IN THE SUPREME COURT OF FLORIDA

GEORGE FREDERICK ATWELL, :

Petitioner, :

v. : Case No.: 70,500
1st District - No.: BM-476

SACRED HEART HOSPITAL OF :
PENSACOLA and SISTER MARY
CARROLL, Administrator, :

Respondents. :

APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL OF FLORIDA, CASE NO.: BM-476

ANSWER BRIEF OF RESPONDENTS

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PREFACE

This is an appeal in which Petitioner seeks to have the Supreme Court of Florida review a decision of the First District Court of Appeal, pursuant to Rule 9.030(a)(2)(A)(v), in which it certified a question to this Court as a matter of great public importance. Respondents, the Defendants in the trial court and the Appellees in the District Court, respectfully submit that this Court should not exercise its discretionary jurisdiction to review the subject decision, in that the facts in this case are of such a peculiar nature that a similar case will very likely not occur.

Petitioner sought a declaratory judgment in the trial court and appealed the decision of the trial court. The District Court of Appeal sustained the decision of the trial court in a unanimous decision, but certified to this Court the question set forth further herein.

The parties to this proceeding will be referred to herein as follows:

Petitioner may sometimes be referred to as "Atwell" or "Plaintiff".

Respondents may jointly be referred to herein sometimes as "Defendants". Sacred Heart Hospital of Pensacola may be referred to herein as "Hospital".

The following symbols will be used: "(R)" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Atwell sought to obtain from the Hospital records concerning the birth of a Caucasian child delivered at the Hospital by W. C. Payne, M.D. on November 10, 1921. The Hospital records did not disclose any patient named Atwell during the full month of November, 1921. (R29). The Hospital declined to deliver those records to Atwell and he initiated the subject litigation.

At the hearing before the lower court, Atwell introduced into evidence, over the objection of Defendants, an Affidavit of W. C. Payne, M.D. certifying that he was the attending physician at the birth of George Frederick Atwell, of Pensacola, Florida, and his birth occurred at the Pensacola Hospital November 10, 1921. (Plaintiff's Exhibit 1, R82).

The evidence presented by Atwell at the hearing before the trial court showed that Atwell was adopted. Atwell testified to what he did after he discovered he was adopted. (R11). Florence Day testified:

> I am aware he was adopted. My mother told me that years ago. (R17).

> Ethel Mae Atwell testified, "Well, he was adopted." (R19).

Petitioner Atwell testified there was a birth record for him from the Department of Vital Statistics as a delayed birth certificate. (R27).

The testimony before the trial court was to the effect

that in 1921 the Hospital did not maintain the sort of patient records which hospitals normally maintain these days. (R28). Such records were kept in huge books with "one-line information, of several items, but one-line entry for patients". (R29). Thus, rather than detailed patient records, there would have been a one-line entry for each the mother and the infant delivered by her.

The Court in its Final Judgment made the following finding of fact:

> 1. Plaintiff, George Frederick Atwell, was born on November 10, 1921, at Pensacola Hospital, the predecessor of Defendant Hospital. Plaintiff was the only Caucasian child delivered at said hospital by W. C. Payne, M.D., on that date. (R84).

The Final Judgment also contained the following:

> 2. The Plaintiff, as a patient, is entitled to a copy of the medical records pertaining to his birth.
>
> 3. The Defendant shall furnish to Plaintiff, at Plaintiff's expense, a copy of Plaintiff's medical record which shall include the na,e if any, given to Plaintiff at birth, but it shall not include the name of his parents or any other identifying information concerning the natural parents of the Plaintiff. (R84).

Subsequent to the entering of the Final Judgment in the Circuit Court, Atwell appealed same to the First District Court of Appeal. (R85). Atwell in his appeal contended he was entitled to the patient records of his mother. Respondents argued that the patient records of the mother were her patient records and could not be given to Atwell because of the prohibition in

Section 395.017(3), Florida Statutes (1983).

