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STATE OF MINNESOTA
CARVER COUNTY

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

Case Type: Special Administration

In the Matter of:

Estate of Prince Rogers Nelson,

Decedent.

Court File No. 10-PR-16-46

MEMORANDUM IN SUPPORT OF MOTION OF MEDIA COALITION TO INTERVENE FOR THE LIMITED PURPOSE OF ENSURING ACCESS TO COURT PROCEEDINGS AND RECORDS

American Public Media Group (owner of Minnesota Public Radio), The Associated Press, Cable News Network, Inc., Star Tribune Media Company LLC ("Star Tribune"), TEGNA Inc. (owner of NBC network affiliate KARE 11), USA Today Network, CBS Corporation, and Hubbard Broadcasting, Inc., (collectively, the "Media Coalition") seek to intervene in this probate proceeding for the limited purpose of ensuring press and public access to judicial proceedings and records. In particular, the Media Coalition seeks to ensure that a hearing scheduled for June 27, 2016, remains open—in its entirety—to the press and public.

The Media Coalition has reviewed the Court's June 22, 2016, "Order Denying Audio and Video Recording of Proceeding on June 27, 2016," which order also explains that the Court "reserves the right to remove all persons not necessary to the proceedings" if "it must directly address the application of the Parentage Act to a specific person." The Media Coalition is pleased that the Court expects the hearing to remain mostly open. However, as explained in greater detail below, the Media Coalition believes that removal of the press or public during any portion of the hearing would violate the First Amendment and common law rights of access to court proceedings. It therefore files this motion, notwithstanding the Court's June 22 order, so

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that the Court may consider its arguments prior to the June 27 hearing and other proceedings involving paternity in this case.

In addition, the Media Coalition respectfully requests that the Court reconsider its decision to ban not only audio and video recording but also the use of sketch artists during the June 27 hearing. In particular, the ban on sketch artists raises serious constitutional issues. The Media Coalition urges the Court to permit the use of audio and video recording equipment and sketch artists in all proceedings in this case (except as may be provided in a further written order, following a specific motion by a party seeking to limit such coverage in a particular proceeding, with service of that motion on the Media Coalition counsel and a hearing on that motion prior to any limitation).

Finally, the Media Coalition urges the Court to refrain from sealing any portion of the Court file without first giving members of the media an opportunity to be heard and also to vacate its order filed on June 20 sealing the affidavits of interested parties and the Special Administrator's responses thereto, as that order was issued without giving the media such opportunity.

Background

On April 21, 2016, Prince Rogers Nelson, known to his fans as "Prince" and referred to as such herein, was found dead in his Chanhassen, Minnesota, residence. Prince apparently died intestate, as no will has been found, and on May 2, 2016, the Court appointed Bremer Trust, National Association, to serve as Special Administrator of the Estate. Since Prince's death, more than a dozen individuals have come forward claiming to be his heirs and entitled to a portion of his significant wealth. Prince's premature death and its cause, as well as the size and disposition of his estate, are of significant public interest and concern nationwide.

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Since April 21, members of the Media Coalition have reported extensively on Prince's life, the events surrounding his death, and the future of his estate. A number of news organizations have filed with this Court a Notice of Audio/Video Coverage pursuant to Minn. Gen. R Prac. 4.03(a), including several members of the Media Coalition.

On May 18, 2016, the Court entered an order requiring any party claiming a genetic relationship to Prince to file an affidavit with the Court setting forth the basis for his/her claim. The order required the Special Administrator to develop a plan or protocol for testing the claims of any party claiming a genetic relationship, and it instructed the Special Administrator to consider the parties' affidavits, birth records, and other information that might establish a presumption of parentage or an adverse presumption. The May 18 order also authorized the Special Administrator to require genetic testing of parties claiming heirship, and it set a hearing for 8:30 a.m. on June 27, 2016, to consider "motions or objections that arise during the course of the Special Administrator's implementation of this Order." Later, on June 6, 2016, the Court entered an order approving the Special Administrator's protocol for establishing heirship and reiterated that "motions or objections that arise during the course of the Special Administrator's implementation of this Order" would be heard at 8:30 a.m. on June 27.

Given the significant public interest in the administration of Prince's estate, members of the Media Coalition intend to attend and report on the June 27 hearing and wish to do using audio and video recording equipment and/or sketch artists.

