Shedding Light on Guardianship: Rethinking Confidentiality in Article 81 Proceedings

By Elizabeth Adinolfi

> Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
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> - Supreme Court Justice Louis D. Brandeis, 1913

In October of 2017, The New Yorker published *How the Elderly Lose Their Rights*, an article that sent shockwaves through the guardianship bar. It highlighted the rampant abuses and lack of due process protection in Nevada's guardianship system. In Nevada, a complete stranger could file a petition and obtain temporary guardianship over someone. No neutral evaluator was assigned to gather information for the court and the person alleged to be in need of a guardian was not provided with counsel. Family members received no notice of what was happening to their loved ones. Those family members fortunate enough to find out about and attend the hearings often met with hostility and derision from the court, prompted by the guardian's unfounded allegations of neglect or abuse. The temporary guardian was often made a permanent guardian at hearings that lasted only a matter of minutes. Elderly people routinely had strangers assume complete control over their lives, were separated from their families, were placed in assisted living facilities with no court oversight, and had all of their assets liquidated. Worst of all, all of this was hidden from the public for years under the guise of protecting the privacy of the individuals placed under guardianship. The article was so upsetting I felt physically ill by the time I finished reading

As the article made its way around social media, I started getting panicked messages from friends: "Could this happen to my parents?," "Could this happen to me?," and the worst one, "Is this what you do?" I tried to assuage their fears and explain that New York has far more robust protections: court-appointed counsel, neutral court evaluators, mandatory notice requirements, etc. I did not think our system in New York was vulnerable to the same kinds of criticism and attack as Nevada.

Looking back, I see that I was naïve. I could not have predicted the #FreeBritney movement and the media's utter failure to accurately investigate and report on the truth and reality of the Britney Spears conservatorship. Since Britney Spears, the headlines have remained full of cases involving celebrities who have been the subject of guardianship proceedings: Amanda Bynes. Nichelle Nichols. John Amos. Brian Wilson. Michael Oher. Mavis Leno, Jay Leno's wife. Elijah Allman, Cher's son. And most recently, Wendy Williams. The coverage is rarely positive, and the public's trust in our guardianship system is eroding.

However, all of the blame cannot be laid at the media's feet. They cannot get access to case dockets to read the parties' filings or judicial decisions. They, and members of the public, are often prohibited from being present in courtrooms. Accurate reporting has been made nearly impossible by the cloak of secrecy over the guardianship systems across the United States.

It is not just cases involving celebrities, and it is not just inaccurate, negative, or critical media coverage. The guardianship system is losing the ability to attract and keep practitioners. I have had more than one attorney, who is new to guardianship practice, describe it as a "star chamber" or "kangaroo courts." I have allowed my Part 36 registration to lapse, and I am hearing from other attorneys that they either have done the same, are strongly considering doing so, or simply decline appointments when asked. Others are leaving the guardianship practice altogether. I've heard several reasons for the hesitation: concerns about media exposure, challenges in getting paid – whether due to delays in court approval of fee awards, the judge slashing fees, or discovering at the end of a case that the AIP lacks sufficient assets, and unease with the procedural ambiguity surrounding how these cases are handled. If even practitioners are losing faith in the system, how can we expect the public to believe that people's rights are truly being protected?

As a legal community, it is past time that we ask ourselves, and the court system, difficult questions: Are there practices that interfere with the public's trust in the fair administration of justice when the state exercises the power to completely abrogate a person's liberty and rights? What obligations do we, as practitioners, have to make sure that we, and the courts, are not taking actions that erode the legitimacy of guardianships in the public mind? Does the court system's practice of closing courtrooms and the dockets of guardianship cases to the public promote or hinder the pursuit of justice and public trust in the guardianship system? Does the secrecy and lack of public scrutiny enable litigants and attorneys to engage in conduct and utilize tactics that interfere with the fair administration of justice? Does the lack of public scrutiny, and poorly defined procedural rules, result in practices that compromise litigants' rights and the fair administration of justice?

