

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

REPLY BRIEF OF APPELLANT

CONSERVATOR OF EMMA

Patrice A. Putman
Maine Bar No. 3895
LEVEY, WAGLEY & PUTMAN, P.A.
161 Maine Street, Suite 1-A
P.O. Box 7
Winthrop, Maine 04364
(207) 377-6966
p.putman@leveyandwagley.com

Zachary L. Heiden
Maine Bar No. 9476
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION
121 Middle Street, Suite 303
Portland, Maine 04101
(207) 619-6224
zheiden@aclumaine.org

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

 I. Adult and Child Protection Cases Are Not The Same As Criminal
 Or Civil Cases..... 1

 II. This Is Not A Case About Sealing 3

 III. “Protected Persons” Are Not Dead And The State Must Provide
 Them Real Protection 4

CONCLUSION 5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Cases

<i>Estate of Engelhardt</i> , 127 Ohio Misc.2d 12 (2004)	4
--	---

ARGUMENT

I. ADULT AND CHILD PROTECTION CASES ARE NOT THE SAME AS CRIMINAL OR CIVIL CASES.

Appellee relies on a long, distinguished line of cases guaranteeing the right to access court proceedings and court records in criminal and civil cases, Appellee Brief, 17-23. But, probate court proceedings are different from other types of court proceedings, and it is appropriate to apply a different calculus when determining access.

It is no doubt correct that parties must “take the good with the bad” when they seek and obtain advantages from “court supervision over their affairs.” Appellee Br., 24. But, nobody seeks court supervision over their own personal affairs in the form of a conservatorship or a guardianship—such supervision is imposed against a person’s will, albeit for the person’s best interest. But the subject of a conservatorship does not voluntarily open up the most sensitive and personal details of their lives to court scrutiny in order to receive some benefit. This Court should not be indifferent to that important distinction between the subjects of guardianship and conservatorships on the one hand, and the parties to a civil dispute.

Defendants in criminal matters also do not voluntarily submit the details of their lives to public inspections, but openness of records and proceedings in criminal matters is longstanding and long-established, dating back to at least the time of the Magna Carta and its guarantee of the writ of habeas corpus. Open criminal records and proceedings are a guarantor that people will not be tried or imprisoned in secret. Appellant is not arguing here for secret proceedings or records, and Appellant believes that there are more options available than either all documents are secret or all documents are public.

Appellee argues in favor of full access to all documents in possession of any court anywhere, for the public and the press. But, the law has always made finer distinctions about access, based on the type of case, the type of information at stake, and the competing interests. All that Appellant is asking for here is for this Court to recognize that one of those competing interests is the special danger that universal public electronic access poses for especially vulnerable people.

II. THIS IS NOT A CASE ABOUT SEALING

The question presented by the Kennebec County Probate Court does not concern the standard for sealing probate records, and so Appellee's discussion of sealing is inapposite. Instead, the question concerned whether the publicly accessible electronic docket for conservatorship matters (the financial summary included on the docket in Kennebec and Penobscot Counties) ought to include information from documents that are not electronically accessible.

Following a diligent search, Appellant was unable to find any probate court anywhere in the country that provides remote electronic access to all documents in probate court files, even when those documents are physically accessible at a courthouse. Only Ohio provides remote electronic access to all publicly accessible documents in probate court files. Appellant has not been able to find any authority that says remote electronic access to such documents is required by common-law, Constitutional law, statute, or rule. In fact, of the twenty-one states cited in the Appellee's brief, nineteen of them¹ do not allow

¹ New Hampshire, California, Illinois, Kentucky, Massachusetts, Georgia, Texas, Michigan, Colorado, New York, Hawaii, Florida, Connecticut, Rhode Island, Wisconsin, Pennsylvania, Virginia, West Virginia, and Alabama.

remote electronic public access to guardianship and conservatorship files. Nebraska provides limited access, but individuals are required to register before gaining access, which provides a way for courts to track improper use.

Maine and Ohio are the only two states that Appellant has found that allow virtually unfettered remote public access to guardianship and conservatorship matters.

III. “PROTECTED PERSONS” ARE NOT DEAD AND THE STATE MUST PROVIDE THEM REAL PROTECTION

Appellee relies strongly on a 2004 Ohio probate court decision, *Estate of Engelhardt*, 127 Ohio Misc.2d 12 (2004), which involved the electronic public disclosure of an estate’s financial information. That case differs from this one in an important way: *Estate of Engelhardt* was not a protective proceeding. The parties in this case may not agree on much, but they can surely agree that living people have more acute privacy needs than the deceased.

Additionally, *Estate of Englehardt* was not appealed beyond the Ohio probate court level. It has not been followed by, or cited by, any court inside or outside of Ohio.

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, June 24, 2016,



Zachary L. Heiden, Esq.
Maine Bar No. 9476
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION
121 Middle Street, Suite 303
Portland, Maine 04101
(207) 619-6224
zheiden@aclumaine.org

Patrice A. Putman
Maine Bar No. 3895
LEVEY, WAGLEY & PUTMAN, P.A.
161 Maine Street, Suite 1-A
P.O. Box 7
Winthrop, Maine 04364
(207) 377-6966
p.putman@leveyandwagley.com

Counsel for Appellant Conservator
of Emma

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:

Sigmund Schutz, Esq.
Preti Flaherty Believeau &
Pachios, LLP
One City Center
P.O. Box 9546
Portland, ME 04112

Patrice A. Putman, Esq.
Levey, Wagley, & Putman, P.A.
161 Main St., 1-A
Winthrop, ME 04364

Polly Rice Reeves, Esq.
Law Office of Polly Reeves
112 State St.
Augusta, ME 04332

Daniel S. Petersen, Esq.
116 State St.
Augusta, ME 04330

Signed, at Portland, Maine, June
24, 2016,



Zachary L. Heiden, Esq.
Maine Bar #9476
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION
121 Middle Street, Suite 303
Portland, Maine 04101
(207) 619-6224
zheiden@aclumaine.org

Counsel for Appellant Conservator
of Emma