Beyond the parameters set forth in the Court's May 18 order, it is not entirely clear what will be discussed at the June 27 hearing. The Special Administrator noted in a June 17 filing that "the agenda for the June 27, 2016 hearing [is] not fully determined" and that "the degree to which it will be necessary to discuss sensitive and confidential information pertaining to …

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familial relationships is not yet known." The Court acknowledged in its June 22 order that "[t]he Parentage Act may or may not apply to these proceedings." It also clarified in that order that it "will not be addressing [whether] a particular claimant is, in fact, a legal heir of the Decendent. Such a claim shall be scheduled for a separate evidentiary hearing."

Nevertheless, two requests were made on June 17 to restrict press and public access to that hearing. Of note, **no one has requested closure of the entire hearing**. In its June 17 filing, the Special Administrator took no position on whether the hearing should be closed and in fact noted that "[t]here is not consensus among all interested persons of record" on this issue.

The Special Administrator did request that the Court bar coverage of the June 27 hearing by audio and/or video means, and two other interested parties, Brianna Nelson and "V.N." (a minor who has already been publicly identified by the press[1]) requested that, during certain portions of the hearing, the court exclude the press and public altogether. Importantly, though, Brianna Nelson and V.N. do not request closure of or a ban on audio and/or video coverage during the entire hearing—they only seek restrictions during those portions of the hearing when "confidential and sensitive information concerning the Parentage Act and minor child V.N. will be discussed."

However, nothing in the publicly available record suggests that any "confidential and sensitive information concerning" the parentage of V.N. will be disclosed during the June 27 hearing. As reported by Star Tribune, and as explained in the May 18, 2016, affidavit of Brianna Nelson, V.N. is the daughter of Duane Joseph Nelson Jr. (deceased) and the granddaughter of Duane Nelson Sr. (also deceased), who may be a half-brother to Prince, thus making V.N. Prince's great niece. In other words, there appears to be no dispute regarding the identity of

[1] *See* Dan Browning & David Chanen, "Two possible heirs file claim in Prince estate," StarTribune.com (May 19, 2016), http://www.startribune.com/two-possible-heirs-file-claim-in-prince-estate/380037071/#1.

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V.N.'s father or grandfather—the only question as to V.N.'s heirship is whether her **great-grandfather** (allegedly John L. Nelson) sired both Prince and Duane Nelson Sr., thereby making them half-brothers.[2]

On June 20, the Court filed an "Order Sealing Heirship Affidavits and Responses of Special Administrator." The order—issued without a hearing or other opportunity for members of the Media Coalition to voice their objections—sealed both the affidavits submitted by fifteen claimants pursuant to the Special Administrator's protocol and the Special Administrator's letter response to each affidavit. The Court provided no explanation other than to reference "the confidential nature of the determination of heirship" and the request of the Special Administrator to file the affidavits and responses thereto under seal.

Argument

I. The Court Should Allow the Media Coalition to Intervene as of Right to Assert its Interest in Public Access to Judicial Records and Proceedings.

When challenging a court's protective order restricting access to judicial records and proceedings in a civil case, a media representative or other person not a party to the original action may move to intervene as of right under Minn. R. Civ. P. 24.01. *Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986); *see also Williams v. Heins Mills & Olson, PLC*, No. 27-CV-6495, slip op. at 3 (Minn. Dist. Ct., Hennepin Cnty. Mar. 21, 2008) (involving sealed files and closed proceedings).[3]

Rule 24.01 states:

[2] For that matter, the father of Brianna Nelson—who is the daughter of Duane Nelson Sr. and sister of Duane Nelson Jr. and who apparently does not seek closure or restrictions of audio/video coverage on her own behalf—is not at issue either. Only the identity of her grandfather and his relationship to Prince is at issue.

[3] Court opinions not available through Lexis or Westlaw are attached to the Affidavit of Leita Walker.

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> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Media Coalition's motion to intervene satisfies these requirements, just as the intervenor did, for example, in *Lund v. Lund*, 1992 WL 361744, *1 (Minn. App. 1992); *In re Fry*, No. 27-FA-296122, slip op. (Minn. Dist. Ct., Hennepin Cnty. Oct. 18, 2011); *Hecker v. Hecker*, No. 27-FA-98805, slip op. (Minn. Dist. Ct., Hennepin Cnty. July 14, 2010); *Williams*, No. 27-CV-6495, slip op.; and *Dean v. Gall*, No. MP 99-5258, slip op. (Minn. Dist. Ct., Hennepin Cnty. Nov. 17, 2000).

