D.R.L. §114

At a term of Surrogate's Court of the State of New York, held in and for the County of Bronx

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In the Matter of the Adoption of — File Nos. 77X-1931
Children whose First Names were: — 78X-1931

Zalkind Tannenbaum
Sara Nessa Tannenbaum

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Petitioner's Memorandum of Points and Authorities

1. Pending before this Honorable Court is a Petition to unseal the early 1931 adoption files involving the Tannenbaum children. This petition was formally filed on May 27, 2014, and a judgment by this Honorable Court is pending.

2. The Legislature did not define what is meant by "good cause" to unseal an adoption file. "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." **Matter of Linda F.M.**, 52 NY2d 236, 240 [1981]; appeal dismissed 454 US 806 [1981]. However, medical information about the biological parents has been held to constitute "good cause" in most cases. **Chattman v. Bennett,** 57 A.D. 2d 618, 393 N.Y.S. 2d 768 [1977] (Appellate Division, Second Department).

3. Hence, there is no statutory bar to a petition to unseal adoption records for historical research related to a biological father, Frank Tannenbaum (1893-1969). The fact that your Petitioner is a third party unrelated to either the birth or adoptive parents is not barred under Section 114 of the Statute.

4. An interesting parallel are applications under Section 114 by members of Indian tribes asking to unseal an adoption file for the express purpose of determining whether the adoptee may be a member of an Indian tribe and qualify for benefits under various statutes, including the *Indian Child Welfare Act.* In the **Matter of Linda J.W.** 682 N.Y.S. 2d 565 (Family Court, Genesee County, New York, 1998), a third party – here the Clear Sky Band of the Onondaga Indian Nation – requested information from a sealed adoption file. The adoptee in question had been formally adopted some 35 years earlier, and petitioned for access to this information. However, the destination of that information was clearly a third party. The legal question under the "good cause" section of the *New York Domestic Relations Law* was whether she was, indeed, an "Indian person" within the meaning of the *Federal Indian Child Welfare Act of 1978.* In this matter, the Court found that the petitioner had standing as an "Indian person" to request this information, and that determining her status to a third party was "good cause." The petitioner had even located her birth mother, who had no objection to the release of the information. cf. **Matter of Adoption of Rebecca** (1993) 601 N.Y.S.2d 682 (Surrogate's Court, Rensselaer County).

5. In the case of **Golan v Louise Wise Services** (1987), 514 N.Y.S.2d 682, the Court of Appeal invoked a balancing test arguing that the "adoptive parents need to be shielded from the interference with the adoptive relationship by biological parents. Biological parents also must be assured that their privacy will not be disturbed." (684) "Finally, society's interest in providing children with substitute families through the adoption process… may be damaged by disclosure…." (684). The Court then went on to establish some criteria for the disclosure of sealed records, to wit: (1) the degree of the adopted person's need for disclosure, (2) the present wishes of the adoptive and biological parents, and finally (3) and the potential effects upon both sets of parents and their families. (685)

6. In cases where non-medical information is sought, this Court has ruled that "access will be granted for non-medical reasons only where the person seeking the information makes a request that, 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.** (2010) 906 N.Y.S.2d 488, 489. (Surrogate's Court, Bronx County). In an earlier case in this county, the court allowed an adoptee to unseal her adoption file for psychological reasons. Here, the court ruled that in "evaluating the sufficiency of good cause, due consideration should be given to the benefit which would accrue to the petitioner as against any possible adverse impact upon any other party." Since the adoptive parents had passed away, and there was little in the file to reveal the identity of the biological parents, the court stated, "relief can be given to petitioner without it in any way

affecting the rights of any living identifiable person." **Matter of Ann Carol S.**, 172 *New York Law Journal*, 31, at p. 12 (Surr. Ct., Bronx County, August 13, 1974).

7. Thus, in the **Matter of Anonymous,** 92 Misc.2d 224, 399 N.Y.S.2d 857 (1977, Surrogate's Court, Queens County), good cause was shown by a deeply troubled young man who suffered from personality disorders. In this case, evidence from a treating psychiatrist, his adoptive parents from whom he was estranged, and the consent of the biological parents facilitated the order of the Court which disclosed the identities of the biological/birth parents to the petitioner.

