# THE FALCONI WRITS: PRIVACY, COURT ACCESS, AND THE FUTURE OF CLOSED HEARINGS AND SEALED FILES

by

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In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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# I. INTRODUCTION

> "Saying that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about freedom of speech because you have nothing to say." Jean-Michel Jarre.

These are going to be unusual CLE materials, because as of this writing the outcome of the issue remains unknown. Oral argument was held on March 2, 2023, and the decision has remained pending for the past eight months.

There were at least three arguably inter-related writ petitions[1] filed, each containing issues and arguments not necessarily presented in the others, but they all concerned the same basic subject matter.

Essentially, the question boils down to whether litigants to a family law case have the right to close the proceedings, and seal most of the written records, from third parties unrelated to the proceedings who would like to see all the paper and watch (and broadcast) all the hearings. The relevant issues present a mix of constitutional, legal, historical, and public policy considerations, and the outcome of the conflict will have massive repercussions for the future of family law practice in Nevada, in ways both obvious and subtle.

# II. BACKGROUND AND HISTORY

## A. Sealed Files

The "sealed files rule," NRS 125.110, has been on the books for nearly 100 years. It was enacted in 1931, and was updated only once, in 1963, non-substantively to eliminate an irrelevant reference to "jury verdicts."

The statute provides that certain pleadings and orders in divorce cases remain open to public inspection, but that all other papers can be sealed as a matter of right upon request of either party. Specifically, The Complaint, Summons, Judgment, and any orders for publication of notice are open – all else is sealed, upon request, as a matter of right.

100 years ago, the Legislature did not consider the possibility that unmarried people would be in family court, and the terminology of the statute was written before there was such a thing as a video record, and is therefore a bit antiquated.

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[1] *Falconi v. District Court*, No. 84947, *Falconi v. District Court (Minter)*, No. 85195, and *Las Vegas Review Journal v. Clark Cty. Eighth Judicial Dist. Ct.*, No. 85228.

The Nevada Supreme Court discussed the statute in *Johanson v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 245, 182 P.3d 94 (2008); without much discussion, the Court found that a district court order sealing an entire file, including the documents required by the statute to remain open for inspection, was a manifest abuse of discretion, and reversed.

In footnote 18, the Court discussed one party's defense of the sealing order, noting that prior decisions had provided "inherent authority" to go beyond the statute:

> See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978) (noting that "[e]very court has supervisory power over its own records and files," and the decision to allow access to court records is best left to the sound discretion of the trial court); *Whitney v. Whitney*, 330 P.2d 947, 951 (Cal. Ct. App. 1958) (providing that alimony proceeding can be closed for the welfare of a child); *State v. Grimes*, 29 Nev. 50, 81, 84 P. 1061, 1071 (1906) (stating that there are stronger reasons to deny public access to judicial records concerning private matters when public access "could only serve to satiate a thirst for scandal"); *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986) (recognizing that "no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship," however, good cause must be shown before a proceeding can be closed).

The Court found that the statute "must be strictly construed," and its precise terms enforced.

The public policy rationale for the statute's existence mirrors the concerns in footnote 18; there is an essential difference between criminal proceedings, or even general civil proceedings, on the one hand, and family court suits, on the other.

In criminal matters, it is good policy for the public to be able to keep an eye on whether the State is abusing its power to prosecute an individual. A person found guilty of a crime has little legitimate right or expectation of privacy as to the conduct leading to the conviction, and the law already sets up a balance between public record, so people can be on notice of a criminal record, and the ability of a person to eventually seal and even expunge such a record.

In general tort or contract disputes, the general public has an interest in the actions of companies and entities whose actions may well affect the welfare of lots of people beyond the named parties.

In family court, however, purely personal and quite private and intimate disputes are resolved in that forum only because the Legislature has dictated that it is the only place where such claims may be heard. No other person has a legitimate interest in mom's affair, whether dad has a drinking problem, or if junior has health, psychological, or other difficulties, or in the custody schedule for that child. As the California Supreme Court said in *Wilson v. Cable News*, 444 P.3d 706 (Cal. 2019), there just is no legitimate public interest in a "garden-variety dispute" – like a couple's divorce – because "Absent unusual circumstances, a garden-variety dispute concerning a nonpublic figure will implicate no public issue."

The Nevada sealed file statute reflects a legislative determination that family law litigants have a right of privacy more important than the right of the public to invade that privacy. It strikes a balance between personal privacy and the presumptive open-ness of all government records by providing that pleadings, judgments, findings, and conclusions are open to public inspection, but motions, hearing records (including video records), financial affidavits, and allegations are sealed upon request.