First, "The timeliness of the application to intervene, as in any case, will be based upon the particular circumstances involved, and such factors as how far the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of a delay." *Schumacher*, 392 N.W.2d at 207. There is a "growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779 (3d Cir. 1994). Here, the Media Coalition is asserting its interest in public access within days of learning of the possibility of a closed hearing and within days of learning that certain affidavits and responses thereto would be filed under seal. Its objection to closure is timely. *See Williams*, No. 27-CV-6495, slip op. at 4 ("Star Tribune satisfied the first prong of the above test as it made a timely application for intervention when it asserted its interest in public access within days of learning that certain documents in the record had been sealed under a stipulated protective order and of the possibility of a closed trial."); *General Mills, Inc. v. Whalen*, No. 93-21913, slip op. at 5–6 (Minn. Dist. Ct., Hennepin Cnty., Dec. 27, 1994) (finding that newspaper acted in a timely fashion by moving to

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intervene approximately six weeks after reporters had sought information about the case and had been told that the parties could not provide further information because of a protective order entered months earlier).

Second, with respect to the required "interest relating to the property or transaction": Under Rule 2 of the Supreme Court Rules of Public Access to Records of the Judicial Branch, the public and the media have a legally protected right of access to court files. *See Schumacher*, 392 N.W.2d at 207. And Minn. R. Civ. P. 43.01, which states that "[i]n all trials the testimony of witnesses shall be taken orally in open court," creates "a longstanding presumption of access to court files and proceedings." *Williams*, No. 27-CV-6495, slip op. at 4; *see also id.* (referencing Minn. R. Civ. P. 77.02, which states that "[a]ll trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom"). Further, state and federal guarantees of freedom of the press include protection for gathering news, for "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

Importantly, this right of access does not turn upon any distinction between "a 'private' dispute between the parties and . . . a matter of 'public' concern." *Williams*, No. 27-CV-6495, slip op. at 5. The press and public do not have to justify their interest in public proceedings or explain how they will use particular information they have not yet even seen. *Id.* at 6; *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."); *accord Savior v. McGuire*, 2002 WL 1906023, at *3 (D. Minn., Aug. 15, 2002), *aff'd*, 61 Fed. Appx. 318 (8th Cir. 2003); *Savior v. Humphrey*,

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1999 WL 1059667, at *1–2 (Minn. App., Nov. 23, 1999); *cf. United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989) (interpreting an exemption under the federal Freedom of Information Act, 5 U.S.C. § 552, and stating, "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made") (emphasis in original). Rather, the party seeking secrecy must bear the burden of demonstrating, with particularity, that judicial records or proceedings must be closed.

Third, closure of court proceedings and sealing of files will, "as a practical matter," "impair or impede [the news media's] ability to protect [their] interest" in gathering news and information. A protective order by its very nature deprives the public of such access, thereby "impair[ing] or imped[ing]" the interest of the public and media in the most burdensome manner. *See In re Fry*, No. 27-FA-296122, slip op. at 3 ("Without intervention by the Star Tribune or another media member, the court file would remain sealed which would impair any ability to gather potentially newsworthy information."); *Williams*, No. 27-CV-6495, slip op. at 7 ("Practically speaking, when the Court sealed large portions of the evidentiary record in this case, it prevented Star Tribune and the public from exercising their right of access to court files. Absent intervention by Star Tribune (or other members of the public or press), the public's access to court documents could be impaired.").

Fourth, "[i]t is public policy to encourage intervention whenever possible." *BE & K Constr. Co. v. Peterson*, 464 N.W.2d 756, 758 (Minn. App. 1991) (citing *Norman v. Refsland*, 383 N.W.2d 673, 676 (Minn. 1986)). Applicants for intervention need only "carry the 'minimal' burden of showing that the existing parties 'may' not adequately represent their interests." *Jerome Faribo Farms, Inc. v. Cnty. of Dodge*, 464 N.W.2d 568, 570 (Minn. App. 1990). Intervention is appropriate if the existing parties could not be expected to pursue the matter with

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the same vigor as the proposed intervenors. *Id.* at 571 (reversing denial of intervention, where existing party had interests not shared by applicant for intervention and might be less diligent in pursuing those interests it did share with applicant).

