To be argued by: Adam Paskoff, Esq.
(Time Requested: 8 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

IN THE MATTER OF THE ADOPTION OF
CHILDREN WHOSE FIRST NAMES ARE

ZALKIND AND SARA

Docket No(s).:
77X-1931
and
78X-1931

BRIEF IN SUPPORT OF PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

This appeal addresses the legal issues involved in a request to review an adoption record from 1931; or, alternatively, an application to unseal said adoption record based upon a showing of good cause, which was denied by the Surrogate's Court of the State of New York, County of Bronx (Malave-Gonzalez, Surr.) in a decision and order dated September 18, 2014. The records are sought by an academician for research related to the birth father, Frank Tannenbaum, a historical figure. All of the parties to the adoption are now deceased, and consent has been given by the surviving relatives to the Estate of Frank Tannenbaum (birth father) and the Estate of Zalkind Hurwitz (adopted son). Surrogate Malave-Gonzalez did not address the legal argument that this adoption predates Domestic Relations Law ("DRL") § 114, which was enacted in 1938, requiring all adoption records subsequent thereto to be sealed. There is no known order sealing the requested records, thereby making the record in question public consistent with the availability of such files back in 1931.

Alternatively, appellant seeks reversal of the court's decision denying the unsealing of the adoption record and argues that "good cause" has been established as required by DRL § 114(2). The request is made by a non-party to the adoption, Matthew G. Yeager, Ph.D., Associate Professor of Criminology, Department of Sociology, King's University College, Western University, Canada, for research

purposes. The within appeal is an issue of first impression in the State of New York with grave impact upon establishing standards in determining "good cause" in similar situations, pursuant to a term not defined by statute.

While the entire adoption record was sought by the applicant, alternatively, he requested the date that both children were adopted, their dates of birth, their legal adoptive names and the names and dates of birth of the adoptive parents. Further, the applicant requested the ability to review, but not copy said record.

Questions Presented On Appeal

1. Whether, in the absence of an Order sealing the record, is there a statutory bar to the release of Court records from 1931;

2. Whether it was proper to consider granting access to a 1931 adoption record under the statutory requirements of a subsequent law (DRL § 114(2)) enacted in 1938; and

3. Alternatively, whether the applicant, an academician, has established good cause pursuant to DRL § 114(2) for purposes of research where there is virtually no negative impact to any family members, where the principal parties of the divorce are now deceased, where surviving family members have consented to the release of such information, and where the release of such records materially assist in the research of an historical figure.

STATEMENT OF RELEVANT FACTS

The applicant, Matthew G. Yeager, Ph.D., is writing a biography on Frank Tannenbaum, expanding upon an article entitled "Frank Tannenbaum: The Making of a Convict Criminologist" published in The Prison Journal 91 (June 2011): 177-197, No. 2. [RA at 23]. Mr. Tannenbaum is a historical figure, who is an early American convict criminologist noted for his depiction of the dramatization of evil, which was an early precursor to the later developed labeling theory. The biography would not be complete without an analysis of his personal life discussing the subject's social history, accurate facts, and humanization that allows the reader into the life of the subject. As stated by Professor Yeager, "this request goes beyond mere curiosity" because "[o]ne's social history becomes part of the historical record in a biography." [RA at 16].

All the relevant participants to the adoption are now deceased. Frank Tannenbaum (birth father), was born March 4, 1883 in Galacia, Austria, and emigrated to the United States in 1905. He died in Manhattan on June 1, 1969. On June 1, 1917, Frank married Esther Abramson (birth mother) in the Bronx. [RA at 40]. Esther was born in New York City on June 2, 1895 [RA at 42] and died, upon information and belief, on August 30, 1957. Public Health Records for the City of New York indicate that Frank and Esther had a son named Zalkind born in Manhattan on November 4, 1925. [RA at 44].

