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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,725

MIAMI DAILY NEWS, INC. and THOMAS H. DUBOCQ,

Petitioners,

vs.

ALICE P., et al., and MORTON LAITNER, as attorney for HEALTH AND REHABILITATIVE SERVICES,

Respondents.

Discretionary Review of a Decision of the Third District Court of Appeal

REPLY BRIEF OF AMICUS CURIAE THE MIAMI HERALD PUBLISHING COMPANY

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PRELIMINARY STATEMENT

The American Civil Liberties Union ("ACLU") argues that government disclosure of midwife records would impermissibly interfere with the decision of expectant mothers to enjoy a "home birth" attended by a midwife, thereby violating the mothers' federal decisional autonomy right. However true the ACLU argument may be, it is not relevant to the issue here.

The Miami News and The Miami Herald contend only that the licensing application filed with the state by a midwife applicant is subject to public inspection. Any documents created by already-licensed lay midwives are not public records, nor are they alleged to be here. The only records at issue are those relating to midwife applications under now repealed Chapter 485, Florida Statutes. Only the ACLU's failure to distinguish between licensed lay midwives and midwife applicants and between repealed Chapter 485 and new Chapter 467 allow it to erroneously conclude the application at issue should not be inspected by the public.[1/]

1/ The ACLU makes two additional arguments that can be disposed of briefly here. First, prior decisions of this Court reject the notion that a Florida constitutional right of privacy bars access to these public records. Forsberg v. Housing Authority of Miami Beach, ____ So.2d _____, 9 FLW 335 (Fla. 1984); Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980). Second, courts may not create judicial exemptions from the Public Records Act under the guise of statutory construction. Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980); Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979).

Similarly, in arguing for a judicial exemption to the (Continued)

Since virtually the only licensing requirement imposed by Chapter 485 was the submission of the application, public access to it provided the only check on the licensing process. The ACLU's argument thus reduces to the bizarre assertion that the state law which provided expectant mothers the only information that could have assisted them in making an informed choice as to their use of a midwife unconstitutionally burdens their right to make this decision.

The Florida Legislature responded to the inadequacy of existing midwifery regulation in 1982 by enacting a comprehensive new Midwifery Practice Act, Chapter 467, and repealing Chapter 485. The application submitted under the new regulatory system does not require any listing of the birthings the applicant attended, and the intervenors have already allowed the midwife applicant to attend their respective deliveries. Since inspection therefore could not interfere with either decisions already made or future decisions, no infringement of the decisional autonomy right is presented here. Further, expectant mothers were neither required to allow midwife applicants to attend their birthings, nor to allow midwife applicants to report

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Act, the intervenor-mothers ask this Court to blur the distinction between "information" exemptions and "records" exemptions which they claim are used interchangeably in the Act. However, Florida Statutes Sections 119.07 (3)(b), (c) and (n), provide for records exemptions while Florida Statutes Sections 119.07(3), (b), (e), (f),(g), (h), (i), (j), (k), (l), and (m) define information exemptions. The decision whether certain "information" should be made confidential irrespective of the type of record in which it may be found is one for the Legislature, not the courts.

their attendance to the state. Nor were midwife applicants required to include in their applications the "private facts" listed by the ACLU in its brief. ACLU Br. 13.

The ACLU's essential claim is that expectant mothers have a constitutional right to allow a midwife applicant to attend their deliveries and then demand the deletion of that fact from the public record even though their attendance was part of the state licensing process. The claim is without merit.

REPLY TO FACTUAL CONTENTIONS

In its statement of the case and facts, the ACLU makes two fundamental errors: (i) it distorts the history of midwifery regulation; and (ii) it reaches erroneous conclusions concerning the relative safety of midwifery and home birth based on statistics that do not remotely support its claims. The Miami Herald therefore submits the following factual statement to correct the crucial errors made by the ACLU.

Development of Midwifery Regulations

Controversy over the legitimacy of midwives began at the start of this century. Before that time delivery by a midwife in the home was the common practice. With the rise of modern medicine in the nineteenth century, women increasingly chose physicians over midwives and gave birth in hospitals. By 1920, the use of midwives was limited primarily to the poor rural, non-white and immigrant women who could not afford physician-attended

hospital births. Comment, Legitimacy for the Florida Midwife: The Midwifery Practice Act, 37 U.Miami L.Rev. 123, 128 (1982). High infant and maternal death rates caused many to question whether the practice of midwifery should be allowed to continue. Comment, supra, at 129.