Here, the Special Administrator and certain interested parties to this proceeding have sought to exclude cameras from the courtroom. In addition, Brianna Nelson and V.N. seek closure of certain portions of the June 27 hearing and the Special Administrator has taken no position on closing. Clearly, the parties to this proceeding cannot be expected to pursue press and public access to the records and proceedings in this matter with the same vigor as the Media Coalition. *General Mills*, No. 93-21913, slip op. at 6–7; *Baloga v. Maccabee*, 20 Media L. Rep. 2201, 2202 (Minn. Dist. Ct., Ramsey Cnty. Nov. 13, 1992).

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The Media Coalition satisfies the criteria set forth in Rule 24.01. This Court should grant its motion to intervene to assert its interest in access to judicial records and proceedings.

II. The June 27 Hearing Should Be Open in its Entirety.

A. Courts in this jurisdiction recognize a constitutional and common law right of access to civil proceedings.

The Special Administrator's dismissal of the First Amendment in footnote 2 of its June 17 filing not only mischaracterizes the holding in *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371 (8th Cir. 1990),[4] but also ignores the complexity of the case law and the strong protections for press and public access to civil proceedings recognized not only by a plurality of the Supreme Court but also by federal and state courts in Minnesota and beyond.

"What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947), *quoted in Williams*, No. 27-CV-6495, slip op. at 4–5. Although the U.S. Supreme

[4] The court in *Webster* did **not** hold that "there is no First Amendment right of access to civil proceedings." Rather, it stated that "[w]e find it unnecessary to our decision in this case to decide whether there is a First Amendment right of access applicable to civil proceedings." 898 F.2d at 1374.

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Court has not directly addressed whether the public and the news media have a constitutional right of access to civil proceedings such as this one, it has held that the press and the public both have a constitutional and common law right of access to criminal proceedings, and a plurality has found that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980); *see also id.* at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trial themselves, civil as well as criminal."); *Friedrichs v. Kinney & Lange*, 22 Media L. Rep. 2530, 2532 (Minn. Dist. Ct. Henn. Cnty. 1994) (citing *Richmond Newspapers* and holding that the Supreme Court has "indicated" that the First Amendment right of access "also applies to civil proceedings").

Moreover, the Eighth Circuit has held that the Supreme Court's "reasoning for finding a First Amendment right of public access to criminal trials clearly supports" application of the First Amendment to contempt hearings, which it characterized as "partly civil, partly criminal in nature." *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983). Likewise, the U.S. District Court for the District of Minnesota has held that "[t]he recognized policy of public access, originally most prevalent in criminal proceedings, extends equally to civil matters." *Capellupo v. FMC Corp.*, Nos. 4-85-1239, 4-86-945, 1989 WL 42615, *1 (D. Minn. Apr. 28, 1989); *see also Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) ("[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (same).

And Minnesota state courts, as well, have recognized a "longstanding presumption of openness" in civil suits, even when those suits involve "sensitive issues," *Williams*, No. 27-CV-

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6495, slip op. at 5, and that the "constitutional right of access applies to civil court records," *Friedrichs*, 22 Media L. Rep. at 2532 (also stating that "partnership disputes are no different from many other, oftentimes highly personal, occasions in which individuals avail themselves of the courts"); *see also Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 296 (Minn. App. 2003) ("Similar to the common-law standard, a presumption of access to judicial records exists under the First Amendment."); Order Promulgating Amendments to the Minn. Gen. Rules of Practice ("the right of the public and the media to attend trials is 'implicit in the guarantees of the First Amendment.'").[5]

B. Courts have held that the presumption of openness also applies to probate proceedings.

The rationale underlying the presumption of public access to civil proceedings generally is equally compelling in the probate context. *See, e.g.*, *Estate of Campbell*, 106 P.3d 1096, 1105 (Haw. 2005) (ruling that "the reasons underlying openness in the criminal context . . . are equally compelling in the civil context, including probate proceedings."); *Copley Press, Inc. v. Superior Court*, 74 Cal. Rptr. 2d 69, 74 (Cal. App. 1998) (stating that "[p]robate proceedings . . . are not closed proceedings"); *In re Estates of Zimmer*, 442 N.W.2d 578, 582 (Wis. App. 1989) (recognizing that "a presumption of complete public access" applies to probate records); *George W. Prescott Publ'g Co. v. Register of Probate*, 479 N.E.2d 658, 663 (Mass.