### B. Closed Hearings

NRS 125.080 has been on the books since 1865. The statute permits closed hearings in divorce trials; it was written in an era when unmarried people generally did not have custody cases and some children were still considered "illegitimate," so it only applied to "divorce" cases as originally written.

Starting in the 1980s, local rules for the Eighth Judicial District Court (Clark County) were passed and approved by the Nevada Supreme Court governing procedure in "all domestic relations matters commenced under the provisions of Title 11 of NRS" except paternity and reciprocal support cases (which had their own specialized rules) – in other words, in essentially all family court cases.

Beginning in the early 1990s, the Clark County judges began allowing suits for custody between unmarried people without first requiring the filing of a formal paternity action, in recognition of the fact that about half of custody cases are between people who are not married to each other but have no dispute as to paternity of the child at issue. There is no specific statutory foundation for such actions, but they have been filed and resolved as "custody cases" for over 30 years.

By 1995, the Clark County local rules included EDCR 5.02, stating that ***all*** family court hearings would be "private" upon the request of either party, but allowing the court to override such a request for an expert witness. This was always interpreted to mean the hearings would be closed to third parties.

NRS 125.080 was last updated in 2007; the amendment expanded the list of persons who could presumptively remain in a closed hearing beyond court personnel, the parties, their counsel, and witnesses, to also include parents, guardians, and siblings of parties. The statute states that it applies to "the trial and issue or issues of fact joined therein."

The Clark County local court rules were in place for over 20 years. The provision was accidentally deleted from those rules in 2016, when the rule revision committee of that time concluded that the local rule was "redundant" of NRS 125.080, since "obviously" any procedure regulating trials also applied to hearings leading up to a trial, and what applied to divorce cases applied in all family law cases.

However, not every judge in Clark County agreed – some took the rule deletion to be a "change in policy" and stopped closing hearings except in trials of divorce cases, looking strictly at the language of NRS 125.080.

The next rule revision committee noted the problem and attempted to restore the prior rule as it had been in place since 1995, but when Phase One of the rule revisions went to the Supreme Court for approval in 2019, that Court altered the language to insert the words "pursuant to NRS 125.080" in the title of the rule (then EDCR 5.210), and changed the reference from "all actions filed under Title 11" to "in an action for divorce" in the rule text, although the restored rule still referred to "hearings or trial."

The net effect of those changes was to expand closed hearings from trials to include pre-trial hearings, but to treat people in divorce cases differently from those in custody or other case types, at least in some departments, which would allow closed hearings in divorce cases, but not in paternity, custody, or other case types.

The Phase Two revisions to the local rules concluded in 2021 again restored the reach of the 1995 rule, to ensure equal protection of people whether they are married or not. Treating similarly-situated people equally was given a high priority in consideration of every rule in the 2019-2021 revisions. On its second submission, the Nevada Supreme Court approved restoration of the original language, restoring the rule to the reach it has had since 1995.

## III. THE INTERNET AGE, ITS IMPACT ON CHILDREN, AND PUBLIC POLICY

Ever since the Nevada Legislature authorized the creation of family courts, a public policy objective has been to shield minor children from the adverse effects of divorce and custody litigation. For many years, the Clark County local rules have tried to serve that objective.

Current EDCR 5.304 prohibits lawyers and litigants from discussing family court issues, proceedings, pleadings, or papers with any minor child; or allowing any child to review such materials; or "leaving such materials in a place where it is likely or foreseeable that any minor child will access those materials"; or knowingly permitting any other person to do any of the things prohibited by the rule.

In practice, the rule has not prevented unscrupulous lawyers and litigants from posting case materials, hearing videos, and other family court records on the internet, or providing them to others to post. Obviously, doing so leaves such records "in a place where it is likely or foreseeable that any minor child will access those materials."

The potential, and actual, harm to children, who see their parent's private and most embarrassing topics plastered on the internet, and often their own personal, private, and confidential information (schedules, grades, medical, psychological, and other information) shown to the world, is hard to

overstate. This is especially so because, once posted, it is hard to ever actually purge such information from the internet. Several judges, in several cases, have made detailed findings of the psychological, emotional, and other harm suffered by children – and their parents – from such postings.

In an attempt to address the problem, the closed hearing rule, now at EDCR 5.212, was amended in 2019 to incorporate the *Johanson* footnote authorities recited above, stating that the court retains supervisory power over its own records, explicitly including electronic and video records, and that all such records in any sealed case or from a closed hearing are confidential, not open to public inspection, and may not be disseminated to any third party beyond the parties, their counsel, counsel's staffs, and any experts involved.