Nowhere was this more the case than in Florida, the state with the highest infant and maternal death rates. Id. "Growing concern and agitation about the safety and care of mothers and babies in Florida" led the Legislature to enact Chapter 485, Florida Statutes, in 1931, the first law directly regulating midwifery in Florida. Staff of the House of Representatives Committee on Regulatory Reform, Sunset Review of Chapter 467 at 6 (March 1984) (filed as an Appendix hereto and hereinafter cited as "Sunset Review") At that time, there were some 4000 lay midwives known to be practicing in Florida. Id. The Legislature recognized that the immediate replacement of so many midwives with physicians was impractical. Legislative efforts were thus directed to controlling and educating midwives until their gradual replacement could be effected. Comment, supra, at 131-33.

To this end, Chapter 485 established minimal licensing requirements for midwives. An individual desiring to be licensed as a lay midwife was required to submit an application which included (i) proof she had "attended" at least fifteen births under the supervision of a physician and (ii) "letters of recommendations" from two other physicians. Fla. Admin. Code,

Rule 10D - 36.22. In addition, the applicant had to possess a high school education and demonstrate "cleanliness." § 485.031(3) & (4), Fla. Stat. (1981).

The minimal regulatory scheme imposed by HRS coincided with decreasing public demand for midwife care. Between 1920 and 1970, there was almost a complete shift to physician-attended hospital deliveries.[2/] Indeed, by 1970, midwifery had all but died out and many officials were calling for an end to the lay midwifery program. However, at about this time, "[i]nterest in the concepts of 'natural' childbirth with its non-interventive measures, parent/infant bonding, and women's liberation with its emphasis on the woman's control of her life, body and destiny, resulted in a renewed interest in home births and lay midwifery."[3/] Sunset Review, supra, at 7. Chapter 485, intended only to provide stop-gap supervision of midwives, was "an inadequate vehicle for establishment of the 'new' midwifery envisioned by natural childbirth advocates." Comment, supra, at 140.

Thus, the Florida Legislature passed the 1982 Midwifery Practice Act, Chapter 467, Florida Statutes, and repealed Chapter

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2/ Physician attendance increased from 16% in 1920 to 94% in 1970 for non-white births, and from 77% to 99.5% for white births; while the percentage of births in hospitals increased from 50% to 98%. Sunset Review, supra, at 7.

3/ Whereas the HRS Nursing Program office received only six inquiries for licenses between 1972 and 1976, it received over seventy inquiries during the eighteen-month period ranging from 1977 to mid-1979. Id. at 7-8.

485. Rather than treating midwives as a "problem" to be eliminated as quickly and safely as possible, the new Act recognizes the legitimacy of properly licensed midwifery in the health care system. Chapter 467 creates a stringent licensing system that requires an applicant to either (i) complete a three-year course of clinical study and training and pass a written examination, §§ 467.007 & 467.009, Fla. Stat. or (ii) hold a valid license conferred by another jurisdiction, provided the foreign licensing requirements are substantially equivalent to those established by the new Florida act, § 467.008, Fla. Stat. Chapter 467 recognizes "the need for parents' freedom of choice in the manner of, cost of, and setting for their children's birth," and, to that end, seeks to protect the health and welfare of mothers and infants, and to make midwifery safe and available to women expecting normal deliveries. § 467.002, Fla. Stat.

The ACLU fails to recognize the dramatic change in the law worked by Chapter 467. Instead, the ACLU repeatedly cites 1982 and 1983 statistics for the proposition that midwifery was safe at the time inspection was here demanded, even though Chapter 485 was repealed in 1982. ACLU Br. 4, 6, 9. The ACLU also cites as support a number of agency rules which were promulgated in 1983 pursuant to new Chapter 467, and did not exist under repealed Chapter 485.[4/] ACLU Br. 5.

4/ Passage of the new act in 1982 may well have prevented unqualified persons from being licensed and causing deaths in 1982-83.

By failing to note the legislative change in the midwifery statute and to understand the concerns that motivated that change, the ACLU is led to the wholly erroneous conclusion that the statutory regulation of midwifery, and the public records thereby created, pose a threat to the putative right to allow a midwife applicant to attend the delivery. The enactment of Chapter 467 as a legislative response to the home birth movement reflects Florida's recognition of both the significance of the decision to use a midwife and the legitimacy of employing one that is properly trained. Chapter 467 establishes rigorous standards for the licensing of midwives precisely to afford the public the protection it lacked under Chapter 485.

Had the ACLU noted the statutory change and focused on the record actually at issue here -- a midwife application filed pursuant to repealed Chapter 485 -- it might have understood the actual interest served here by public inspection. When Chapter 485 was in effect, public inspection of applications and their supporting documents was the only vehicle for evaluating midwives or holding the licensing authority accountable for the performance of its public duties. Chapter 485 required no formal training of midwife applicants, established no advisory body and, in fact, allowed HRS virtually unfettered discretion to grant or deny licenses. The Miami Herald does not, as the ACLU contends, necessarily imply "that choice of a midwife is a far riskier choice than selection of a doctor" today. ACLU Br. 2. But, as the Legislature itself recognized when it passed Chapter 467,

choosing a midwife was too risky under the inadequate Chapter 485.