[5] In *Schumacher* the Minnesota Supreme Court declined to apply the constitutional standard to settlement documents and transcripts made part of the court's file by statute. *See* 392 N.W.2d at 204. But the Court emphasized that it "[did] not intend this decision to apply to other civil trial records or documents," *Id*. at 203. Indeed, the court identified a number of federal circuit courts which expressly had recognized a constitutional right of access to civil court proceedings and documents. *Id.* (citing *Wilson v. Am. Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983)). The court then restated the constitutional standard: "In order to overcome the presumption in favor of access [to civil court records], a party must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest." *Id*.

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1985) (holding that automatic closure of financial statements in a divorce proceeding pursuant to a probate court rule may be challenged and "is only justifiable on a showing of overriding necessity").

In *Estate of Campbell*, the Hawaii Supreme Court cited that jurisdiction's "long-established policy of openness in judicial proceedings" in adopting a presumptive public right of access to probate proceedings. 106 P.3d at 1105. In addition to Hawaii's robust common law right of access, the Court looked to Hawaii's Uniform Probate Code, which provides that "unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions." *See* 106 P.3d 1096, 1106 (quoting HRS § 560:1-103). The Court then expressly ruled that "third parties have a right to file petitions challenging the closure of probate court proceedings or the sealing of court records under a principle of law supplementing the probate code"—namely, the common law right of public access to judicial proceedings. 106 P.3d at 1106–07.

The Minnesota Uniform Probate Code contains a provision identical to HRS § 560:1-103. Specifically, Minn. Stat. 524.1-103 provides that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions." The Minnesota Uniform Probate Code is thus similarly supplemented by Minnesota's long-established constitutional and common law rights of public access, and this probate proceeding is presumptively public under Minnesota law.

C. Language in the Parentage Act does not defeat the presumption of openness in probate proceedings.

This is not a Parentage Act proceeding, and the June 27 hearing is not being conducted under or pursuant to the Parentage Act. As the Minnesota Supreme Court has ruled, "[t]he Parentage Act and the Probate Code are independent statutes designed to address different

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primary rights." *In re Estate of Palmer*, 658 N.W.2d 197, 200 (Minn. 2003). The Parentage Act creates causes of action for individuals seeking to establish the existence or nonexistence of a parent-child relationship. *See* Minn. Stat. § 257.57. Neither Brianna Nelson nor V.N. (nor anyone else, to the best of the Media Coalition's knowledge) has brought a cause of action under the Parentage Act. Instead, the protocol established here merely incorporates genetic testing procedures long-established under the Parentage Act for purposes of establishing *distant heirship* (not the existence or non-existence of a parent-child relationship) in a probate proceeding. Minnesota Statute § 257.70 does not apply for this reason alone.

What is more, neither the Special Administrator nor any interested party has cited any decision—and the Media Coalition has not identified any decision—holding that mere use of certain genetic testing procedures from the Parentage Act for the purpose of determining distant heirship in a probate proceeding somehow converts that proceeding into one requiring exclusion of the press and public. In fact, the Special Administrator acknowledges that "the Probate Code does not expressly incorporate or reference the sections of the Parentage Act regarding closed proceedings or sealed records."

The one case the Special Administrator does cite in support of its claim that there exists some unresolved "legal question" involved the applicability of the Parentage Act's *statute of limitations*—not whether the Parentage Act could overcome constitutional and common law rights of access to court records and files. *See In re Estate of Jotham*, 722 N.W.2d 447 (Minn. 2006). Indeed, the court in *Jotham* held only that if a party "seeking to establish paternity in a probate proceeding *invokes a Parentage Act presumption*, the provisions of the Act limiting attempts to rebut such a presumption may not be disregarded" and that probate courts do not have "license to pick and choose among the provisions of the Parentage Act *when ascertaining*

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parentage for probate purposes." *Id.* at 452–53 (emphases added). The *Jotham* court clarified what the Special Administrator characterizes as an "in its entirety" directive when it stated, "[W]hen a party benefits from a presumption of paternity found in the Parentage Act and relies on that presumption to establish paternity in a probate proceeding, the probate court must apply the Parentage Act in its entirety *to determine paternity for purposes of intestate succession*." *Id.* at 453 (emphasis added).

