January 25, 2017

VIA E-MAIL (lawcourt.clerk@courts.maine.gov)
Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Re. Comments on Proposed Amendments to the Maine Rules of Probate Procedure to Classify Additional Types of Records and Information as "Private"

Dear Mr. Pollack:
The Maine Freedom of Information Coalition ("MFOIC") provides these comments on the proposed amendments to Maine Rule of Probate Procedure 92.12 ("Public Records and Redaction") to express reservations with the proposal to make confidential certain records filed with Maine probate courts. The MFOIC urges the Court to ensure maximum transparency in Maine court records and courtrooms. The MFOIC opposes a categorical approach to confidentiality in court records.

About MFOIC
The MFOIC is a Maine non-profit corporation dedicated to educating Mainers about their rights and responsibilities as citizens in our democracy and enhancing knowledge and awareness of the First Amendment and laws that ensure transparency in government. The members of Coalition include the Maine Association of Broadcasters, the League of Women Voters of Maine, the Maine Library Association, the Maine Press Association, the Society of Professional Journalists, the Maine Real Estate Management Association, and a representative of academic/government interests. The MFOIC's contact information is P.O. Box 232, Augusta, ME 04332, info@mfoic.org, and my personal e-mail address is modmedia@earthlink.net.
The MFOIC filed a brief in Conservatorship of Emma, 2017 ME 1, __ A.3d __, and remains interested in public access to Maine courtrooms and court records.

Proposed Amendment to Probate Rule
Probate Rule 92.12 makes a few narrowly defined categories of records and information confidential. "'Private Records' means (1) all records and documents (electronic or nonelectronic) relating to an adoption proceeding; (2) Certificates of Value (Probate Form DE-401A); (3) Physicians' and Psychologists' Reports (Probate Form PP-505); and (4) any record or document designated as a

Private Record by the Probate Court." M.R.Prob.P. 92.12(a). The Rule also makes confidential a few categories of information, labeled "Private Information": (1) Social Security numbers of living individuals; (2) banking/brokerage account numbers; and (3) any other information designated as Private Information by the Probate Court. M.R.Prob.P. 92.12(c).
The amendment would broaden the categories of confidential records to include all inventories, accountings, death certificates, and birth certificates filed with the Probate Court, as well as any information on the cause of death contained in any record filed with the Probate Court. This information would be categorically confidential, regardless of the nature or circumstances of the filing, whether the records are subject to judicial review and approval, relevant to a contested proceeding, the public interest in the information in these documents, whether the person(s) involved may be public figures or officials, and, apparently, without any exceptions by which the public could obtain copies of these records on an appropriate showing.

MFOIC Objections to Proposed Amendment

The proposed amendment to Rule 92.12 makes too much information secret for the following reasons:

First, transparency around what judges do and why they do what they do is required by the First Amendment and the common law. By making all information in all accountings and inventories non-public the proposed amendment would make it impossible for the public to see the evidentiary record by which the court performs its function of reviewing and approving (or not) accountings and inventories. As a result, the court would effectively be engaged in secret decision making. Accountings are distinct from mere clerical or administrative filings that do not involve the exercise of judicial power. See, e.g., 18-A M.R.S. §§ 5-419(a) (requiring the filing of accounts "with the court for approval" and that accounting "must be approved by the court"); 5-419(b) (court may also "adjudicate[ ] as to the conservator's liabilities" in certain accounts, after notice and hearing). Because the court is required to enter orders approving such records, they are judicial records to which a presumptive right of public access attaches. To the extent that other records are filed with the court for judicial approval or in connection with a contested proceeding they too should presumptively be public. Many courts have held that the public has a right to inspect and copy probate court records under the common law, the First Amendment (or state constitutional equivalents), or both. The proposed amendment would unnecessarily infringe on these rights.

Second, public access to court records is in the public interest. Transparency around what guardians and other fiduciaries are doing (the subject matter of inventories and accountings) and the court's oversight of them, deters misconduct by the threat of exposure, allows the public to see what the court is up to, and makes possible the discovery of misconduct when it occurs. See Siedle v. Putnam Inv., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system") (citation and internal quotation marks omitted). The New Hampshire Supreme Court recently noted the "need for openness and public

accountability" in court records in proceedings involving "children and families." Associated Press v. State, 153 N.H. 120 (2005). To paraphrase Justice Brandeis, sunlight is the best disinfectant.

Third, the rule change is not narrowly tailored to serve a compelling need. The Advisory Committee Note to the proposed amendments does not explain the reason for the proposed changes, but generalized privacy or publicity concerns do not warrant a categorical rule making all inventories, accountings, death certificates, and birth certificates confidential. In general, courts have refused to seal records for "fear of adverse publicity." Siedle, 147 F.3d at 10. "The mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access." Id. In appropriate cases, privacy rights can limit the presumptive right of access to judicial records, but only where "specific, severe harm" would result from disclosure. FTC v. Standard Financial Management Corp., 830 F.2d 404, 412 (1st Cir. 1987).

To the extent that the rule is meant to protect against identity theft, there is no evidence that probate court records or information have ever been used to perpetrate identity theft. The risk of identity theft is already minimized by the existing rule prohibiting disclosure of banking/brokerage account numbers and social security numbers. Other information, like full dates of birth or taxpayer identification numbers (in addition to social security numbers) might be made confidential to protect against the risk of identity theft without making secret all of the information contained in the documents listed in the proposed rule.

Fourth, a better approach is to address specific requests to seal particular information on a case-by-case basis. Any particular privacy or other interests that may warrant a seal can be addressed on a case-by-case basis. Any party may file a motion asking the Court to seal a particular record (or information within a record) and, to the extent the record (or information) merits a seal the Court may order a seal after making specific on the record findings sufficient to justify any seal. See Nat'l Org. for Marriage v. McKee, 2010 U.S. Dist. LEXIS 90749, *12 (D. Me. Aug. 24, 2010) (in order to seal documents (and permit appellate review of such order), the courts must make "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest").
This individualized approach best comports with First Amendment and common law principles of transparency by recognizing that records or information that may merit confidentiality in one proceeding, may not in another. A high profile matter involving a public figure, or proceedings involving actual or suspected misconduct, may merit a different balance than another matter involving a private person, unusually sensitive information, or particular showing of risk to a specific person if certain information is disclosed. Records filed with the court for clerical or administrative purposes and not reviewed or approved by the court may shed little light on the conduct of judicial officers. By contrast, records reviewed and approved by the probate court must remain public if the public is to retain a meaningful opportunity to understand and evaluate the court's exercise of its judicial function.

Conclusion

The MFOIC appreciates the opportunity to provide input in connection with the proposed amendment.

Sincerely,

James Campbell, President
Maine Freedom of Information Coalition