8. In a more recent case, an adoptee petitioned the Surrogate's Court for Nassau County for copies of his pre-adoption birth certificate. If correct, this certificate could establish Hungarian citizenship, which would aid the adoptee in his quest for business and family relationships. The Court found that since the biological mother had given consent, since the adoptive parents were no longer alive, and since the biological father was unknown,

> The state's interest in maintaining confidentiality as part of a viable system of adoption is ….not a factor in this case, as there is no information contained in the requested document which petitioner does not already possess, and petitioner is not requesting unfettered access to the entire adoption file.

Matter of Victor M.I.I., 23 Misc. 3d 1103(A) [Surr. Ct., Nassau Cty, 2009]. See also **Matter of S.P.,** 27 Misc. 3d 1217(A) [2010, Surr. Ct., Bronx County].

9. In the case of **Matter of Estate of Walker** (1985) 486 N.Y.S.2d 899 [N.Y. Court of Appeal], the petitioners were the adopted children of the late "Jimmy" Walker, mayor of New York City from 1926 to 1932. As a condition of the last Will and Testament, both adopted children contended that they were entitled to copies of the adoption decree, which apparently identified their biological mothers. They filed this action in Surrogate's Court, state of New York, and asked for disclosure of these decrees. The Court of Appeal held that while the Estate of James Walker clearly anticipated that they would get copies of these decrees, such disclosure from the Court's own files was contrary to "public policy of New York" (at 902). In this case, the intention of the Last Will and Testament was not sufficient "good cause" for the Court to order disclosure. Citing that public policy, the Court of Appeals stated (at 903):

> ….sealed records shield the adopted child from possibly disturbing facts concerning the child's birth or parentage; sealing insures that the natural parents will not be able to locate the child and interfere with the relationship between the child and the adoptive parents; and finally, sealing protects the identity and privacy of the natural parents.

It is worth noting, however, that none of these so-called public purposes now apply to the 1931 Tannenbaum adoption files. There is no privacy to violate since all the parties are deceased. Compare **Matter of Grand Jury Subpoenas Duces Tecum,** 395 N.Y.S. 2d 645, 646 [Appellate Division, First Department, 1977]. Moreover, your Petitioner, who is a professor of sociology and

criminology, already knows the identity of all parties, their names, birth dates, and dates of death. Citing **Walker, Golan,** and **Linda F. M.** for the appropriate public policy in the year 2014, is clearly out-of-date and no longer relevant to these archival records.

10. The overall effect of this "good cause" requirement, if strictly interpreted by the Courts, is to create an almost impenetrable wall of secrecy around adoption files. Indeed, courts appear to "adhere to decisions that were articulated in an era when unplanned pregnancies and single mothers were severely chastised." A. Behné, "Balancing the Adoption Triangle: The State, the Adoptive Parents, and the Birth Parents – Where Does the Adoptee Fit In?" 15 **Buffalo Journal of Public Interest Law** 49, 55 [1996]. cf. **People v. Doe,** 138 N.Y.S. 2d 307, 309 [Erie County Court, 1955]. This is the case even when ancient files have taken on the characteristics of archival records, much like those that are released by the U.S. Census Bureau or various municipal archives. For instance, New York City's own Municipal Archives permits public access to old birth, death, and marriage records from the years 1795 to 1948, depending on the record. As records age and the adoptees, birth parents, or adoptive parents have passed away, the State's claim to privacy and the best interests of either the adoptee or the "process" of adoption become less persuasive. Here, we do not need to presume that all the parties have passed away; quite to the contrary, we have put forward prima facie evidence to this effect. cf. **Young v. Shulenberg,** 165 N.Y. Rep. 385, 390 [Ct. Appeal, 1901].

11. The Courts have generally assumed that exceptions "to the medical requirement are rare but do occur occasionally." "Otherwise, the statute's requirement of good cause would become a nullity and every application would have to be granted" [referring to general curiosity about one's relatives or backgrounds]. **Matter of Arthur Lewis**, 237 *New York Law Journal* 76 at p. 32 (Surr. Ct., Kings County, April 20, 2007). This assertion is actually not present in the statutory language of Section 114(2). It does not say that disclosure must be "rare," or that petitions based on particularized historical research are prohibited. Further, that statute says nothing about what is to be done with adoption files that are now archival. Prior to 1938, these files were even public. This assumption resembles a "Sky is Falling" argument that is not based, statistically, on the record. Exactly how many petitions have been put forward on the basis of historical research to unseal an adoption file? We kindly suggest that this is likely a case of first impression, and that if granted, the sky will not cave in, figuratively or literally.