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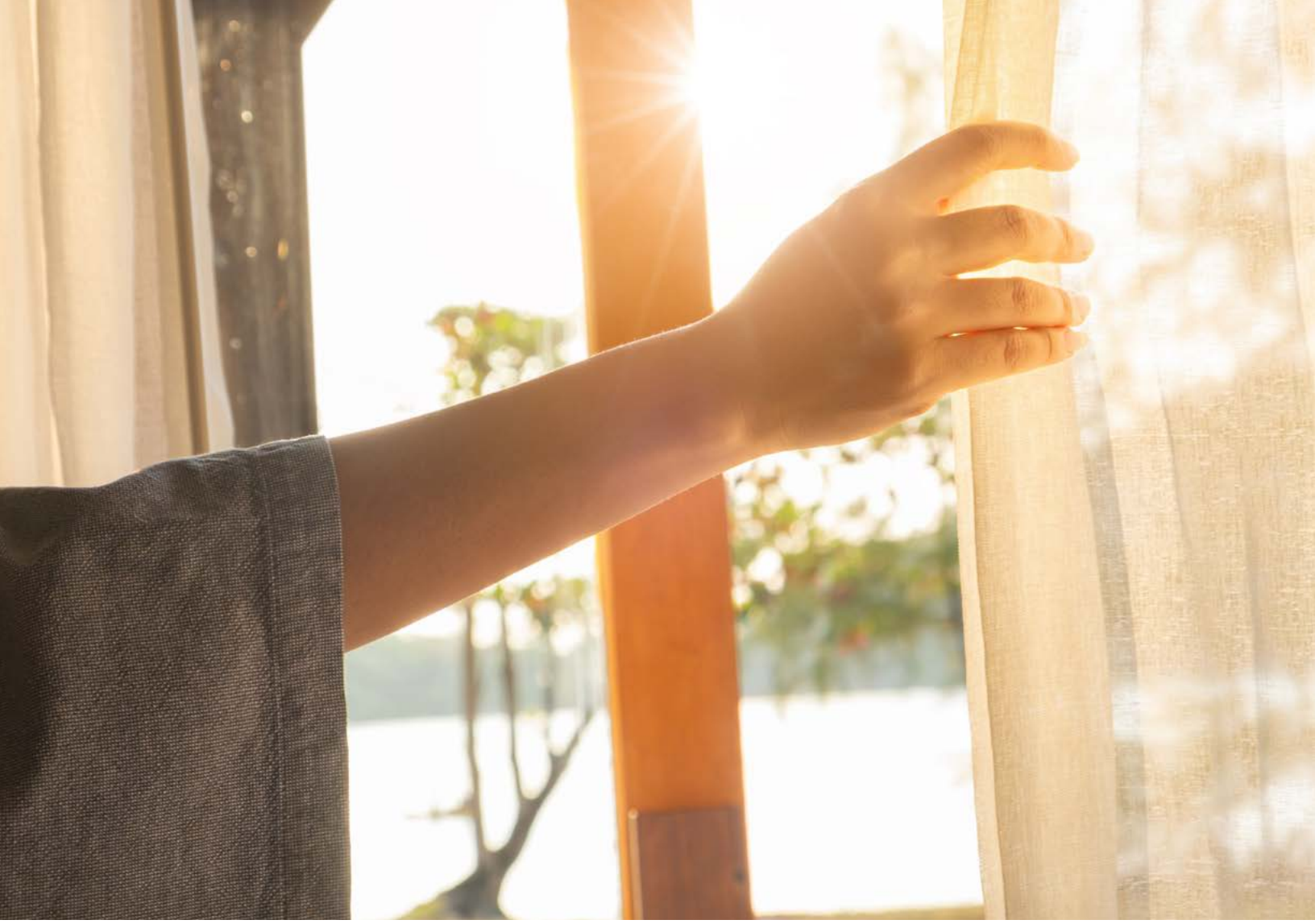
These questions have gnawed at me for years. I started writing this article in 2018 but never finished it because I was hesitant about making this critique public. However, over the past eight years my belief that the courts' and practitioners' desire to protect the privacy of AIPs does more damage than good has only grown stronger. After seeing the recent lawsuit filed in the Southern District of New York by Wendy Williams' ex-husband, allegedly on her behalf, against 33 individuals and entities involved in her guardianship, I decided it was time to finish what I started eight years ago and make my concerns public.