Parties and their agents are specifically prohibited from distributing, copying, or facilitating the distribution or copying of any such records without court permission. The rule gives specific direction that "any person or entity that distributes or copies the record of a private hearing shall cease doing so and remove it from public access upon being put on notice that it is the record of a private hearing." It will be up to the courts to enforce this rule by proper contempt sanctions.

There are those who claim that court rules "cannot affect" non-parties to cases, but that claim is nonsense. Beyond the closed hearing and sealed file rules, for well over a century, wage assignment orders, subpoenas, injunctions, and many *other* court processes have required non-parties to act or cease acting in compliance with court orders and rules. Courts should be at least as vigilant in protecting the privacy of parties and their children.

## IV. CAST OF CHARACTERS IN THE CURRENT PROCEEDINGS

In the appellate proceedings, the filings claimed that "Our Nevada Judges" ("ONJ") is a "private, independent, and neutral entity, the objective of which is to bridge the gap between the public and the judiciary [which] conducts statistical analysis on all judicial districts and their corresponding judicial departments, provides electronic coverage of and reports on judicial proceedings, and conducts interviews with judges, lawyers, and others who have interacted meaningfully with the legal community."

In actuality, ONJ is a for-profit website fun by Alex Falconi which primarily posts YouTube videos of court proceedings, usually interspersed with overlays, commentary, and some editorial comments. It makes money by generating ad revenue; the more people click on a video, the greater the sums paid.[2]

[2] At oral argument, counsel for Falconi objected to the characterization of "for profit," claiming that it actually does not make any money; no evidence for that proposition was offered.

Siding with Falconi either as amicus or by filing parallel actions are the American Civil Liberties Union ("ACLU"), four legal aid organizations[3] ("legal aid") and the Las Vegas Review-Journal ("RJ").

Troy Minter, who resisted Mr. Falconi's efforts to attend and broadcast his closed hearing in his sealed case, was represented by the Abrams & Mayo Law Firm. The Eighth Judicial District Court was represented by Jeffrey Conner, Esq., of the Attorney General's Office.

Siding with Mr. Minter and the District Court as amicus were the American Academy of Matrimonial Lawyers, represented by me, and the State Bar of Nevada Family Law Section ("FLS"), represented by Shann Winesett, Esq., and Michelle Hauser, Esq.

On behalf of the AAML, I sought and received permission to appear at oral argument as amicus. It was granted, and the hearing was expanded to encompass all three pending writ petitions, and to allow argument by counsel for Falconi, the RJ, the AG, the ACLU, and the AAML.

Neither actual party to the Minter divorce case expressed an intent to appear. As both parties were represented by counsel, I obviously could not speak with them,[4] so I reached out to their respective counsel and asked whether they wanted anything said or not said on their behalf, and whether they would cede their time to me. Neither wanted anything specific recited at argument, and both ceded their time.

## V. PETITIONER'S BASIC CLAIMS

Falconi filed both an initial Petition and a Supplement. The Petition claimed that the family divisions of Washoe and Clark County "need guidance" to understand that no party or judge has a right to bar broadcast of their custody proceedings whether or not hearings are closed and files are sealed. It based that claim on SCR 230(1), which allows "media requests" for court access.

The Petition, which was fairly short and summary, claimed that the media rule trumped the statutes and "depriving the public of access to these proceedings" was an attempted "end run" around the rule.

The Petition interpreted the wording of the rule, that ""all courtroom proceedings that are open to the public" are subject to electronic coverage to mean that no hearing can be closed, and it further cited some unfortunate precedent indicating that "participant conduct" (meaning lawyer actions) in a case is a matter of "public interest."

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[3] The brief was filed on behalf of the Legal Aid Center of Southern Nevada, Nevada Legal Services, Northern Nevada Legal Aid, and Volunteer Attorneys for Rural Nevadans.

[4] NRPC 4.2 (Communication with Person Represented by Counsel).

It asked the Court to find that the media access rule trumped the EDCRs regulating sealed files and closed hearings. It claimed that the ONJ "standard practice" of "blurring faces and redacting identities" was all the "protection" any person needed. It protested that NRS 125.110 only applied to "divorce actions" and the Minters were not married.

It claimed that closing a hearing is "unconstitutional," citing to federal cases regarding general access to courtrooms, which it claimed prohibited "government" from "summarily closing courtroom doors which had long been open to the public."[5] Ignoring that hearings are closed only by the request of a party, the Petition framed the contest as between Falconi and "the government," and asserted that Falconi had a right to access all "court trials, hearings, and records."

