

MEDIA AND CONFIDENTIALITY

Background & Analysis:

Background:

This is a complex issue and a complete background and comprehensive analysis is beyond the scope of the tool kit. The following is a sample of constitutional and statutory and rule provisions pertinent to this issue:

Article I, Section 23 of the Florida Constitution recognizes a person's right to be free from governmental intrusion into the person's private life. When private matters are brought into court, a person's right of privacy can compete with well-established statutory and common law rights of access to court proceedings and records. In Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988), the Court reiterated that "a strong presumption of openness exists for all court proceedings." However, the Court went on to "find that, under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure...." Id.

Section 63.162 (1), Florida Statutes, provides that all adoption hearings "shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the adoption and are required to consent, and representatives of agencies who are present to perform their official duties." The constitutionality of this statute was upheld by the Supreme Court in In re The Matter of the Adoption of H.Y.T., 458 So. 2d 1127 (Fla.1984). The Court noted that "the Florida Legislature has recognized an overriding public policy of protecting from harmful publicity parties to and the subject of adoption proceedings... [and] this policy recognizes that adoption proceedings are qualitatively different from other judicial proceedings." Id. at 1128.

Section 742.16(5), Florida Statutes, provides that all hearings in Expedited Affirmation of Parental Status for Gestational Surrogacy cases "shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, and any persons who have received notice of the hearing."

Section 39.809 (4), Florida Statutes, provides that "all hearings involving termination of parental rights are confidential and closed to the public." The Supreme Court specifically found that this statute requiring the mandatory closure of TPR proceedings is valid under the United States and Florida constitutional provisions respecting access of the public and media to judicial proceedings, in Natural Parents of J.B. v. Florida Dept. of Children and Family Services, 780 So.2d 6 (Fla. 2001).

Section 390.01114(4)(f), Florida Statutes, dealing with parental notice of abortions provides that "[a]ll hearings under this section, including appeals, shall remain confidential and closed to the public, as provided by court rule." In addition, Florida Statutes §390.01116 provides that:

[a]ny information that can be used to identify a minor petitioning a circuit court for a judicial waiver, as provided in §390.01114, of the notice requirements under the Parental Notice of Abortion Act is: (1) Confidential and exempt from s. 24(a), Art. I of the State Constitution if held by a circuit court or an appellate court.

Fla. R. Jud. Admin. 2.420(d)(1) provides that:

[t]he clerk of the court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of this rule. The following information shall be maintained as confidential: ... (B) except as provided by court order, information subject to subdivisions (c)(7) or (c)(8) of this rule that is currently confidential or exempt from §119.07, Florida Statutes and Article I, Section 24(a) of the Florida Constitution as specifically stated in any of the following statutes or as they may be amended or renumbered: (vii) [i]nformation that can be used to identify a minor petitioning for waiver of parental notice when seeking to terminate pregnancy. §390.01116, Florida Statutes.

Section 742.031(1), Florida Statutes, gives the court discretion to restrict access in Paternity proceedings, and provides that "hearings for the purpose of establishing or refuting the allegations of the complaint and answer shall be held in the chambers and may be restricted to persons, in addition to the parties involved and their counsel, as the judge in his or her discretion may direct." Additionally, Florida Statute §742.09 indicates that anyone who publishes or broadcasts "the name of any of the parties to any court proceeding instituted ... under this act ... shall be guilty of a misdemeanor of the first degree...."

Florida Statutes §984.20(2)(c) provides that:

(c)child-in-need-of-services hearings shall be open to the public, and no person shall be excluded there from except on special order of the judge who, in his or her discretion, may close any hearing to the public when

the public interest or the welfare of the child, in his or her opinion, is best served by so doing.

Florida Statutes §985.035(1) provides that Delinquency hearings “must be open to the public, and no person may be excluded except on special order of the court. The court, in its discretion, may close any hearing to the public when the public interest and the welfare of the child are best served by so doing.”

Florida Statutes §39.507(2) provides that Dependency hearings (but not TPR hearings, pursuant to §39.809(4)) “shall be open to the public, and a person may not be excluded except on special order of the judge, who may close any hearing to the public upon determining that the public interest or the welfare of the child is best served by so doing.”

Florida Statutes §92.53(1) provides that:

.... a victim or witness who is under the age of 16 or who is a person with mental retardation...would suffer at least moderate emotional or mental harm if ...required to testify in open court, ... the trial court may order the videotaping of the victim or witness in a case, whether civil or criminal in nature, in which videotaped testimony is to be utilized at trial in lieu of trial testimony in open court.

Florida Statutes §918.16 (1) provides that:

.... in the trial of any case, civil or criminal, when any person under the age of 16 or any person with mental retardation... is testifying concerning any sex offense, the court shall clear the courtroom of all persons except the parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and at the request of the victim, victim or witness advocates....

In Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113, 114 (Fla. 1988), the Supreme Court held “that all trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions.” Those exceptions “fall into two categories: the first includes those necessary to ensure order and dignity in the courtroom and the second deals with the content of the information,” *Id.* at 117. The Court specifically found “no justification to give dissolution proceedings special consideration, ... (and) parties seeking a dissolution of their marriage are not entitled to a private court proceeding,” *Id.* at 119.