After having heard oral argument of counsel for the parties, the District Court of Appeal concluded that the trial court's construction of Section 395.017, which considers the mandatory provisions of Subsection (1) in pari materia with the mandatory confidentiality provisions of Subsection (3), is a correct and reasonable interpretation of the statute. The decision was unanimous. The Court certified the question set forth on Page 5 hereof to the Florida Supreme Court.

Respondents recognize that the District Court certified the question set forth above to this Court. Notwithstanding that fact, it is respectfully submitted that due to the peculiar facts presented in this case, arising out of a birth in 1921 when only limited patient records were kept (R29), a similar question will probably not be presented again to the courts of Florida. In view of that fact and the fact the decision of the District Court was unanimous, Respondents would respectfully request the Supreme Court not to exercise its discretionary jurisdiction of review in this matter.

QUESTION CERTIFIED BY DISTRICT COURT

DOES SECTION 395.017, FLORIDA STATUTES, REQUIRE A HOSPITAL, UPON PROPER PATIENT REQUEST, TO DISCLOSE COMPLETE PATIENT RECORDS WHEN TO DO SO WOULD COMPROMISE THE PRIVACY INTEREST OF A NON-REQUESTING PATIENT?

SUMMARY OF ARGUMENT

The issue before this Court is whether or not the Hospital will have to furnish to Petitioner Atwell the patient records of his mother. In its Judgment, the trial court, recognizing the nature of the hospital patient records in 1921, found that Atwell was entitled to a copy of the medical records pertaining to his birth. It further held the Hospital would furnish to Atwell a copy of Atwell's medical record, which would include the name, if any, given to him at birth, but it shall not include the name of his parents or any other identifying information concerning the natural parents of Plaintiff. (R84). The District Court of Appeal concluded the trial court's construction of Section 395.017, which considers the mandatory disclosure provisions of Subsection (1) in pari materia with the mandatory confidentiality provisions of Subsection (3), is a correct and reasonable interpretation of the statute.

Respondents submit that this, under the circumstances presented, is a correct balancing of the interests of the mother and Atwell in attempting to do fairness to each in a construction of Section

395.017. Further, Respondents submit that the Judgment of the trial court and the Decision of the District Court both conform to the public policy of the State of Florida as announced by its courts and with the adoption statutes of this state.

ARGUMENT

Respondents agree that this appeal presents a case of first impression in Florida. As stated earlier, however, Respondents submit the facts in this case are of such a peculiar and limited nature, that a similar case will in all probability not be presented in the future.

We have here a situation which had its beginning in 1921. A woman was delivered of a male child on November 10, 1921. For whatever reason, not known to us today, that mother did not keep her child and the child ended up living with the Mr. and Mrs. Atwell, who were recognized as parents of Petitioners. That mother is entitled to the confidential protection of the Florida Statute, and the Hospital, under that statute, has no right to waive that confidentiality. To try to do so would be a violation by the Hospital of its obligations under Florida law.

Section 395.017 concerning patient records of a hospital provides in Subsection (1) that such patient records shall, upon request, be furnished to any person admitted therein for care and treatment. However, Subsection (3) states that patient

records shall have a privileged and confidential status and shall not be disclosed without the consent of the person to whom they pertain, unless such disclosure is made in one of the particular exceptions set forth therein, none of which here apply. Therefore, under that statute, based upon the trial court having determined that Atwell was the child delivered on the day set forth above, Atwell was entitled to his patient records, but not those of his mother, which were confidential to her.

Petitioner's Brief at Page 7 contains the following:

> . . . Since Atwell was never formally adopted, the information he now seeks could have been obtained from his birth certificate; however, unfortunately, that information was never recorded with the Bureau of Vital Statistics . . . (sic).

This statement does not conform with the evidence presented by Atwell at the hearing before the Court. Not only did Atwell refer to the fact he was adopted (R11), but Florence Day, his first cousin, testified she was aware he was adopted and stated his mother told her that years ago. (R17). Ethel May Atwell, another witness called by Petitioner, and who stated Atwell was her nephew, testified he was adopted. (R19). Atwell testified there is a birth record for him from the Department of Vital Statistics which was a delayed birth certificate. (R29).