The Supplement, filed ten days later, went a bit further, this time asserting that the local rules regarding closed hearings and sealed files were "facially unconstitutional" by classifying custody cases as paternity cases under NRS ch. 126, and again claiming that the dispute was between "the public" and "the government." It asserted a "right" to "access judicial proceedings" under Nevada and federal case law.

The Supplement (falsely) asserted that the local rules call for family court proceedings to "occur in secret by default," and that they are unconstitutional both facially and as applied.

## VI. ASSORTED CLAIMS OF THOSE SUPPORTING PETITIONER

The ACLU brief largely repeated the sweeping generalities of Falconi's filings, asking the Court to enjoin the family court from enforcing its rules. Its brief sniffed that NRS 126.211, automatically sealing paternity cases, and NRS 125.080, providing for closed hearings, are "likely unconstitutional," but did not ask that the statutes be struck down.

It (falsely) asserted that the good cause requirement for exclusion of parents, etc. had been eliminated (this is addressed below). Citing a "white paper" from a reporter's organization, it (falsely) asserted that Nevada's rules were "the least accessible, most restrictive" in the country. It (falsely) asserted that domestic violence perpetrators could deprive victims of any support system by closing hearings.

While the brief was unclear, it appeared to demand both access to all hearings and access to all documents filed in every family law case.

The RJ brief piled on, repeating many of the same points, and repeating that it wanted access to all hearings and documents, but going further than the others by asking the Court to strike down NRS 126.211 and 125.080 as well. It demanded that every court conduct a separate special noticed hearing on the issue every time anyone asks to close a hearing, and asserted that even closing a

[5] *Richmond Newspapers v. Virginia* , 448 U.S. 555, 556-57 (1980).

hearing on a finding of good cause would be unconstitutional, because "strict scrutiny" of any such order would be required.

The RJ brief stressed that it was demanding "contemporaneous" access – i.e., the ability to review every document filed in every divorce case without any delay or request.

The brief filed by legal aid largely echoed the others but also took a separate tack, asserting that somehow "closed hearings exacerbate already existing obstacles for low-income and marginalized litigants in accessing courts." It asserted that judges are biased against *pro se* litigants, and that judges are racially biased, and that judges, lawyers, social workers, etc., routinely interact with one another and so are "clubby" and are all biased against *pro se* litigants.

With no citation to authority or cogent explanation, the brief then made the leap that any closed hearings would necessarily make all that bias worse. It repeated the false claim that closed hearings exclude support networks. In a spectacular leap of illogic, it asserted that "Since legal outcomes are worse for pro se parties, and pro se parties re disproportionately women and people of color, private hearings and trials will violate equal protection."

Finally, legal aid asserted that somehow making every hearing public would "shine light on abuses of power which leads to meaningful change." There were no citations to any kind of authority for that magical thinking.

## VII. MR. MINTER'S RESPONSE

The brief filed by Mr. Minter noted that none of the authority cited by the applicants pertained to family court cases, but instead addressed criminal matters and general civil cases. It raised the "experience and logic" test applied by federal courts, which ask whether "the type of proceeding at issue traditionally has been conducted in an open fashion." It noted that the information disclosed in family law cases is "already protected and private," and noted the obvious danger to children of publicizing a child's "schedule and personal vulnerabilities and interests."

The brief asserted at length that denying litigants the ability to shield their children from press intrusion would be a violation of the parents' fundamental liberty interest in raising their children. It re-framed the dispute as being between third parties' "first amendment rights" and the Minters' right of privacy, and cited authority stating that the "press" has no greater right to information than any other member of the public.

The brief rebuffed the claim of a conflict between the local rules and media access rules, noting that the latter only apply to hearings "that are open to the public."

## VIII. THE AG's RESPONSE

The AG chose to make s strictly procedural argument, asserting that any request for declaratory relief had to be made first at the district court level, so that the writ petition was procedurally improper and that it requested a "disfavored advisory opinion."

## IX. THE STATE BAR FAMILY LAW SECTION'S RESPONSE

The FLS reviewed Nevada's historical policy favoring privacy in domestic relations matters, from even before statehood, noting that closed hearings were required upon demand since 1865, and most family records have been sealed upon request since 1931. It noted specific legislation providing confidentiality in multiple family law subjects, including adoption, paternity, child support, dependency, and juvenile justice.

Asserting that family law is "fundamentally different" from other areas of law, the FLS noted the intention to treat similarly-situated persons equally by treating litigants to divorce and other case-types equally.