Frank and Esther divorced in Sonora, Mexico in 1929. The divorce papers reveal that there was a daughter born to this union, upon information and belief, on June 29, 1927. After the divorce, Esther remarried Eli Hurwitz in or about 1929. Records indicate that they had two children, Zalkind Hurwitz and Saranessa Hurwitz (a/k/a Saralneus Hurwitz). The family resided in Brooklyn and were also known by the last name Hurowitz [RA at 46].

The JewishGen Burial Registry and death certificate reveal that a Zalkind Hurwitz, with the same birth date above, passed away in Florida on June 23, 1994 [RA at 48 and 50]. Information furnished to the applicant through the surviving daughter of Zalkind Hurwitz indicates that Nessa Hurwitz Sternfeld passed away on May 18, 2011, in Tarrytown, New York. [RA at 53].

The Social Security Death Index reveals that the adoptive father, Eliahu Hurwitz, died in July of 1968, most likely in the Bronx, New York [RA at 51]. Thus all parties directly related to this adoption proceeding are now deceased.

Consenting to the release of the records is Frank's surviving nephew, Sherman W. Tanenbaum, the sole legal heir to the Estate of Frank Tanenbaum. [RA at 67 and 69]. Also consenting to the release of the records is Annette Hurwitz Jenner, daughter of Zalkind Hurwitz. [RA at 66 and 70].

The Petition

Professor Yeager, a criminologist of more than 42 years, requested access to the Tannenbaum adoption in connection with his detailed research into Frank Tannenbaum's life for purposes of completing his biography on the subject. A detailed factual record was set forth in the Surrogate's Court with a request for access to the adoption file on the basis of two theories, to wit: 1) The adoption, which was completed in 1931, was not sealed and predated the automatic sealing requirements of DRL § 114, which was enacted in 1938., thereby making said adoption records a public record consistent with such records of that time; and, alternatively, 2) an application was made based upon a showing of good cause pursuant to DRL § 114(2).

The Decision Below

The Honorable Nelida Malave-Gonzalez, Surrogate, Bronx County, denied the request to access the adoption records in a written decision dated September 18, 2014 [RA at 8]. Surrogate Malave-Gonzalez analyzed the application solely under a theory of unsealing for good cause pursuant to the standards required in DRL § 114(2), determining that no compelling reason exists in weighing disclosure against the privacy interests at stake. There was no detailed analysis weighing the privacy issues protected by DRL § 114 against an academic request for research which has no negative impact on the same.

Arguments

I.

THE ADOPTION RECORDS IN QUESTION PREDATE MANDATORY SEALING AND NO ORDER SEALING SUCH RECORDS ARE KNOWN TO EXIST, THEREBY RENDERING THE REQUESTED RECORDS PUBLIC RECORDS CONSISTENT WITH THE TREATMENT OF ADOPTION RECORDS AT THAT TIME

The adoption in question concluded in 1931. DRL § 114 was not enacted until 1938. Surrogate Malave-Gonzalez did not directly address this argument, but in a circuitous way referenced that courts had the discretionary power to seal adoption records since 1924. There is no reference by the Court of an existing Order sealing the adoption record in question. Based on the record before this Appellate Division there is no basis to seal this adoption record 84 years after-the-fact. If the Judge or Surrogate presiding over the adoption in 1931, with full knowledge of the discretionary right to seal such record, chose not to do so, then there can be no justifiable reason for the record to be sealed 84 years later.

Surrogate Malave-Gonzalez stated no reason to treat this adoption record as sealed. The Surrogate did state that the function of sealing an adoption record was "to protect confidentiality 'which is vital to the adoption process' to provide anonymity to the natural parents, enable the adoptive parents to form a close bond with their adopted child, protect the adopted child from possibly disturbing information that might be

found in his records, and allow the state to foster an orderly and supervised adoption system" citing cases from 1981 and 2013[1]. All of the stated reasons are valid and important to adoptions made pursuant to DRL § 114, but none of the reasoning is applicable to the adoption that is the subject of this matter.

