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August 3, 2016

Matt Pollack, Esq.
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street
Portland, ME 04101-4125

Re: *Conservatorship of Emma*
Law Court Docket No. KEN-16-032

Dear Mr. Pollack:

In lieu of a full amicus brief, I am writing in response to the Court's request for input from the Office of the Attorney General in this matter. It is the view of this Office that M.R. Prob. P. 92.12 provides litigants in Probate Court matters with an adequate procedure to request the Probate Court to designate sensitive information as Private Information or as a Private Record. Private Information and Private Records are not available to the public in the electronic file or at the courthouse. Rule 92.12(a) expressly defines all adoption records, Certificates of Value (Probate Form DE-401A) and Physicians' and Psychologists Reports (Probate Form PP-505) as Private Records. Rule 92.12(c) expressly defines social security numbers and account numbers as private information. The Probate Court has the discretion to designate additional information or records as private pursuant to the authority granted under 92.12(a)(4) and 92.12(c)(3). Maine statutes and the Probate Court rules do not distinguish between Probate Court records available to the public electronically and those available at the courthouse.

In the event the Probate Court receives a request from a party to designate sensitive information as Private Information or as a Private Record, the Court can balance the privacy interest of the litigant versus the public's interest in access to court records on a case by case basis. In the case before the Court, the Probate Court had the authority under M.R. Prob. P. 92.12 to designate the financial account information as private. No request was made to the Probate Court to designate the sensitive financial information as confidential at the time the information was filed with the Court. Had such a request been made, the Probate Court would have had an opportunity to engage in a balancing analysis.

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This Court has recognized that the public's interest in access to court proceedings is stronger in criminal proceedings than it is in civil proceedings. *In re Bailey M.*, 2002 ME 12, ¶ 11 788 A.2d 590 (noting that Supreme Court precedents relating to First amendment right to access to certain criminal proceedings did not apply to child protection proceedings); *Doe v. Roe*, 495 A.2d 1235 (Me. 1985) (publisher's claim of interest in court approval of a minor settlement of a medical malpractice claim was insufficient to satisfy standard for intervention as of right in the case in order to challenge court's order to seal settlement documents). Neither this Court nor the Supreme Court has determined whether there is a First Amendment or common law right of public access to filings in guardianship proceedings. Even if such a right exists, it is not absolute, and would be subject to restriction upon a showing of an overriding privacy interest.¹

As a practical matter, Rule 92.12 could be amended to enlarge the categories of per se private documents/information. Litigants (some of whom may be pro se) could be educated about the procedures available for designating sensitive information as private. In addition, the Probate Court could borrow from the ECF model used at the Federal Court which requires registration for ECF users. Use of this model may reduce the risk of improper use of the information in electronic files.

Please let me know if additional information or briefing would be of assistance to the Court.

Sincerely,



Susan P. Herman
Deputy Attorney General

SPH/bms

cc: Sigmund Schutz, Esq.
Patrice Putnam, Esq.
Polly Rice Reeves, Esq.
Daniel Petersen, Esq.
Zachary L. Heiden, Esq.

¹ Probate Court filings which include information that is confidential or privileged (such as medical records) pursuant to law would presumably easily satisfy the balancing analysis in favor of a designation as private under M.R. Prob. 92.12.