In other words, nothing in *Jotham* requires application of the Parentage Act's confidentiality provision to these proceedings. The Media Coalition is not aware that Brianna Nelson or V.N. has invoked any Parentage Act presumption in this case, and the genetic testing at issue here is not even being used to determine who their fathers are.

Moreover, although it might make sense to prohibit parties from divorcing the Parentage Act's presumptions from limitations it imposes on rebutting such presumptions, *see id.* at 452, it makes no sense to hold that invocation of certain Parentage Act presumptions and procedures renders an otherwise public probate proceeding confidential. The policy behind the confidentiality of the Parentage Act is presumably to protect vulnerable individuals—e.g., unwed mothers and young children—from the stigma that might arise if inquiries into parentage became publicly available during a sensitive time in their lives. But these protections are not necessary in a probate proceeding involving individuals (primarily adults) who have voluntarily thrust themselves into a public debate by laying claim to a portion of Prince's estate.

Moreover, it appears that many of the questions regarding parentage involve individuals who are dead (e.g., John L. Nelson and Duane Nelson Sr.) and any privacy interest those deceased individuals may have had in the parentage issues at stake died with them. *See Estate of Benson by Benson v. Minn. Bd. of Med. Practice*, 526 N.W.2d 634 (Minn. App. 1995) ("[C]laim

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for invasion of the decedent's statutory privacy interests is an action for personal injury which does not survive decedent's death.").

Finally, even as to the minor child, V.N., as discussed above, there appears to be no question regarding the identity of her father or grandfather—the questions relate to whether her great-grandfather sired Prince—and the privacy concerns reflected in the confidentiality provisions of the Parentage Act simply do not apply with equal force in a probate proceeding like this one, where the question of parentage is several generations removed from V.N.

D. There has been no attempt by any interested party to justify, consistent with the First Amendment and the common law, exclusion of the press and public from any portion of any proceeding in this case.

Because the confidentiality provisions of the Parentage Act do **not** apply here, and because the First Amendment and common law rights of access **do** apply, the Court should do what courts do in other civil proceedings when faced with requests for closure, and ask whether the party seeking a protective order has justified that order's effect upon the media's ability to gather news. The answer to that question is **no**.

Under the constitutional standard discussed above, the party seeking to overcome the presumption in favor of access to civil court records "must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest." *Schumacher*, 392 N.W.2d at 203; *see also Minn. Twins P'ship*, 659 N.W.2d at 296. Vague, general allegations of harm do not establish good cause for denying access. *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001). Instead, the First Amendment presumption of openness "may be overcome only by an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with *findings specific enough that a reviewing*

court can determine whether the closure order was properly entered." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (emphasis added). The party seeking closure must show the compelling legal interests and factual support that allegedly justify closure, and the trial court must articulate with specificity the basis for closure. *Id*. at 512–13.

Meanwhile, under the common-law standard, the court determines the scope of the press and public's access by balancing the interests of supporting access, "including the presumption in favor of access . . . against the interests asserted for denying access." *Schumacher*, 392 N.W.2d at 203. "In order to overcome the presumption in favor of access, a party must show *strong countervailing reasons* why access should be restricted." *Id.* at 205–06 (emphasis added). Regardless of the right's constitutional or common-law basis, however, "court proceedings and documents enjoy a 'presumption of openness' that generally may be overcome only by showing that a party's constitutional rights would be at risk if the proceeding or document is made public." *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 755 (Minn. 2005).

Here, no party has even attempted to justify closure of the Court under either the constitutional or common law tests. Meanwhile, the Media Coalition seriously doubts that any party could do so. "[P]rivate litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal." *P&G v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). "The mere fact a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file." *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 18 (Ill. 2000); *see also Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 119 (Fla. 1988) (holding that the privacy interests of parents and children in a dissolution proceeding did not justify sealing the court's files); *George W. Prescott Publ'g*, 479 N.E.2d at