It expressly distinguished criminal law, constitutionally and structurally, and distinguished family law from "general civil law" on the basis of the extremely personal and extensive private information required to be disclosed in every case. It noted that in the "digital age," steps had to be taken to preserve the historical reality of "practical obscurity" of private information that was the reality in a world of paper files kept by a clerk of court. It warned of easy data mining and resulting harm to litigants if all hearings and documents were opened.

The FLS argued that the right of privacy of family law litigants outweighed the general notion of public access to court proceedings, noting federal law relating to "zones of privacy" regarding marriage, family, and children.

## X. THE AAML RESPONSE

The AAML brief was extensive, starting with detailing the judge-made rule permitting paternity cases where paternity was not contested to proceed as "custody cases," and noting that the *Minter* case was one of them.

As a paternity case, the *Minter* case is governed by NRS 126.211 and the local rules implementing the statute; in those statutes and rules, the legislature has adopted the model act language saying the hearings are presumptively closed and the records sealed, and put the burden of changing that status on those who would alter it. Nevada's Title IV federal funding requires maintaining existing confidentiality.

The AAML brief surveyed the national authority indicating that every state in the Union has some process or procedure, by statute, court rule, or informal procedure, for both sealing of some or all documents in particular family law case types and closing hearings in some types of family law cases, and that states are free to choose the balance they believe to be proper between privacy and public access.

The brief noted that several states have stricter privacy protections than Nevada, some publishing all divorce cases with "anonymous" names, and that the protections go beyond divorce everywhere, to all of the sensitive and personal matters involved in family court regardless of the formal cause of action. Some states close all such cases and hearings automatically, without requiring the request of a party. In such places with a history of protecting privacy, a "newspaper could obtain access only if it could demonstrate a legitimate interest for some useful purpose."[6]

Nevada caselaw going back to 1906 restricting public access to divorce filings was discussed,[7] Nevada's extensive history of protecting personal privacy was examined, both legislatively[8] and judicially.[9] The federal and Nevada authorities discussing the right of privacy as both fundamental and individual were examined.

Because privacy is a right deemed fundamental, the AAML brief reversed the position expressed by the RJ, saying that any effort to *invade* that interest would require "strict scrutiny."[10] Examining the arguments made in the prior briefs one by one, the AAML brief concluded that there is no significant countervailing policy that outweighs protection of the personal privacy of family court litigants, noting that the United States Supreme Court has not seen the "first amendment" quite as expansively as Falconi and the RJ would have it, and have stated that "The right to speak and publish does not carry with it the right to gather information."[11]

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[6] Laura Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records on Line*, 17 J. Am. Acad. Matrim. Law. 45, 54 (2001) (footnotes omitted).

[7] *State v. Grimes*, 29 Nev. 50, 81, 84 P. 1061, 1071-72 (1906), citing to *In re Caswell's Request,* 29 A. 259 (R.I. 1893) and multiple other cases and annotations.

[8] *See*, *e.g.*, NRS 125.080 (since 1865, right to close divorce trials); NRS 125.110 (since 1931, right to seal some divorce filings); NRS 126.211 (since 1979, in parentage actions, all hearings and trials are closed, and all records sealed except on motion for good cause shown).

[9] *See*, *e.g.*, SCR 230(2)(b), requiring judges to weigh the right of privacy of a party when considering a reporter's request to access court proceedings.

[10] *State v. Eighth Jud. Dist. Ct. (Logan D.)*, 129 Nev. 492, 306 P.3d 369 (2013).

[11] *Houchins v. KQED Inc.*, 438 U.S. 1 (1978), at 16-17.

The brief argued that because Falconi has no "fundamental constitutional right" to invade the privacy of family court litigants, no "narrowly tailored" inquiry is required,[12] only a "rational purpose" review of the statutes and rules, which the brief recounted..

Identifying Falconi's straw man argument, the AAML noted that "unlimited voyeurism accomplishes nothing to prevent any of the suggested evils of incompetence, etc." The brief further noted that in Nevada both the closed hearing rule and the sealed file rule are *individual* rights, and the Petition's attack on rules claiming they are means by which "the government" closes courtrooms or seals files is a false framing.

While automatic closure of all proceedings ***is*** the case in various other jurisdictions, which have rebuffed claims of constitutional violation in doing so, in *Nevada* most proceedings are presumptively *open*, and Falconi's claim that all family court proceedings "occur in secret by default" is false on its face. The brief squarely refuted Falconi's claims that the issue was "Falconi vs. the State" but was actually "Falconi vs. Mr. Minter," with the question being whether Mr. Falconi's right to invade Mr. Minter's privacy outweighed Mr. Minter's right to protect it.