All of the principals to this adoption are now deceased, and there is no basis to seal this adoption record 84 years after-the-fact when neither the biological parents, adoptive parents, or adopted children are alive to reap the benefit of confidentiality, and the purpose of allowing a close bond to form between the adoptive parents and adopted children. As further discussed herein, the rational behind sealing the record is inapplicable to this matter, which was an adoption presumably done on consent, with the biological mother remaining the parent and only her second husband adopting the children. On that basis, there is no need for anonymity of the natural parents.

Historically, adoption records were publicly available in the 1920's and 1930's. *See* Elizabeth J. Samuels, "The Idea of Adoption: An Inquiry into the History of Adoptee Access to Birth Records," 53 Rutgers L. Rev. 367 (2001). Inasmuch as there is no evidence that this record was sealed based on discretion of the presiding Judge or Surrogate prior to 1938, this adoption file is a matter of public record and should be released to Professor Yeager.

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1 Surrogate Malave-Gonzalez cited Matter of Linda F. M. 52 N.Y.2d at 236 (1981), appeal dismissed 454 U.S. 806 (1981); Matter of Candy, M.M.M. (38 Misc.3d 1228(A); 2013 N.Y. Slip Op. 50312 [U](Sur Ct, Nassau County

II.

ALTERNATIVELY, UNDER THE UNIQUE FACTS PRESENTED HEREIN, GOOD CAUSE HAS BEEN ESTABLISHED TO UNSEAL THIS ADOPTION RECORD

Surrogate Malave-Gonzalez went through a perfunctory analysis of unsealing the record pursuant to the standards set forth in DRL § 114(2), which states in relevant part:

> No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

The statute is silent as to what constitutes good cause. Although not specified by the statute, both the petitioner and the Court recognize that the most common basis to establish a showing of good cause is usually for medical grounds. However, Courts have found good cause for non-medical reasons, with the Surrogate Court citing examples of establishing Hungarian lineage for purposes of citizenship (Matter of Victor M. I. II., NYLJ, Mar. 30, 2009, at 25, col 1 [Sur Ct, Nassau County 2009]); apply for Turkish citizenship after a close relationship was established with the birth mother (Matter of S. P., NYLJ, May 13, 2010, at 38, col 3 [Sur Ct, Bronx County

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2013); Matter of Hayden, 106 Misc.2d (Sup Ct, Albany County 1981).

2010]); or to establish membership in the Hopi Tribe (Matter of Merri H. F., NYLJ, May 27, 2005, at 5, col 1 [Sur Ct, Kings County 2005]).

Surrogate Malave-Gonzalez cited examples where other courts did not find good cause to establish Puerto Rican heritage in order to participate in a basketball draft (Matter of C. C., NYLJ, Jan. 7, 2010, col 4 [Sur Ct, Kings County 2010]); learn the identities of biological relatives (Matter of Linda F. M., 52 N.Y.2d at 240); make the adoptee aware of a biological brother (Matter of Robert R. B., 147 Misc.2d 569 [Fam Ct, Schoharie County 1990]); or ascertain the birth mother's religion (Matter of Alicia L. L. T., 38 Misc.3d 966 [Sue Ct, Nassau County 2012]).

What is clear is the application by Professor Yeager, an academician, is an issue of first impression. Surrogate Malave-Gonzalez concluded "[t]hat the adoption records are old do not support unsealing. Otherwise, the statute's requirement of good cause would become a nullity and adoption records could be unsealed after the mere passage of time" citing Matter of R. S., NYLJ, Oct. 25, 2006, at 32, col 1 [Sur Ct, Kings County 2006]). While petitioner does not argue that the aforesaid reasoning is incorrect, it is respectfully argued that the passage of time should be a factor considered among all other factors in determining whether good cause is established. To disregard the passage of time entirely does a disservice to the purpose of sealing records in protecting the anonymity of parties and allowing the adoptive parents to

form a close bond with the adopted child.