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663 (vacating order sealing transcripts of a deposition and other parts of a dissolution proceeding; "it is clear that allegations of potential embarrassment, or the fear of unjustified adverse publicity, are not sufficient."); *Doe v.Heitler*, 26 P.3d 539, 544 (Colo. App. 2001) ("A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file."); *Lutz v. Lutz*, 20 Media L. Rep. 2029 (Mich. Cir. Ct., Washtenaw Cnty. Nov. 12, 1992, Nov. 20, 1992, and Nov. 23, 1992) (vacating order sealing records of dissolution proceeding involving an officer of Chrysler Auto Corporation); *Ex parte Weston,* 19 Media L. Rep. 1737, 1743 (S.C. Fam. Ct., Greenville Cnty. Nov. 25, 1991) (unsealing records in divorce proceeding initiated against the South Carolina Secretary of State). These propositions apply equally to public figures and average citizens. *See generally Lutz,* 20 Media L. Rep. 2029; *Ex parte Weston*, 19 Media L. Rep. at 1743.

There is simply no compelling reason here to depart from the presumption that this probate proceeding is open to the press and public. Accordingly the Court should refrain from removing any individual from the June 27 hearing or from future hearings or trials in this matter.

III. The Court Should Allow Sketch Artists and Audio and Video Coverage at any Proceeding in this Case That is Open to the Press and Public.

The Media Coalition respectfully requests that the Court reconsider its decision to ban audio and video recording and the use of sketch artists at the June 27 hearing. It further urges the Court to issue an order permitting such coverage in all future proceedings in this case, except as provided in a further written order of the Court. Finally, it asks that any future restrictions on audio and video recording are imposed only after filing of a specific motion by a party seeking to limit such coverage, with service of that motion on the Media Coalition counsel, and an opportunity for the Media Coalition to be heard.

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The prohibition on sketch artists raises serious constitutional issues, as explained in *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102 (5th Cir. 1974). In that case, the court overseeing the criminal prosecution of the "Gainesville Eight" prohibited not only in-court sketching but also the publication of sketches of courtroom scenes, regardless of where the sketches were made. *Id.* at 103. With regard to the prohibition on in-court sketching the Fifth Circuit stated, "[w]e are unwilling . . . to condone a sweeping prohibition of in-court sketching when there has been no showing whatsoever that sketching is in any way obtrusive or disruptive. . . . [W]e are firmly of the view that the restraint imposed by the court below is overly broad and thus invalid." *Id.* at 107; *see also United States v. Kaplan*, No. 1:99-CR-609-WBH, 2001 U.S. Dist. LEXIS 26550, at *10 (N.D. Ga. May 29, 2001) (ruling that "restriction on sketching the faces of witnesses constitutes a prior restraint in dereliction of the *First Amendment*, the burden is on the Government to show that such restraint is narrowly tailored to advance a compelling state interest.") (emphasis in original); *KPNX Broad. v. Superior Court*, 678 P.2d 431, 439 (Ariz. 1984) (holding that sketch order was "an unconstitutional prior restraint of First Amendment expression based on the media's lawful exercise of its right of access to the open criminal trial below"). Further, nothing in Minn. Gen. R. Prac. 4.02, which deals with audio and video coverage and the "tak[ing]" of "pictures" and "photographs" authorizes the Court's prohibition on sketch artists at the June 27 hearing.

As for the ban on audio and video coverage: This is a probate proceeding. This is not a Parentage Act proceeding, and for the reasons explained above, the confidentiality provisions in the Parentage Act do not apply. Likewise, this is not a "paternity proceeding." The limitations in Minn. Gen. R. Prac. 4.02(c)(v) on use of audio and video coverage during such proceedings

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therefore do not apply, either, and the Court is not required by Rule 4.02(c) to exclude cameras and recording equipment.

Meanwhile, there are strong public policies supporting allowance of audio and video recording equipment in public courtrooms. Chief among them is that allowing cameras and audio recording equipment in courtrooms enables the public to observe courtroom proceedings that are otherwise largely inaccessible to the average citizen for practical, if not legal, reasons. This in turn enhances public understanding on an issue of public concern—the disposition of the estate of a wealthy resident (and, perhaps, the importance of estate planning). It also enhances public understanding of the judicial system itself, and respect for that system, as well. For the judicial system to work effectively, it must not only be fair, but it must be *perceived* to be fair, and as Chief Justice Burger explained in the plurality opinion in *Richmond Newspapers*, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572.