Petitioner's Brief at page 10 contains the following:

> . . . Although she had the option upon the birth of that child to consent to her child's adoption and give to him the opportunity to have adoptive parents, she chose not to do so. The execution of a release

> for adoption has legal significance and consequences. Had she executed such a document, her legal rights as to this child would have been terminated and the child would have the legal status of an adoptee. This was her option. On the other hand, Atwell had no such option; he is the injured party, the abandoned infant, deprived of the legal status of an adoptee.
>
> . . . On the other hand, if a natural parent desires protection from disclosure of identify, she could have and should have given the child up for adoption. After she made the decision not to release Atwell for adoption, how can the Hospital now argue that her name should not be revealed? . . .

There is no evidence in the Record to support the statements in Paragraph 10 of Petitioner's Brief set forth above. Nothing appears in the evidence before the trial court about any action of the mother relative to adoption or lack of adoption. There is no testimony in the record that Atwell was not formally adopted, nor that information was never recorded with the Bureau of Vital Statistics.

Petitioner Atwell discusses Section 63.162, Florida Statutes (1985), concerning adoption, at Page 11 of his Brief. That is apparently inserted because that statute states information concerning a natural parent shall not be disclosed except for "good cause shown". No "good cause" was shown in the evidence and testimony before the trial court, and that question was not raised in the appeal. Atwell, supra, p. 1370. There is no evidence in the record of any "good cause" prompting the desire of Atwell to secure the patient records of his mother. Brief of Petitioner (pp. 8-9) refers to the right of a person born out of wedlock being a lineal descendant of his mother

and discusses that further. Petitioner's Brief fails to also refer to Section 63.172, Florida Statutes (1985), which states that a judgment of adoption terminates all legal relationship between the adopted person and his relatives, including his natural parents. Respondents recognize there is no evidence of a judgment of adoption having been entered, but there is testimony of Atwell and his two aunts that he was adopted. Thus, based on their testimony, his right to inherit from his natural mother would have been terminated.

Two District Courts of Appeal have held that a trial court abuses its discretion when it releases confidential information about the identify of natural parents where good cause has not been shown. See In Re: Lay, 382 So. 2d 814, Fla. 1st DCA 1980; In Re: Adoption of Rand, 347 So. 2d 450, Fla. 3d DCA 1977. Petitioner has shown no medical reason why he needs access to any information beyond that which the Court has already supplied to him. Petitioner has shown no need for information regarding his genetic history. He has not alleged the existence of matters that affect, for example, title to real property, or shown the interest of any parties in real property as heirs or otherwise. Consequently, in the absence of a showing of some legitimate reason for disclosure of the natural parent's identify, other than to uncover the name of an individual who apparently wanted to remain unidentified, a Court would be in violation of its legislatively imposed duty if it revealed such identity.

The Florida Statutes not only allow a court to take into consideration the far-reaching repercussions of revealing a natural parent's identify, but require a court to consider potential deleterious emotional effects. The Court below rightly considered Respondent's legitimate concerns about the well-being not only of the natural mother, but of the natural father, or any other natural children who could still be living at the present time. The Court recognized that these concerns were not merely academic or conjectural, or advanced merely for the sake of argument.

If Petitioner's natural mother were 20 years old, or even 25 years old in1921, that parent would be approximately between 86 and 91 years of age in 1986. Other children could have been born to that individual and could be approximately the Petitioner's age. Countless women live beyond the age of 85 and most individuals live at least until their mid-60's. Thus, the possibility that Petitioner actually has natural siblings, still living, who have been heretofore unaware of his existence, or at least of their familial relation, is not just the result of some remote speculation, but is easily imaginable and well with the realm of biological capability. Release of confidential information about Petitioner's mother and possibly her family could result in severe emotional and traumatic upset at this time.