None of the examples cited by the Court either for or against unsealing an adoption record relate to the facts of this matter which is for purposes of academic research. No one is arguing that academic research by itself should trump the confidentiality of a recent adoption matter that properly involves the protections afforded by DRL § 114. However, in the case at bar, the protections do not apply, and Surrogate Malave-Gonzalez has issued a Decision and Order that essentially states that academic research can never be a basis to unseal adoption records. There is no statutory bar to an application to unseal adoption records for historical research related to the biological father. It is respectfully submitted, that such conclusion renders the requirement of assessing "good cause" a nullity as the facts of this particular application were never considered. This conclusion is contrary to the case relied on by the Court, In re Matter of Linda F. M., 52 N.Y.2d 236, 240 (1981), appeal dismissed, 454 U.S. (1981)("By its very nature, good cause admits of no universal black-letter definition. Whether it exists, and the extent of disclosure that is appropriate, must remain for the courts to decide on the facts of each case.").

Surrogate Malave-Gonzales did not invoke a balancing test and consider relevant factors such as 1) the degree of the need for disclosure; 2) the wishes of the adoptive and biological parents; and 3) the potential effects upon both set of parents

and their families. *See* Golan v. Louise Wise Services, 514 N.Y.S.2d 682 (1987). Had the balancing test been considered, all of the factors support unsealing of this record. Where non-medical information is sought, courts in New York have held that access will be granted "where the person seeking the information makes a request, if granted, will benefit the petitioner and will not have an adverse impact on the interests of the adopted child or the adoptive or biological parents." In re Adoption of G., 906 N.Y.S.2d 488, 489 (Sur Ct, Bronx County 2010).

In this matter, Professor Yeager has set forth, in detail, the historical relevance of the biological father. The background history and circumstances surrounding the adoption are relevant to the chronology of his personal life. The information sought is consistent with background information gathered by researchers in biographies in general. Every single basis cited by the Surrogate's Court in denying the request to unseal the adoption record is now irrelevant to the adoption in question:

1. Anonymity to the natural parents – The only adoptive parent was the adoptive father. The natural parents, adoptive father, and adopted children are all deceased. Representatives of the estates of the parties involved are all aware of the adoption and consent to the release of the records. Further, it appears that this adoption was made upon consent of the birth father, thereby rendering anonymity between the parties as moot.

2. Enable the adoptive parents to form a close bond with the adoptive child – Since the relevant parties are now deceased, the unsealing of this adoption record will not impact that intent in the least.

3. Protect the adopted child from possibly disturbing information that might be

found in his records – Both adopted children are deceased. An in camera inspection can be made for any "disturbing information", which is unlikely since the mother's second husband adopted the children and the facts of this adoption are known by the surviving family members.

4. Allow the state to foster an orderly and supervised adoption system – Release of this record will not impact on the orderly nature of the adoption system since the adoption in question was completed 84 years ago. DRL § 114 remains in place for all adoptions subsequent to 1938.

Having addressed the public policy of sealing records, we will now address the arguments in favor of good cause proffered by Professor Yeager.

The applicant is a criminologist with 42 years experience and a Professor at King's College, Western University, Canada. [RA at 32]. In 2013-2014, the applicant was a visiting scholar at the Department of Sociology, Columbia University, working with archival documents maintained by Columbia related to the subject, Frank Tannenbaum. Frank Tannenbaum is a subject of historical relevance in the field of sociology and criminology, and was the subject of an earlier 2011 article by Professor Yeager. [RA at 23].

Good Cause must rise above a desire to learn one's identity or mere curiosity. *See* In re Matter of Linda F. M. v. Dept. of Health, City of New York, 437 N.Y.S.2d 283, *cert. denied*, 454 U.S. 806 (1981). Professor Yeager set forth his need for this information because "[t]he importance of a historical figure, like Frank Tannenbaum, is not just his contributions to the field of criminology, but includes a chronology of his

personal life…. These aspects of a subject's social history provide context, accurate facts, humanization, and allow for the telling of a story that interests the reader." [RA at 16]. Therefore, the request goes beyond mere curiosity and as discussed above, has no negative impact on the parties to the adoption proceeding.

