

# ADVOCATE

ARIZONA ASSOCIATION FOR JUSTICE / ARIZONA TRIAL LAWYERS ASSOCIATION • MARCH/APRIL 2020

## The “Confidential” Settlement in Probate Court

by Bridget O’Brien Swartz, *Certified Elder Law Attorney,*  
*National Elder Law Foundation and Fellow, the American College of Trust & Estate Counsel*

Bridget O’Brien Swartz, Partner at the law firm of Dyer Bregman & Ferris, PLLC – Bridget primarily practices in the area of special needs law, including but not limited to assisting clients with public benefits eligibility issues, personal injury settlement planning, guardianship and conservatorship, as well as special needs trust drafting and administration.

Bridget is originally from Duluth, Minnesota, obtained her undergraduate degree from Notre Dame, and her law degree as well as a Masters in Public Administration from ASU. She is a Certified Elder Law Attorney certified by the National Elder Law Foundation and a Fellow of the American College of Trust and Estate Counsel (ACTEC). She remains actively involved in national attorney organizations such as the National Academy of Elder Law Attorneys (NAELA) on its Board of Directors and the Special Needs Alliance.

Bridget also serves on the Board of Legal Specialization of the State Bar of Arizona.

At long last, you have arrived at a settlement on behalf of your client who is a minor or incapacitated adult. It is understood among the parties to the settlement that due to the plaintiff’s minority or incapacity, the settlement is contingent on probate court approval (or, if it is not, it should be). Additionally, the defendant insists on the settlement being confidential. You have been down this road before and are prepared to present the settlement to the probate court for approval, asking the court to seal the probate court file in its entirety so that it is not a matter of public record in an effort to abide by the terms of confidentiality of the settlement.

Well, not so fast as the probate court is not inclined to seal the entire court file and instead permit the filing of select “confidential documents” pursuant to Rule 8 of the Arizona Rules of Probate Procedure (hereinafter “A.R.P.P.”), which was Rule 7, A.R.P.P prior to January 1, 2020. Moreover, Rule 5.4 of the Arizona Rules of Civil Procedure (hereinafter “A.R.C.P.”) regarding the sealing of court records has been amended effective January 1, 2020. Further, Rule 9, A.R.P.P. has been amended, also effective January 1, 2020, to specifically provide that Rule 5.4, A.R.C.P. applies in probate proceedings. When you consider together 1) the availability of Rule 8, A.R.P.P. regarding confidential documents; 2) Rule 9, A.R.P.P. now explicitly requiring the probate court to follow Rule 5.4, A.R.C.P. with respect to sealing documents; and 3) the

public policy expressed in Rule 5.4, A.R.C.P. against sealing court documents, it is likely that there will be fewer filings of motions to seal in probate matters; more denials when such motions to seal are filed; and more use of the confidential document filing process established under Rule 9, A.R.P.P.

### Let’s first look at Rule 8, A.R.P.P.

For a couple of years now, the probate court has resisted entering orders to file matters under seal not only as a matter of public policy, but a matter of facilitating ease of administration, and understandably so. Think about it—Rule 5.4, A.R.C.P. contemplates a court matter being finite, not ongoing as are most probate matters. In most probate cases, the matter continues until the age of majority for a minor and for the lifetime of an incapacitated adult. Sealing the entire probate court file presents challenges in the ongoing administration of the matter not only for interested parties but also the court. So, rather than seal the entire probate court file, the probate court has instead come to rely on Rule 8, A.R.P.P. which permits an order to be entered that directs the Clerk of the Court to file certain documents confidentially.

What does it mean for a document to be filed confidentially and does it satisfy the terms of a settlement requiring “confidentiality”? In most instances, yes, as long as the following are considered:

*See The “Confidential” Settlement, page 15*

# The “Confidential” Settlement

Continued from page 1

- The terms of the settlement agreement do not provide for filing the probate court matter under seal but rather generally require confidentially or, if specificity is required, that certain information is sought, not necessarily guaranteed, to be filed as confidential in the probate court.
- Understand that, although confidential documents are not part of the public record of a probate case, persons authorized under Rule 8(b)(2)(A) through (F) and Rule 8(b)(3)(B) and (C) have access to such documents, which includes a party to the probate case and his/her legal representative, an attorney appointed by the court to represent the subject person, judicial officers, the public fiduciary, and any person authorized by the court on a showing of good cause.
- A motion seeking to file certain documents confidentially is filed with the probate court in advance of filing any pleadings containing confidential information and that the order sought contemplates the title of each and every document to be filed that will contain confidential information; otherwise, be prepared to seek an amended or additional order.
- Assuming an order is entered, adhere to the procedures set forth in Rule 8(c), A.R.P.P.
- Be sure to check the probate court docket at a later date, but not much later, to confirm that the confidential documents do not appear! If they do, contact the Office of the Clerk of the Court to remedy the situation.

## Now let's look at Rule 5.4, A.R.C.P. regarding sealing documents

In the rare instance that a case to be filed in probate court satisfies the requirements set forth in Rule 5.4, A.R.C.P.,<sup>1</sup> which includes the requirement that no reasonable, less restrictive alternative exists to preserve the confidentiality of the information (does Rule 8, A.R.P.P. not fit the bill?), recent amendments to the civil rule complicate the initial filing of a probate matter the filing party wishes to be under seal.<sup>2</sup> If the public's access to the identity of the petitioner, as the filing party is known in a probate matter, and/or the subject minor or incapacitated adult is not of concern, the solution may be to initially file general pleadings to initiate the probate matter, such as a petition seeking the appointment of a conservator and related pleadings. Once a case number and judicial officer are assigned to the matter, a motion seeking to have the matter filed under seal can then be filed.

If the identity of the petitioning party and/or the subject minor or incapacitated adult being accessible to the public for any period of time is of concern, then the filing party will need to adhere to the new requirements of Rule 5.4, A.R.C.P. Under amended Rule 5.4, A.R.C.P., the focus is on the “case-initiating document,” that is, the document filed that commences an action and advance authorization to file a case initiating document under seal cannot be granted.<sup>3</sup> Before filing a motion seeking to file a document or matter

See *The “Confidential” Settlement*, page 17

# Worker's Compensation



CERTIFIED  
SPECIALIST

29 Years Helping  
Injured Workers

## Law Office of Eric Averkamp

3048 E. Baseline Rd., Suite 121  
Mesa, Arizona 85204

480-632-9800 • [awerkamlaw.com](http://awerkamlaw.com)

Member of the Arizona Association for Justice

## Collision Safety Consultants of Arizona, LLC

27000 N. Alma School Parkway, #1039  
Scottsdale, Arizona 85262

### RESULTS ARE GUARANTEED

- Diminished Value Reports
- Post Repair Inspections
- Total Loss Valuations
- Appraisal Clause



Over 70 Years of Combined Experience  
in the Collision Industry!

JAN VESELY  
602-620-9661

BOB ISHAM  
480-215-0543

[www.collisionsafetyconsultantsofaz.com](http://www.collisionsafetyconsultantsofaz.com)

Arizona Adjuster Lic. # 1146889