The ACLU's Misuse of Statistics

The ACLU makes repeated references to statistical data that purportedly support its claim that a midwife delivery without a physician attending is as safe as, or safer than, a delivery by a physician. The ACLU itself notes, and then totally disregards, the fact that there are no meaningful data available on the relative safety of birth settings. ACLU Br. 3. Institute of Medicine and National Research Council, Research Issues in the Assessment of Birth Settings (1983).

> The committee commissioned a review to assess the literature on the safety of nonhospital birth settings (Appendix A). The review makes it apparent that the literature is insufficient for a conclusive determination of whether safe, appropriate care can be provided in unconventional settings. Risks are neither clearly identified nor quantified. There are no good comparative studies the number of subjects studied is small and the studies are poorly controlled. In fact, there is little, if any, objective evidence about the advantages or disadvantages of any birth setting (Adamson, 1981), or whether low-risk pregnancies managed in unconventional settings have outcomes that are worse, the same, or better than outcomes in traditional hospital practices.

Research Issues at 25; see also id. at 33. Yet the ACLU proceeds to draw conclusions from statistically insignificant numbers and studies having no relevance to the issues here. Repeatedly, the ACLU equates "home delivery" with "midwife delivery" and

"hospital delivery" with "physician delivery" despite the fact that a home birth may be supervised by a physician. None of the statistics distinguish between home births attended by midwives alone and those attended by midwives supervised by physicians, as is commonly the practice among more affluent parents choosing home birth. Cf. Research Issues, supra; Sunset Review, supra (statistics cited therein).

The ACLU similarly attaches to mortality rate figures a significance which they do not possess:

> Mortality rates provide only crude indicators for measuring birth outcomes, and retrospective studies using data collected for entirely different purposes introduce many measurement problems. Concluding that a causal relationship exists when mortality rates vary between subgroups is inappropriate.

Id. at 171; see id. at 175. The citation of mortality rates for home versus hospital delivery fails to take into account crucial differences in prenatal care, the fact that all births diagnosed as high-risk are performed in hospitals, and the fact that the home delivery may have been performed by a physician rather than a midwife. The actual significance of the cited mortality rates is further distorted by the fact that the ACLU treats midwife statistics from other jurisdictions as if midwives everywhere received the same level of training. A midwife may have almost no training (as in Florida prior to 1982) or may, as is required in the Netherlands (and now in Florida), have three years of specialized education.

Finally, the ACLU questions The Miami Herald's assertion

that ineffective midwifery regulations disproportionately harm the poor. Relying primarily on a study of "the home birth set" in California, the ACLU again distorts statistical data in an effort to show that the decision to employ a midwife is not an economic one. Historically midwives have been employed more commonly by those who could not afford the latest in medical care. See Comment, supra, at 125, 128. While the resurgence of interest in midwifery in the 1970's may not be entirely based on economic considerations, it is nonetheless true that cost remains a crucial factor in the choice of a midwife delivery. See § 467.002, Fla. Stat. All available studies indicate that midwife care and delivery is significantly less expensive than hospital-based physician delivery.5/

ARGUMENT

PUBLIC INSPECTION OF THE RECORDS WILL NOT INFRINGE THE INTERVENOR-MOTHERS' FEDERAL CONSTITUTIONAL RIGHT OF PRIVACY.

The ACLU argues that public inspection of the midwife application would infringe "familial decisional privacy," claiming expectant mothers would be dissuaded from using midwives because their choice of this birthing method would be disclosed to the public. ACLU Br. 17. The ACLU's argument is without

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5/ In South Florida, the cost of hospital-based physician obstetrical care in 1981 ranged from $1,700 to $1,900. The cost of a licensed lay midwife, in contrast, was only $500. Comment, supra, at 139. See also Sunset Review, supra, at Tables B, C & D.

basis.

A. Neither the Rights of the Intervenors Nor of Any Prospective Mothers Will Be Infringed by Public Inspection of the Records.

The intervenors have already allowed the midwife applicant to attend the birthings memorialized in these records. Public inspection of the records cannot alter these decisions since the applicant has already attended these birthings. As for any prospective mother's decision to use a midwife, inspection of these records poses no threat to the autonomy right because the state licensing process no longer requires midwife applicants to append proof of birth attendance to their applications. Hence, no prospective mother's use of a midwife applicant would be disclosed. Access to the old midwife application records can only aid prospective mothers in deciding whether to use any of the midwives licensed under the old act,[6/] since such access provides the only information available concerning their qualifications.