Both Florida Statute Section 395.017 and Florida Statute Section 63.162 support the notion that, where a person desires

access to medical records not his own, a paramount concern is always confidentiality of the identity of third parties. Most especially in the context of an adoptee or natural parent of an adoptee, confidentiality becomes an even more crucial concern. Certain well-recognized public policy reasons play an important part in the Legislature's articulation of these rules. For this reason a court is irresponsible and vulnerable to reversal if it does not take into consideration such policies as are relevant on a case by case basis.

As to Petitioner's contention that Respondent in some way lacks standing to assert the rights of the natural mother, Respondent is not attempting to assert the natural mother's right under consideration in the instant litigation. Instead, Respondent is trying to maintain the separateness of the Petitioner's medical records from those of a person who is not a party to the matter under consideration. The Hospital is not merely undertaking an altruistic campaign to protect a non-party's right. The Hospital is affirmatively precluded by statutory mandate and by common law patient/hospital privilege from releasing the records of another individual when that individual's record should be the subject of an entirely different matter. Moreover, the Hospital may well be subject to censure if Atwell's patient records are released.

The cases Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed 2d 551 (1972); Sparks v. Reeves, 97 So. 2d 18 (Fla. 1957),

Behn v. Timmons, 345 So. 2d 388 (Fla. 1 DCA 1977), and In Re Guardianship of D.A. McW, 429 So. 2d 699 (Fla. 4 DCA 1983), are cited at Page 13 of Appellant's Brief concerning a parent's right to custody of the parent's child. Appellant then urges similar rights should be afforded a child. This argument is not appropriate to the facts in this case. In the four cases just cited, a parent (father) was asserting his right to a minor child. In our case, the mother gave up her child in 1921. Appellant Atwell is not a "child" but a person 65 years of age.

The matters set forth herein are consistent with Florida law and policy. In Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (3d DCA 1978), the Court observed that a tribunal commits reversible error when it orders production of medical records of persons who were not parties to the particular action. As to medical histories, however, "both the courts and the legislatures have recognized this area as a sanctuary of privacy entitled to protection." South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798, 802 (3d DCA 1985) (Citing Priest v. Rotary, 98 F.R.D. 755) (N.D. Cal. 1983); Lampshire v. Procter & Gamble Co., 94 F.R.D. 58 (N.D. Ga. 1982); Peralta, supra. Frequently, medical records contain detailed information about the most personal aspects of an individual's life. Certainly, in the case of a natural mother who relinquishes her right to keep a child, anonymity is recognized as an important consideration, important enough to have elicited the legislative imprimatur.

Fla. Stat. Section 63.162(4)(a)-(d). Individuals often have deeply personal reasons for deciding to part with a newborn child. Frequently such decisions are in the best interest of the child and divulging underlying circumstances can precipitate deleterious emotional consequences for all persons involved.

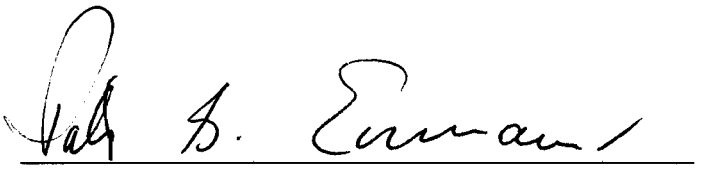
This Brief is filed on behalf of both Respondents, but its emphasis is on Respondent Hospital, which is the real defendant in this matter.

CONCLUSION

The decision of the First District Court of Appeal should be sustained. That decision upheld the decision of the trial judge who heard the evidence and saw the witnesses. Each court sought to properly carry out the intent of Section 395.017, Florida Statutes (1983). Each court recognized the right of Atwell to "his" patient records, but denied him the right to have the patient records of his mother. This decision conforms with adherence to the statute insofar as practicable under the circumstances for each of those parties.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondents has been furnished to Kathleen E. Gainesley, c/o Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, attorneys for Petitioner, at 226 South Palafox Street, Pensacola, Florida 32581-2308, by hand delivery this 23rd day of June, 1987.



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