Professor Yeager further argued to the Surrogate's Court that:

> Historical research in criminology and sociology has, over the years, produced a large body of important findings about the origins of criminological thought. See Block, Inciardi & Hollowell, **Historical approaches to crime: research strategies and issues** (Beverly Hills, California: Sage, 1977). Cf. Renne, **The search for criminal man: a conceptual history of the dangerous offender** (Lexington, Mass: Lexington Books, 1978); Hibbert, **The roots of evil: a social history of crime and punishment** (Boston: Little Brown, 1963). These historical contributions represent public good, and are often written in the public interest. It is respectfully submitted that "good cause" as a concept incorporates both the public good and public interest.

[RA at 16].

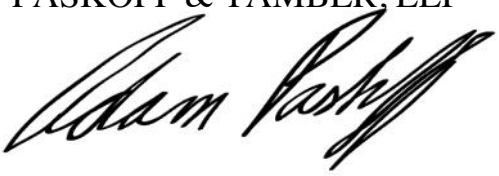
Precedence exists granting the application to unseal adoption records by a third-party unrelated to the adoption. *See* Matter of Linda J. W., 682 N.Y.S.2d 565 (Family Court, Genesee County 1998)(Unsealing granted to the Clear Sky Band of the Onondaga Indian Nation for purposes of determining whether an adoptee was a member of an Indian tribe and qualified for benefits under the Indian Child Welfare Act). Therefore, Professor Yeager has standing to make this application, respectfully, submitting it is in advancement of the public good and without any negative impact on the parties to this adoption.

CONCLUSION

For the foregoing reasons it is respectfully requested that Professor Yeager's petition to release the 1931 adoption records be granted.

Dated: New York, New York
April 23, 2015

Respectfully Submitted,
PASKOFF & TAMBER, LLP



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CERTIFICATE OF COMPLIANCE PURSUANT TO
22 NYCRR § 670.10.3(f)

The forgoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

———————————————————————————X

IN THE MATTER OF THE ADOPTION OF,
CHILDREN WHOSE FIRST NAMES ARE

ZALKIND and SARA

Docket No(s).: 77X-1931 and 78X-1931

———————————————————————————X

STATEMENT PURSUANT TO CPLR 5531

1. The Docket Numbers in the Surrogate's Court were Docket nos.: 77X-1931 and 78X-1931.

2. The full names of the parties are set forth in the caption above. There have been no changes.

3. The action was commenced in the Surrogate's Court, Bronx County on May 27, 2014.

4. No notice was required because all parties requiring notice are deceased and the Surrogate's Court did not direct any further notice be served.

5. The object of the action is a motion to review adoption records from 1931, which predated the statute that requires mandatory sealing of adoption records; or alternatively a motion to unseal adoption records based upon a showing of good cause pursuant to Domestic Relations Law § 114(2).

6. The appeal is from a decision and order of the Surrogate's Court, Bronx County dated September 18, 2014, denying the request to review the adoption file and denying the request to unseal adoption records on the basis of good cause

7. The appeal is on the appendix method.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

———————————————————————————X

IN THE MATTER OF THE ADOPTION OF,
CHILDREN WHOSE FIRST NAMES ARE

ZALKIND and SARA

Docket No(s).: 77X-1931 and 78X-1931

———————————————————————————X

AFFIRMATION OF SERVICE

ADAM PASKOFF, an attorney at law for the State of New York, hereby affirms upon penalties of perjury being duly sworn, deposes and says that:

This was an application to unseal adoption records in the Surrogate's Court, State of New York, County of Bronx. No party requiring notice is still alive. The Court did not direct any other party to be served Notice. Therefore, this Record of Appeal is not being served on any other party.

Dated: April 23, 2015

ADAM PASKOFF