Disruption of the proceedings caused by audio and video coverage might be reason to ban such coverage, but there is no reason to believe such disruption is likely. All fifty states have provisions, albeit with limitations, to allow cameras at some level of their state court system, *see* Marder, Nancy S., *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST, L.J. 1489, 1391–92 (2012), and the Minnesota Supreme Court has previously recognized that "the evidence seems clear that cameras themselves do not impact the actual in-court proceedings." *Promulgation of Amendments to the Minn. Gen. Rules of Prac.*, No. ADM09–8009, Mem. at 8 (Minn. filed Mar. 11, 2011).

Finally, to the extent the interested parties have any reasonable expectation of privacy given their voluntary participation in this public matter—and they arguably do not, for the

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reasons discussed above—the ban on audio and camera recording is not likely to significantly protect that interest. The interested parties—including V.N.—have already been publicly identified by name and likely will be photographed as they enter and exit the courthouse. Indeed, many of them have already had their photographs published in news reports about this proceeding. Thus, the Court's June 22 order is not likely to effectively protect the privacy interests of parties involved in this matter. The only effect it is likely to have is to make it more difficult, if not impossible, for members of the Media Coalition to convey to the public in a comprehensive manner what transpires at the June 27 hearing.

IV. The Court Should Vacate its June 20 Sealing Order, and No Records Filed With the Court in This Proceeding Should be Sealed Without Giving the Media an Opportunity to be Heard.

The presumption of public access applies not only to courtroom proceedings but also to records filed with the Court in this matter. *See* Rules of Public Access to Records of the Judicial Branch, Rule 2 ("Records of *all courts* and court administrators in the state of Minnesota are *presumed to be open . . . at all times.*" (emphasis added)). "Once the court receives or collects records from parties, the broad rule of public access attaches." *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 272 (Minn. 2007); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978); *Schumacher*, 392 N.W.2d 197 (recognizing a common law right of access to civil court records).

This presumption of public access to judicial records is widely applied to probate records. *See, e.g.*, *Estate of Campbell*, 106 P.3d at 1106; *Copley Press*, 74 Cal. Rptr. at 74 (noting that "no statute exempts probate files from the status of public records"); *In re Estates of Zimmer*, 442 N.W.2d at 130 (recognizing "a presumption of complete public access" to probate records); *George W. Prescott Publ'g*, 479 N.E.2d at 663 (holding that closure of probate records "is only justifiable on a showing of overriding necessity").

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As set forth above, a party seeking to overcome the presumption of access to civil court records "must demonstrate that a compelling governmental interest exists and that the restriction on access is narrowly tailored to meet this governmental interest" or "must show strong countervailing reasons why access should be restricted." *Schumacher*, 392 N.W.2d at 203, 205–06. Moreover, the trial court must articulate *with specificity* the basis for any sealing order. *Press-Enter.*, 464 U.S. at 512–13 (emphasis added).

As was the case with respect to closing the courtroom, no party has attempted to justify sealing the heirship affidavits or the Special Administrator's responses thereto under either the constitutional or common law test, nor has the Court articulated the grounds for sealing with the requisite specificity. The Court's June 20 sealing order is set forth below in its entirety:

> Due to the confidential nature of the determination of heirship issues, the above-referenced Affidavits and the Special Administrator's responses thereto shall be sealed pending further order of the Court.

Conclusory reference to the "confidential nature" of heirship issue, without any consideration of the press and public's constitutional and common law rights to access the heirship affidavits and other records in this matter, is insufficient to justify sealing. And in any event, no authority suggests that heirship issues are confidential under Minnesota law.

There is no compelling reason to depart from the presumption that the judicial records in this probate proceeding—including the presently sealed heirship affidavits and the Special Administrator's responses thereto—are open to the press and public. Accordingly the Court should vacate its June 20 order sealing these documents. In addition, the Court should decline to seal any additional record filed in this matter without first giving the media an opportunity to be heard on the issue.

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Conclusion

For the reasons explained above, the Media Coalition requests that the Court permit the press and public to attend the entirety of the hearing on June 27, that the Court permit use of audio and video recording equipment and sketch artists at any proceeding in this case open to the press and public, that it refrain from sealing any portion of the Court file without first giving members of the media an opportunity to be heard, and that it vacate its June 20 order sealing the affidavits of interested parties and the Special Administrator's responses thereto, as that order was issued without giving the media such opportunity.

Dated: June 23, 2016

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