The brief recounted the many dozens of federal and state laws which mandate keeping certain information confidential, ranging from HIPAA, FERPA, VAWA, and many more prohibiting dissemination of a great deal of personal information. It was pointed out at oral argument that Falconi is not simply prohibited from *broadcasting* any of that personal identifying information, the relevant statutes bar him from being in the room to ***hear*** it.

And the brief noted that if the intended goal was ***actually*** monitoring judicial behavior rather than invading privacy in salacious cases, it would be simple enough to watch the overwhelming majority of cases which are ***not*** sealed and hearings which are ***not*** closed.

Noting that dozens of states have made all hearings and records in paternity (and other) types of cases sealed, either automatically, or presumptively, or upon judicial order, and have rebuffed constitutional and other challenges to doing so, the brief argued that Nevada's balance between privacy and access is a legislative determination and that the Court should not seek to invade that legislative policy arena.

The brief noted that any statute or rule that would treat married and unmarried persons dissimilarly would violate the Equal Protection Clause of the Constitution.[13] Clark County's local rules give identical rights to married and unmarried parents, and equal protection to children regardless of their parents' marital status, whether the cases originate as "divorce" or "parentage" cases or otherwise,

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[12] *See Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 64 P.3d 1056 (2003).

[13] *Eisenstadt v. Baird*, 405 U.S. 438 (1972) at 453.

The brief noted the impossibility of shielding children from exposure to court materials relating to cases involving them if cases could not be sealed and hearings closed, since, once posted on the internet, they would inevitably be "exposed" to those materials.

The brief flatly rejected any notion that the Court's media access rules and the local rules conflicted, since the former note on their face that "certain proceedings" are "made confidential by law." It squarely addressed the "boogeyman" argument pervading the writ petition that preventing the publication of the private information of all family court litigants and their children will somehow allow some never-specified "corruption" to flourish, noting that every hearing is recorded, that the parties and their lawyers have full access, that there is *no one* more attuned to any possible abuse than the opposing party and his or her counsel, and that the Bar and Judicial Discipline have full access if some lawyer's or judge's conduct is in question.

The brief pointed out that the writ petition ignored the reality that if family court litigants cannot exclude *everyone*, they cannot exclude *anyone*. Falconi made a point of saying that in his broadcasts he chooses to blur faces, bleep child names, etc., but if the courtroom cannot be closed, his choice of practices mean nothing, as others present may choose to do none of those things. As stated in the brief:

> If the courtroom cannot be closed during hearings, then Chester the Molester from down the street – who will be ***very*** interested in little Susie's pick-up and drop-off times and when she is alone, will have free access to that information. If "reporters" from "Our Nevada Judges" must be admitted, so must the "reporters" (recruiters) from the North American Man-Boy Love Association, looking for potential recruits. Judges are not going to interrogate those present (or viewing virtually) to divine their intentions.

Even absent malefactors, the emotional trauma inflicted on children watching their parents in courtroom conflict is massive, and essentially universal. The cases are innumerable, but as one judge put it in one order, watching the video of a contested hearing between the parents "would clearly be disturbing emotionally and mentally to most any child who witnessed it" by watching their mother:

> struggling with divorce issues . . . who was very emotional and distraught during the hearing, to listen to financial and other matters being discussed in escalated tones, to hear accusations flying across the room, seeing their parents in conflict in a setting where children are not typically allowed to be present *for very good reasons*, to know their friends and relatives can access this same video material online at any time . . . .[14]

Falconi's pretense in his briefing that he is doing all children a favor by making sure they can enjoy the show is an affront to experience, decency, and common sense.

The brief challenged Falconi's desire to cloak his assault on family court as any kind of noble effort, because while:

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[14] *Brandon Saiter v. Tina Saiter*, Case No D-15-521372-D, Order filed March 21, 2017 (emphasis in original).

> the original writ petition claimed (at 9) that the purpose of forced entry into every family law hearing and document was to "educate and inform," it should be squarely addressed that the desired "coverage" is for the purpose of generating ad revenue by sensationalizing private disputes and trauma – in other words monetizing the misery of others. The more lurid and salacious the hearings broadcast, the more profit is generated by the increased clicks to those videos.

The brief addressed the bizarre arguments allegedly filed on behalf of the four legal aid organizations, noting that the filing had never been submitted to nor approved by the Board of Directors of the Legal Aid Center of Southern Nevada, and that none of the hundreds of attorneys honored each year for serving the poor by representing them pro bono in the family courts of Nevada were even asked what they thought about the matter.

The AAML noted that the legal aid brief vaguely attacks "the system" because some judges have racial and other biases and asserts (without evidence) that judges are "too chummy" with lawyers, asserting that the solution to improving the quality of the judiciary has to do with judicial selection and training, not in splashing litigants' private information across the internet, which would accomplish exactly nothing toward the stated goal.

