-keep-your-personal-information-secure (last visited April 19, 2016).

court take care to safeguard this data and not publicize it without justification.

Consider the following examples taken from the www.*maineprobate.net*: [4]

- Mr. A: Guardianship and Conservatorship documents reveal that Mr. A is a 91-year old veteran with serious cognitive disabilities who lives in a Maine Veteran's Home. The documents reveal Mr. A's medical diagnoses, net worth, and include a case worker's social and medical report. Mr. A. is under DHHS protection;

- Ms. B: the Petition for Public Conservator in Ms. B's case reveals that she is 86 years old, that she has Alzheimer's Disease and that she lives in an Alzheimer's facility. The publicly accessible file includes her net worth and a summary of her social security and retirement benefits. In addition, a letter in her file notes that her conservatorship was later terminated because she no longer had sufficient assets to justify the conservatorship;

- C: Guardianship documents for C reveal that she is a four year old girl under DHHS protection. The publicly accessible document include details of emotional and physical abuse, mental health diagnoses, the girl's safety plan, her sibling's names, her then-current location, discussion of her counseling session progress, and a copy of the District Court's parental rights and child support orders;

[4] Though these examples were all taken from the publicly accessible Maine Probate Court electronic filing system, Conservator has chosen not to identify the individuals nor provide links to the publicly accessible files out of concern for the privacy of the protected individuals.

- D: Guardianship documents for D reveal that she is a baby under DHHS protection, that her mother is mentally disabled and also under DHHS's care, and that her brother was molested by her father. It contains medical reports and personal statements. All involved are named with addresses.

- E: Guardianship documents for E reveal that he is a baby under DHHS protection and that his mother was a victim of rape. This publicly accessible file includes a five-page report from a Guardian Ad Litem with extensive family history and details.

B. Electronic Publication By The Maine Probate Court Of Sensitive Information Violates The Right To Privacy Of Protected Persons.

The United States Supreme Court recognized that the accumulation of vast amounts of personal information in computer form poses a threat to the right to privacy nearly forty years ago, at a time when only the most imaginative science fiction writer could have contemplated the power and pervasiveness of computers today. In *Whalen v. Roe*, Justice Stevens ended his decision denying privacy protection to medical patients with this observation:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the

> direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.

Whalen v. Roe, 429 U.S. 589, 605 (1977).

At around the same time, this Court recognized the right to privacy, joining a majority of jurisdictions in the United States at the time. *See Berthiaume's Estate v. Pratt*, 365 A.2d 792, 794 (Me. 1976). Maine's right to privacy includes protection against at least four different types of invasions: 1) intrusions upon physical or mental solitude or seclusion; 2) public disclosure of private facts; 3) publicity which places a person in a false light; and 4) appropriation of a person's name or likeness. *See id.* This case concerns the second type of invasion.

Disclosure of private facts constitutes a violation of privacy when the facts concern private matters, as opposed to the public life, of the individual, and when the facts are of a kind that would be highly offensive to a reasonable person. *See Loe v. Town of Thomaston*, 600 A.2d 1090, 1093 (Me. 1991). Here, Conservator objects to the disclosure of sensitive personal information, including medical and financial information, that protected persons are forced to reveal without any

voice in the matter. These matters are not "highly offensive" in and of themselves, but the forced exposure and publication of them on the internet, with no filter or other protection, is highly offensive to the deep personal instinct for self-preservation.

Berthiaume's Estate is instructive here. The invasion of privacy at issue in that case was a photograph taken by a doctor of a deceased patient over his pre-mortem, nonverbally-expressed, wishes. *See Berthiaume's Estate*, 365 A.2d at 793. This Court concluded in that case that such an action constituted an invasion of privacy. *See id.* at 795. That the photograph in that case was taken for the benefit of medical science and not out of any desire to harm did not matter, because the photograph still constituted an intrusion on the legally-protected right to be let alone. *See id.*

It would posed less of an intrusion into the right to be let alone, and would present less of a risk to the health and safety of protected persons in conservatorship and guardianship proceedings, if the probate courts were to publish naked pictures of them online, rather than publishing their personal financial and medical records. Yet no court

would have trouble concluding that publishing naked pictures of a vulnerable person without any say by that person is highly offensive.

Entering the probate court system for a guardianship or conservatorship matter is rarely voluntary. The guardianship and conservatorship processes strip a person of the ability to make decisions for themselves, denying an important aspect of what it means to be human. This is done out of concern for the protected person's best interest, and Conservator does not question the propriety of it. But, the court system that sanctions such a process owes a special duty to the individuals whose lives it takes over.