In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979) established that electronic media are permitted to have access to courtrooms subject to standards adopted by the Supreme Court and the authority of the presiding judge to control the conduct of proceedings to ensure a fair trial.

Analysis:

Express statutory authority mandates the closure of Adoption, Parental Status, and TPR proceedings. All other UFC proceedings are statutorily open to the public and the press. However, pursuant to Fla. Fam. L.R.P. 12.400 and the related Fla. R. Jud. Admin. 2.420(c)(9), the court has the discretion to close UFC proceedings or seal records where appropriate. It is helpful to note that the commentary to Fla. Fam. L.R.P. 12.400 states that:

(j)udicial proceedings and records should be public except when substantial compelling circumstances, especially the protection of children ... require otherwise. Family law matters frequently present such circumstances. It is intended that this rule be applied to protect the interests of minor children from offensive testimony and to protect children in a divorce proceeding.

Where a statute requiring closure does not exist, the court must make findings to support a closure order, and find that there is no reasonable alternative. Guidance for making these findings and determining when closure of proceedings is appropriate, is found in Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113, 118 (Fla. 1988), where the Court sets out five factors that trial courts must consider when they exercise their power to close all or part of a civil proceeding:

1. A strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court proceedings are public records available for public examination.
2. Both the public and news media shall have standing to challenge any closure order. The burden of proof in these proceedings shall always be on the party seeking closure.
3. Closure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by

disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

4. Before entering a closure order, the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose.
5. The presumption of openness continues through the appellate review process, and the party seeking closure continues to have the burden to justify closure.

The court must balance the rights and interests of the parties to the litigation with those of the public and the press when determining what, if any, restrictions may be placed upon access to judicial proceedings. The constitutional right of privacy established in Florida under Article I, Section 23 may provide the basis to close proceedings in UFC cases. The court should generally focus on the content of the subject matter - rather than the status of the party seeking closure - to determine whether a sufficient privacy interest exists that would warrant closure of the proceedings. It is not enough to show that the parties are "famous" or are public figures to obtain a closed hearing.

It should be noted that media and public access to court proceedings differs from the right to have access to court records. Access to court records is strictly limited by statute in adoption cases, per §63.162(2); in Child-in-need-of-services cases, per §984.06(3), (4); in Dependency cases, per §§39.0132(3), (4)(a) and 39.202(1); in TPR cases, per §§39.814(3)(4); and in Judicial Waiver of Parental Notice cases per §390.01116, Florida Statutes. Court records in these cases are confidential and are to be maintained separately by the Clerk. The public is prohibited from inspecting them. Access to these records may be granted only upon order of the court, and then only to persons deemed to have a proper interest in them.

Access to court records that are not made confidential per statute may nonetheless be limited or denied if the content of those records is of such a personal and private nature as to outweigh the public's right to access the records. "The Supreme Court of Florida has clearly held that the Public's interest in the disclosure of public records pursuant to statute is to be balanced against the privacy rights of the subjects of those records." State v. Rolling, 1994 WL 722891 at 3 (Fla. Cir. Ct.); 22 Med. L. Rep. 2264. In that criminal case, the court allowed photographs of murdered victims to be viewed by the media and the public but prohibited the photographs from being removed or reproduced so that the surviving family members would not be confronted by the photographs in a public forum. *Id.* at 6.

Likewise, in Earnhardt ex rel. Estate of Earnhardt v. Volusia Co., 2001 WL 992068 (Fla. Cir. Ct.); 29 Med. L. Rep. 2173, where various media outlets sought to obtain autopsy photographs of Dale Earnhardt, the court found that the deeply personal nature of the photographs and the unnecessary public inspection of the photographs would cause personal distress and trauma to the surviving family members and held that the photographs were not to be disclosed in any way. Part of the rationale for the decision was that there were numerous other ways for the media and the public to obtain any relevant information regarding the autopsy that were less intrusive on the surviving family members' privacy interests than viewing the photographs. *Id.* at 2.

The guardian ad litem has been found to have the authority to waive the benefit of statutory provisions of confidentiality on behalf of minors, and the media was allowed full access to both the proceedings and records after the court determined that disclosure was in the best interests of the children in Department of Health and Rehabilitative Services v. A.N., 604 So. 2d 11 (Fla. App. 3 Dist. 1992).

Finally, Fla. Fam. L.R.P. 12.004 authorizes a judge hearing a family case and authorized court staff to access and review the files of any related case, whether pending or closed. This rule was developed to aid the court and staff in their coordination of related family cases. Fla. Fam. L.R.P. 12.004(c), precludes judges or court staff from disclosing confidential information and documents in related family case files except in accordance with applicable state and federal confidentiality laws. Fla. Fam. L.R.P. 12.007 addresses confidential files in related family cases by providing that access to confidential files in related cases is not allowed unless authorized by Fla. R. Jud. Admin. 2.420. Fla. Fam. L.R.P. 12.007(b) clarifies that when a petitioner for a domestic violence injunction requests that his or her address be kept confidential, this information is exempt from the public records provisions and is a confidential court record.