The AAML noted that there would be a significant cost, to every litigant in every case, to have to prove, over and over, the obvious and identical compelling reasons for keeping family law matters private that the Nevada Legislature has already determined is appropriate, and it is unfair to burden parties – rich *or* poor – with having to do so.

It refuted the accusation as to excluding "support systems" from the courtroom, because there is a list of persons presumably not excluded, which *are* those "support systems," and judges can make additional inclusions or exclusions as appropriate; obviously, witness exclusion rules exist regardless of any such lists.

## XI. "TRANSPARENCY" AND INVASION OF PRIVACY

Some superficial commentators have expressed the opinion that everyone has some never-defined "right" to know about anything said or done in a courtroom because the public funds the courts. The opinion is absurd on its face, of course – location in a courtroom does not make private matters in a divorce case matters of "public interest" any more than it does conversations in private vehicles driving down public highways.

There are multiple categories of people and information in a "public courtroom." While there is a public good in evaluating the manner in which a judge performs judicial duties, and probably some right to know if court personnel are actually doing their jobs, there is no legitimate interest in whether the court bailiff is behind on his child support payments or the Judicial Executive Assistant has been a victim of domestic violence. Likewise, the personal and private details of the lives of non-public-figure parties is simply not the business of anyone except the parties to the case.

The distinction between the operation of the court as an institution, and the private information of the people who are required to resolve their disputes in that location is critical, and glossing it over is sophistry – no one has a "right" to know the personal and financial information of a litigant, or what that litigant discusses with counsel, as statutory and common law privileges have established for centuries.

Family law cases are filled with information that is indisputably private – tax return information, health information, private employment information, children's schedules and special needs, etc. People do not surrender for open public consumption their personal information and what goes on in the privacy of their homes just because they divorce any more than they do because their blood draws are processed in a government laboratory or their doctor works out of a Medicaid or Veteran's Administration office.

"The public" has no more right to the private lives of the parties, paralegals, clerks, and lawyers who have to be present in a courtroom than they do to the personal information of a welder doing maintenance on a public bridge, or the piano tuner in a public auditorium; the courtroom is simply where those people have required appointments, or where they happen to be working.

For a century, statutes and court rules have attempted to balance the "transparency" of public review of judicial officers doing their duties and the protection of the privacy of the litigants; that is why pleadings, judgments, findings, and conclusions are open to public inspection, but motions, hearing records (including video records), financial affidavits, and allegations are sealed upon request. That well-established balance is a good one.

## XII. WHAT WILL HAPPEN IF THE WRITS ARE GRANTED

The California experience is illuminating. After a California court struck down some automatic protections for personal privacy, the rich immediately gravitated to a system of private judging and mediation. The poor have no such options. Similar trends have already appeared in Nevada.[15] Eliminating the statutes and court rules in question would greatly harm the poor, perhaps even more than everyone else.

But the risks and harms to every member of the public in the family court system would be widespread and severe. With no limitations placed, it would be a simple matter for computer-assisted companies to Hoover up, aggregate, and re-sell the private personal information of every litigant in family law.

The staggering harm that would inevitably result in increased identity theft, blackmail, burglary, assaults, child kidnapings, and every other means of misuse of that information is obvious. Protective orders would be rendered meaningless. Businesses would be compromised or ruined,

[15] *See*, *e.g.*, Clark County Communiqué, November, 2022, listing ads for both JAMS (at 13) and ARM (at 15) offering several former members of this Court, and others, for "private judging" and private mediation, for a fee.

trade secrets would cease to be so, and every federal and state statute requiring the protection of personal identifying information would be violated at all times. Without serious doubt, many will be harmed and some will die.

There is essentially no good that could possibly come from the trashing of the closed hearing and sealed files statutes and rules.

## XIII. WHAT *SHOULD* HAPPEN IN THE LEGISLATURE REGARDING THE STATUTES

The Mission Statement of the AAML is to preserve the best interests of the Family and of Society, improve the practice, elevate the standards, and advance the cause of Matrimonial Law. In Nevada, a lawyer has to already be a Certified Specialist just to apply to the Academy and take its qualification test.

The Nevada AAML Chapter discussed and debated the closed hearing and sealed file rules at length in 2019. Amendments to both were approved by the Chapter as good improvements in Nevada family law state wide. They were run past legal aid, and the self-help centers, neither of which voiced any objections. They have been introduced as bills in the last two legislative sessions, but never brought up for hearings or passed into law.