The probate courts are under no obligation to publish sensitive health and financial information on the internet. The Maine Freedom of Access Act does not apply to probate court records. 4 M.R.S. § 7 (2014) (granting control over Maine court records to Law Court); *State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453, 454 (1912) ("[T]here must be and is an inherent power in the court to preserve and protect its own records."). And, the court's own rules do not require internet publication of all material contained in court files.

The First Amendment contains an important guarantee of access to court records, but that right is not absolute. It is strongest in areas, such as the criminal law, where the public's interest is strongest and most grounded in history. But, there is no commensurate longstanding history of access to guardianship and conservatorship files. *See In re Bailey M.*, 2002 ME 12, ¶ 11, 788 A.2d 590, 595 (recognizing the right to public court access in some criminal matters but refusing to recognize the right of a party to a child protective matter to have an open hearing); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (recognizing a First Amendment right to access court records in criminal matters); *see also Westmoreland v. Columbia Broadcasting Sys.*, Inc. 752 F.2d 16, 23 (recognizing a First Amendment right to access general civil proceedings).

This Court, in its administrative order governing public information and confidentiality, has recognized that the dissemination of sensitive information can be harmful, and that there is an obligation on the part of the court to guard against that harm. *See* State of Maine Supreme Judicial Court Administrative Order JB-05-20 (effective January 14, 2015). The purpose of that order is both to protect against

the disclosure of confidential information and to ensure that sensitive information is only communicated to "appropriate recipients." *See id.* "Sensitive information" is not defined in the order, but the term presumably refers to information that a person would not generally expect to share with the public, such as personal net worth, real estate holdings, medical diagnoses, and the status of relationships with various close family members.

In another context, the Court would characterize a person's attitude towards such information as a "reasonable expectation of privacy," because it is information that a person subjectively takes steps to protect (if they are competent to do so) and it is information that society is willing to recognize as private. That such information, in this case, came to be in the hands of the probate court was not due to any informed intelligent choice on the part of the "protected person," nor to any wrongdoing on the part of the person the probate court is charged with protecting.

C. The Transition From Paper To Electronic Records Alters The Calculus Of Privacy and Public Access.

The Law Court ought to follow the lead of the United States Supreme Court in recognizing that electronic records are qualitatively different from paper records. Acknowledging that difference, in turn, ought to lead the development of a new calculus for balancing the right to access court records and the right to privacy for the protected person.

The United States Supreme Court has recognized this new reality, it its landmark decision in *Riley v. California*, requiring police officers to obtain a search warrant before examining the contents of a cellphone seized incident to an arrest. *See Riley v. California*, 134 S. Ct. 2473 (2014). In *Riley*, the government argued that a search of electronic data contained in a cellphone is "materially indistinguishable" from searches of physical items, such as address books, wallets, and notes, which are permitted without a warrant. *See id.* at 2488. Writing for a unanimous court, Chief Justice Roberts rejected that argument, noting that comparing a search of all data contained in a cellphone to a search of physical documents contained in a person's pocket was "like saying that a ride on horseback is materially indistinguishable from a flight to the

moon. . .” *Id.* “Both,” Chief Justice Roberts wrote, “are ways of getting from Point A to Point B, but little else justifies lumping them together.” *Id.*

Though a search of the physical contents of a person’s pockets may not constitute a cognizable privacy intrusion, that reasoning cannot be logically extended to digital data that may have overlapping characteristics. *See id. 2489.* Digital data is different. Magnitudes more data can be stored digitally in a smaller space, and it can be analyzed to reveal patterns with greater speed and accuracy.

Searching through a physical record or document, whether found in a criminal suspect’s pocket or in a physical file takes time and effort. And, there is a physical limit on how much information can be contained in a physical case file or in a person’s pocket. These physical concerns provide a measure of protection that members of the public have come to rely upon, and which the courts ought to recognize as reasonable.

The transition to digital data eliminates these protections. As the Supreme Court noted in *Riley*, “[m]ost people cannot lug around every piece of mail they have received for the past several months, every

picture they have taken, or every book or article they have read." *Id.* at 2489. But, all that data is easily and frequently contained in a cellphone. Similarly, most people would not sort through the finances, health records, and family histories of all the protected persons in a given county, yet the transition to electronic records makes such a search easy to do from any computer anywhere in the world.

Other courts have already recognized the threat to privacy that electronic court records can pose. For example, in *EW v. New York Blood Ctr.*, the court allowed the plaintiff to proceed under a pseudonym, comparing "access to court files by those surfing the internet" to the "modern enterprise and invention" identified by Samuel Warren and Louis Brandeis as capable of inflicting greater mental harm through the invasion of privacy "than could be inflicted by mere bodily injury." *EW v. New York Blood Ctr.*, 213 F.R.D. 108, 112-13 (E.D.N.Y. 2003) (*quoting* Warren & Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193, 196 (1890)).