As practitioners, we are often quick to ask for courtrooms to be closed and for files to be sealed. Keeping private sensitive financial information, or embarrassing facts, about AIPs takes precedence over the deeply held principle embedded in New York Judiciary Law § 4 that "The sittings of every court within this state shall be public, and every citizen may freely attend the same[.]" Yet this secrecy fails to serve its purpose, and results in procedural anomalies, inaccurate and at times inflammatory media coverage, and litigation within and outside of the guardianship proceedings that drains AIPs assets and places practitioners and guardians at risk, all to the detriment of AIPs and IPs.

In evaluating the wisdom of keeping the public and the media out of Article 81 proceedings, we can look to the experience of the Family Court, which has similar concerns regarding privacy as it shares the purpose of protecting vulnerable individuals. When the Family Court was created in 1962, it was intended to be open to the public. Yet, as a matter of practice, courtrooms were routinely closed to the public and the media. The secrecy was intended to protect the privacy of people embroiled in intimate family battles, and prevent children from having highly sensitive information, such as having been victims of sexual abuse, follow them for the rest of their lives.



But journalists and others pushed for access, arguing that the closed doors shielded judges and other public officials from scrutiny.[1] For 35 years the secrecy continued, until 1997 when the horrific murder of six-year-old Elisa Izquierdo, whom the Family Court had returned to her abusive mother, led then Chief Judge Judith Kaye to issue rules opening the family courts.[2]

In announcing the new rules, Chief Judge Kaye echoed Justice Brandeis, "Sunshine is good for children."[3] She stated that, as an important public institution, the Family Court required public scrutiny: "It is vital that the public have a good understanding of the court and confidence in the court process[.]"[4] Judge Lippman echoed her sentiment, stating "[t]he Chief Judge, myself and the administrative board all feel it is very important to make it clear that the court is open to public scrutiny and accountable to the public."[5]

After Chief Judge Kaye announced the new rules, The New York Times ran an editorial that echoes the criticisms of the guardianship system that are becoming more prevalent every day:

> For decades it has been allowed to operate as a closed institution, keeping the press and public outside except in rare cases. Judges have used vague and generalized concerns about the privacy of litigants to shield their decisions, and the performance of the agencies who regularly appear before them, from public scrutiny and possible criticism. . . . The goal here is [to] change the court's traditional culture of secrecy and get it to pay attention to the presumption in existing law that hearings and other proceedings ought to be open.[6]

Like the Family Court, the Guardianship Court is an important, vital public institution that requires public scrutiny and must be accountable to the public.

Our practice is truly at a crossroads. As our population continues to age, and as the prevalence of diseases like Alzheimer's and other forms of dementia continues to increase, the resources necessary for the guardianship courts to meet the needs of individuals who require guardians will likely increase.

Without attorneys willing to take appointments, and the state allocating adequate resources for the courts to manage these increasing caseloads, the system cannot function. If the public cannot see the need for resources because our guardianship proceedings are closed, or worse, the public believes the guardianship system is abusive and corrupt, we risk the continued viability of the system that is supposed to protect the most vulnerable adults from abuse, exploitation, and harm.

It is time to heed Justice Brandeis' and Chief Judge Kaye's wisdom and let in the sunlight for everyone's benefit: AIPs, practitioners, the courts, and the public.

Endnotes

1. https://www.nytimes.com/1997/09/13/nyregion/opening-the-doors-on-family-court-s-secrets.html.
2. https://web.archive.org/web/20160304044007/http://old.post-gazette.com/regionstate/20010924d2courtmainreg2.asp.
3. https://web.archive.org/web/20160304044007/http://old.post-gazette.com/regionstate/20010924d2courtmainreg2.asp.
4. https://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html.
5. https://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html.
6. https://www.nytimes.com/1997/06/22/opinion/prying-open-family-court.html.

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