The AAML proposed bill updates the language of the sealing statute to reflect the modern, electronic records that exist, and expands the protections of the statute from just divorces to ***all*** family court cases, so that all parties and children in all such cases, whether labeled divorce, custody, adoption, guardianship, separate maintenance, domestic partnership, cohabitation, or otherwise are treated the same and the people in those cases are provided identical protection.

Responding to modern problems, the bill provides a mechanism to redact or seal parts of a record if Social Security numbers or other personal identifying information that other statutes say should not be disclosed is put into the public record, to protect against identify theft and similar abuses. And it provides a mechanism for unsealing a case in case something was sealed improperly for any reason.

The same documents that were previously kept public are still kept public by the proposed amendments – it simply treats married and unmarried people equally in terms of their rights to privacy, and updates the terminology to reflect modern technology. There simply is no legitimate reason to oppose updating the statutes.

## XIV. CONCLUSIONS

For a century, the statutes and court rules of Nevada have balanced the "transparency" of public review of judicial officers doing their duties and protection of the privacy of the litigants; that is why pleadings, judgments, findings, and conclusions are open to public inspection, but motions, hearing records (including video records), financial affidavits, and allegations are sealed upon request. That well-established balance is a good one.

Nevada's paternity statutes, and the parallel statutes and rules governing divorce actions, follow the strong historical policy in Nevada of protecting privacy in family law matters; there is no policy consideration superior to Mr. Minter and Ms. Easler's privacy rights.

Falconi has no greater right to access closed hearings or sealed files than any other member of the public, and his rights are not superior to those of the parties. Federal and state law mandate keeping hundreds of kinds of information confidential that saturate all family court filings and hearings. Every state has the power to decide how to balance these concerns, and Nevada's policy choices certainly have a rational basis, and appear intended to protect interests that have been repeatedly deemed "fundamental."

The statutes have not been recently updated, and the local rules fill gaps that have developed given modern proceedings and technology. Married and unmarried parties, and all children of all parties, are entitled to equal protection of their privacy rights no matter which door through which they enter family court.

The Falconi petition asserts that "the public" must monitor the fairness and integrity of family court hearings and filings, but cites no cases involving a party's fundamental right to privacy. He also claims without evidence that public scrutiny will prevent perjury, but the opposite seems more likely to be true.

In fact, Falconi has not identified a single legitimate interest that the public has in any issue related to a divorce or in what sense the public has a legitimate interest in the personal life of the parties to a divorce or their children. This is because there isn't any.

The reality reflected in the challenged statutes and rules is that persons and their children involved in a family law proceeding have a high interest in the system protecting their fundamental constitutional right to privacy, which is a liberty interest under the Nevada Constitution and 14th amendment of the U.S. Constitution.

Since the founding of family court, measures were taken to prevent children from being exposed to case materials. That becomes impossible if hearings are broadcast and files are opened.

There is imminent and obvious danger of criminal and other mis-use of information common to nearly all family law filings and hearings, exacerbated by the magnified harm of the broad transmission and permanence of matters put on the internet, ranging from identity theft to fraud to children being needlessly harassed or bullied. If hearings and documents must be open to "the press," they are likewise open to every reprobate with malicious intent.

The public has no legitimate interest in knowing how much dad or mom earn, what it costs each of them to live; what they own and the value of those assets; which parent got up at night to care for a crying child or more effectively imposed discipline; whether family members have mental health, drug, or alcohol dependency problems; whether domestic violence has allegedly been committed; who is alleged to have had an affair with whom; or any other issues common in family law proceedings.

The bottom line is that except for the people directly involved, none of that is anyone else's business. Each party and child involved has a fundamental right to privacy of that information.

Any "monitoring" of family court hearings and documents could only result in complaints being submitted to judicial discipline and the Bar, or appeals to this Court, and those agencies and entities already have both full access to all materials and a party present in every hearing highly attuned to any suspected abuse or over-reaching.

Nevada has a lot of good reasons for its 160-year tradition of guarding personal privacy in family law cases. The writ petition seeking to invalidate all the statutes and rules requiring confidentiality of materials, and permitting closing hearings and sealing parts of files, should be denied.

As a matter of public policy, family court litigants and their children deserve the privacy intended by the Nevada Legislature in enacting the protections of closed hearings (90 years ago) and sealed files (150 years ago). The terminology of those provisions should be updated with terms appropriate for the information technology undreamed of when the provisions were enacted. Equal protection of those laws should be provided to all persons – and their children – regardless of their marital status. In the next legislature, those protections should be extended to all families in Nevada by way of enactment of the AAML statutory updates.

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