Furthermore, even if the Chapter 485 licensing system were still in effect, no autonomy right would be involved here. The use of midwives could not be discouraged by public inspection of midwife applications; only the attendance at the births by midwife applicants could conceivably be affected. No statute -- either repealed or current -- requires licensed midwives to

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6/ The new statute "grandfathered" in midwives licensed under the old act. § 467.209(2), Fla. Stat.

create records or submit them to the state. Only midwife applicants were so required. Expectant mothers remained free to employ licensed midwives and to give birth at home without the presence of midwife applicants or the creation of any public record.

B. A Mother Has No Constitutional Privacy Right to Excise From the Public Record the Fact a Midwife Applicant Attended Her Delivery When That Attendance Was Permitted by the Mother and Used by the Applicant in Her Licensing Application.

The ACLU attempts to bring this case under the "privacy protection accorded to child-bearing." ACLU Br. 18. However, the state is not interfering in a woman's "decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Nothing in state law required the mother to allow either the attendance of the applicant or the applicant's use of the birth as part of her application. Nothing in law required the applicant to disclose the "private facts" at issue in her application. Nonetheless, the ACLU argues that the mothers have a constitutional right -- not only to be attended by a midwife applicant -- but also to insist that the state delete from the public record the fact that the applicant attended the birth, even though the applicant used her experience in the licensing process. This claim is absurd.

The Supreme Court has isolated a core area of fundamental rights protected from government intrusion unless the state

can demonstrate a compelling reason for this restriction.[7] No case has extended the right to encompass the use of midwives or midwife applicants.[8] No case has ever held that mothers have the right to employ midwife applicants seeking state licensure and simultaneously demand that this fact be kept confidential.[9]

Even if the mothers' decision to use a physician assisted by a midwife applicant were to merit constitutional protection, that "privacy interest" would be outweighed by Florida's strong commitment to open government at all levels[10] and its duty to protect the health and well-being of pregnant

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7/ L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 15-1 et seq., 886-990 (1978).

8/ The Miami Herald offers no opinion here as to whether either a statutory prohibition or a statutory burden on the decision to use a midwife would violate the decisional autonomy right of mothers since the issue is not before this Court.

9/ At least one court has flatly refused to extend the constitutional right of privacy to protect any decision concerning who should be permitted to be present at birth and where that birth should take place. Fitzgerald v. Porter Memorial Hospital, 523 F.2d 717, 721 (7th Cir. 1975), cert. denied 425 U.S. 916 (1976); see also Bowland v. Municipal Court, 18 Cal.3d 479, 495, 556 P.2d 1081, 1089, 134 Cal. Rptr. 630, 638 (1976) ("the right of privacy has never been interpreted so broadly as to protect a woman's choice of the manner and circumstances in which her baby is born").

10/ This Court has often recognized the public interest in open government as among the most compelling recognized in Florida. Wood v. Marston, 442 So.2d 934, 941 (Fla. 1983).

women and their newborn children.[11/] In fact, the right of decisional autonomy dictates that the state provide expectant mothers access to the midwife applications in order to evaluate midwife competency.

C. Even a Mistaken Promise of Confidentiality to the Mothers Would Not Create an Exemption from Chapter 119.

The ACLU complains that the mothers did not knowingly waive their constitutional right of privacy by permitting the midwife applicant to attend their birthings. But the mothers concede that they knowingly invited the midwife applicant to take part in the birthing process. The mothers also cooperated with the applicant in providing the information that ultimately became part of the application filed with the state.

Even where an explicit promise of confidentiality has been made, this Court has held inspection must be allowed if the material at issue is a public record. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633, 635 (Fla. 1980). Since a public official may not create an exemption by making an ultra vires representation of confidentiality, a midwife applicant certainly could not have created an exemption

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11/ In Roe v. Wade, 410 U.S. 113, 154 (1973), the United States Supreme Court held that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."

by promising the mothers confidentiality.[12/] Only the Legislature may create exemptions from the Public Records Act. E.g., Wait, supra. Once information is placed in a public record and a request to inspect it has been made, the party who provided the information cannot "raise...a challenge" to its inspection. Tribune Co. v. Cannella, _____ So.2d _____, 9 FLW 341, 342 (Fla. 1984).

CONCLUSION

Based on the foregoing reasons, the decision of the Third District Court of Appeal should be reversed.

Respectfully submitted,

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12/ The Miami Herald does not believe the Record shows any promise of confidentiality was, in fact, made to the mothers.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing Reply Brief of Amicus Curiae The Miami Herald Publishing Company was served upon the following this 25 day of October, 1984.

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