12. 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 a 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 the public interest.

13. In a similar vein, historical biography represents both the public good and the public interest, especially in the case of Frank Tannenbaum (see Exhibit **A**, appended to Petition For Access to Sealed Adoption Records). The record is replete with examples of historical biography that constituted major contributions to civil society. cf. Radzinsky, **Stalin: the first indepth biography based on explosive new documents from Russia's secret archives** (New York: Doubleday, 1996); Baynham, **Alexander the Great : the unique history of Quintus Curtius** (Ann Arbor: U of Michigan Press, 1998); Heidelberger-Leonard, **The philosopher of Auschwitz : Jean Améry and living with the Holocaust** (New York: Palgrave McMillan, 2010).

14. Indeed, it would be paradoxical to invoke privacy concerns among the biological and adoptive parents in the Tannenbaum matter when they already knew each other! Those parties have now all passed away, including their adoptive offspring. It is also well known that New York law permits adoptees, upon reaching the age of eighteen, to obtain non-identifying information about their biological parents. Such information can include "[f]acts and circumstances relating to the nature and cause of the adoption." *Sect. 4138-c(3)(i)* of *Public Health Law*.. If those birth parents consent, identifying information which includes names and addresses may be exchanged. See generally, section 4138-c.

15. For the record, we have obtained permissions from the Estate of Frank Tannenbaum to access the entire adoption files, as well as the Estate of the late Zalkind Hurwitz (Mr. Tannenbaum's biological son). These permissions are appended in **Exhibits 1** and **2** to this Memorandum. These permissions clearly undermine the Court's historic privacy doctrine. For our purposes, they are intended to supplement our main argument: there exists "good cause" to unseal these records for historical research into the life of the late convict criminologist, Frank Tannenbaum (1893-1969).

In particular, we have reasonable cause to believe there is information in the files that will provide some insight as to the "[f]acts and circumstances relating to the nature and cause of the adoption." This clearly impacts upon Frank Tannenbaum's personal biography, his priorities, and his work in both Latin America studies and criminology.

Administration

16. This is a 1931 adoption file and as such, precedes the 1938 Statute which sealed all adoption files in the State of New York. However, in 1924, the State Legislature authorized courts to seal adoptions records in their discretion. It is unclear whether such an Order is present in the Tannenbaum files. Your Petitioner would ask that these files not be sealed as they now constitute archival records for which the general purposes of section 114(2) of the *Domestic Relations Law* no longer apply.

17. Your Petitioner is further aware of a recommendation from the Attorney General that this Petition to unseal adoption records and accompanying Points and Authorities ought to be sealed as well. cf. 1964 Ops Atty Gen Sept. 2. Your Petitioner, however, takes the position that given the public interest aspects of this Petition, the materials herein should not be sealed as they come from a third party and none of the materials are confidential, nor should they be deemed confidential. If the Opinion to be issued by this Honorable Court shall be deemed public, then these pleadings likewise should be in the public domain.

18. It is part of the Record in this proceeding that your Petitioner respectfully requested a hearing on the record because the petition "puts forth a unique set of facts under the Statute, and because it differs from most case law which involves medical records, or petitions from adoptees or their relatives." *Letter to the Court, dated June 2, 2014.* It still remains my respectful position that a hearing on this case is indicated, citing **Application of Hayden,** 435 N.Y.S. 2d 541 (Supreme Court, Albany County, 1981).

Indeed, it is distinctly a Due Process disadvantage to this Petitioner in that there is no opposing party whose views and authorities might be subject to examination. Your Law Department has not disclosed its own advice and counsel, nor has this Honorable Court shared its concerns prior to a final decision.

19. Albeit this Petitioner is not clear about court costs, should this Honorable Court deem that costs be awarded to the State, I would ask that said costs be waived in the public interest – for all the reasons stated in these moving papers.

19. I make this Memorandum of Points and Authorities in support of this Petition and for no other or improper purpose.

SWORN BEFORE ME in the City)
of New York, County of New York,)
)
this ____ day of June, 2014)

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A Notary.

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MATTHEW G. YEAGER, Ph.D.
245 West 107th Street – Apt. 5E
New York City, New York 10025
Phone: (646) 922-8826
E-mail: myeager@bellnet.ca