And, in *Doe v. Cabrera*, the court permitted a plaintiff to use a pseudonym in her civil action concerning sexual assault, over the defendant's objection that the plaintiff chose to bring the suit knowing

that her identity would be revealed in the process. *Doe v. Cabrera*, 307 F.R.D. 1, 6 (D.D.C. 2014). The court rejected that objection, noting that, in the age of electronic filing, simply being identified in connection with a lawsuit could subject the plaintiff to "unnecessary interrogation, criticism, or psychological trauma." *Id.* at 7. While the court noted its appreciation for "the public benefits of the Internet," it expressed concern over the internet's "unfortunate drawback of providing an avenue for harassing people." *Id.*

This Court is well on the way to recognizing that changes in technology require changes in the enforcement of privacy protections. In 2005, this Court created the Maine Taskforce on Electronic Court Records Access (TECRA), to consider the legal and policy ramifications of a transition from paper to electronic court files. TECRA recommended the adoption of a two-tier approach to private information: information that is confidential by law would not be available in any form; but, information that is sensitive or that could expose a person to needless harm would be available in person by request at a courthouse but not available on a court website accessible to every person in the world with internet access. *See* Maine Supreme

Judicial Court, Report of the Maine Taskforce on Electronic Court Record Access, 7-8 (September 26, 2005).

In recognizing this second tier of matter—private but not confidential—TECRA breathed life into the concept of "practical obscurity," which is a term used to describe the protection that comes from information being held in paper form in a particular physical location. Records in that form are protected, though not as absolutely protected as records that are impounded. That does not make the protection any less meaningful because, as TECRA observed, "[a]lthough the data is theoretically available, it is very unlikely that it would ever be viewed by anyone or widely disseminated due to the fact that it is too inconvenient to uncover." *Id.* "By contrast, electronic data or documents are accessible to an anonymous inquisitor at the click of a button." *Id.* at 9.

TECRA recommended embracing "practical obscurity" as a way of providing meaningful protection for private material that is not legally confidential, as courts manage the transition from primarily paper to primarily electronic records. As examples, it observed that domestic violence victims are less likely to avail themselves of the court's

protection if their names and case files are available to "casual online browsers," and that a person's charitable giving practices might be worth keeping private even though a certain segment of the population might have an interest in such information. *See id.* at 9.

In making the distinction between documents available through a website and documents available in person at a courthouse, TECRA observed that "courts have no duty of dissemination beyond making non-confidential records reasonably accessible." *Id.* at fn. 17. Publishing court documents on the internet is more akin to "a form of broadcasting"—an action which is "above and beyond the court's duty to preserve documents and data and allow access thereto." *Id.*

TECRA made a number of recommendations consistent with its view on the need to protect the privacy of those who come in contact with the court system. Included among those recommendations is the proposal that certain information should be presumptively not subject to disclosure except upon a clear showing of need and the prior approval of a judge, "due to compelling privacy issues including personal safety, identity theft, and misuse of personal data." *Id.* at 46, fn. 49. That list includes, *inter alia*, dates of birth, addresses of witnesses, financial

statements, and ADA requests for accommodation. *Id.* Yet, all that information is routinely available in electronic form to anyone in the world through the Maine Probate Court's electronic filing system.

Courts of all kinds have an obligation to protect the rights of people who come into court. When that does not happen, it is up to this Court to correct that error. The Law Court should answer the question presented by the Kennebec County Probate Court in the following way:

> The Maine Probate Courts should adopt a policy different from options a, b, and c, because current court practice violates the right to privacy of protected persons in guardianship and conservatorship matters. While a new policy is being developed, probate courts shall not publish any summaries of inventories or accounts in conservatorship matters in the electronic case docket. Additionally, until such time as the Probate Courts have adopted a policy that consistently and adequately protects all the personal and private information of all persons who have been petitioned for guardianship and/or conservatorship (including private medical, living, and family information), all public hyperlinks to all guardianship and conservatorship documents shall be turned off and made available only to Registered Filers affiliated with a particular matter as set out in Probate Rule 92.10 (a). Members of the general public and Registered Filers not affiliated with a matter shall have remote access to Guardianship and Conservatorship records only upon the showing of good cause.

CONCLUSION

For the reasons discussed, the Law Court ought to accept the reported question of the Kennebec County Probate Court, and it ought to declare that current probate court practice violates the right to privacy of protected persons within its jurisdiction.

Signed, at Portland, Maine, April 26, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I filed this document with the Maine Supreme Judicial Court, and served two copies upon all counsel of record and unrepresented parties:

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