IN THE SUPREME COURT OF FLORIDA

GEORGE FREDERICK ATWELL,

Petitioner,

vs.

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

Respondent.

CASE NO. 70,500
1st District - No. BM-476

APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA, CASE NO.: BM-476 BROUGHT PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(v)

INITIAL BRIEF OF PETITIONER

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PREFACE

This is an appeal invoking the discretionary jurisdiction of the Supreme Court of Florida pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) to review a decision of the First District Court of Appeal. The decision passes upon a question certified to be of great public importance.

The Petitioner was the Appellant before the First District Court of Appeal and the Plaintiff in an action for declaratory judgment.

Herein the parties shall be referred to as follows:

PETITIONER: Atwell

Appellant

Plaintiff

RESPONDENT: Hospital

Appellees

Defendants

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

STATEMENT OF THE CASE AND OF THE FACT

The action below was initiated by Atwell in order to obtain the records of his birth from the Hospital. These records were compiled at the time of Atwell's birth on November 10, 1921. Atwell adopts the following finding of the trial court as a correct statement 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" (R 84).

The birth of Atwell was recorded by the Hospital as a one line journal entry in a register described as a "huge book" (R 29, 30). Atwell requested that he be allowed to inspect and copy the journal entry evidencing his birth (R 12, 13, 83); however, the Hospital refused his request (R 14, 25). The Hospital claimed this information was confidential and release of same would violate Atwell's natural parents' right of privacy as the entry contained the name of his natural mother and other identifying information (R 29, 30, 32-36, 84).

Atwell filed a four count complaint seeking his records from the Hospital (R 54). Three counts of the complaint were dismissed (R 75); however, one count seeking a declaration that Atwell was entitled to his patient records pursuant to Section 395.017, Florida Statutes (1985) survived. This cause was heard before The Honorable M.C. Blanchard of the First Judicial Circuit, Escambia County, Florida, on March 26, 1986 (R 1). The trial court found for Atwell as follows:

> "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 name, 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" (R 84).

Atwell thereafter perfected his appeal to the First District Court of Appeal (R 85).

The First District Court of Appeal filed its opinion on April 6, 1987, affirming the trial court's decision and certifying to this Court the following question:

> 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?

Atwell filed his Notice to Invoke the Discretionary Jurisdiction of this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) to review the decision of the First District Court of Appeal which passes upon a question certified to be of great public importance. Atwell v. Sacred Heart Hospital of Pensacola, 504 So.2d 1367 (Fla. 1st DCA 1987).

QUESTION PRESENTED

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 THE ARGUMENT

Atwell, a foster child, requested the record of his birth from the Hospital pursuant to his statutory rights as set forth under Section 395.017(1) and Section 395.017(5), Florida Statutes (1985). The Hospital denied his request vicariously asserting his natural parent's right of privacy. The trial court held Atwell was entitled to his patient records but allowed the Hospital to edit those records prior to their release and delete the name of his parent or other identifying information. Thus, contrary to the statutory requirement, Atwell was not allowed to receive "a true and correct copy of all patient records". §395.017(1), Fla. Stat. (1985).

Atwell asserts the Statute provides a clear and mandatory directive. The Statute does not distinguish between patient records of birth and other types of patient records. The Statute does not place any conditions precedent upon a patient's right to receive his entire record. By virtue of the court's decision to allow the Hospital to censor his patient records, Atwell has been precluded from his entitlement not only as provided under Chapter 395, Florida Statutes (1985), but also from his potential entitlement to share in his natural parent's estate as provided under Chapter 732, Florida Statutes (1985).

Assuming the Statute contains an internal conflict such that this Court must evaluate the competing interests, the right to disclosure versus the right of privacy, Atwell contends the natural mother's interest in denying her natural child the information in question are either non-existent or insignificant.

Finally, Atwell asserts that Chapter 395, Florida Statute (1985), as interpreted and applied by the tribunal below, would deny Atwell due process and equal protection of the law under the state and federal constitutions. In effect, if the ruling below were allowed to stand, a foster child would have less access to his own birth records than an adopted child under these same circumstances.

ARGUMENT

This appeal presents a case of first impression; and if this Court determines that it cannot reach a decision on the statutory grounds presented, then this Court should consider Atwell's assertion of his disclosural and constitutional right to know the name or names of his parent or parents.

Section 395.017(1), Florida Statutes (1985) clearly entitles Atwell to all of his patient records which are in the possession of the Hospital; and Section 395.017(5), Florida Statutes (1985) clearly states that such patient records shall contain information required for the completion of a birth certificate. Birth certificates require the inclusion of the name of an infant's mother and father, if known. §382.16, Fla. Stat. (1985). Birth certificates then become a matter of public record. Chapter 119, Fla. Stat. (1985). 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. Atwell v. Sacred Heart Hospital of Pensacola, 504 So.2d 1367, 1370 (Fla. 1st DCA 1987).

Atwell asserts that Section 395.017, Florida Statutes (1985) is unambiguous and does not make disclosure discretionary. Disclosure of a patient's records is not a discretionary act but rather a mandatory act. The trial court in granting the Hospital the right to censor or edit Atwell's patient records violated the principal set forth in In Re Alkire's Estate, 142 Fla. 862, 198 So. 475 (1940):

"The judicial power in the several courts vested

> by section 1, Article V, and the original and appellate jurisdiction defined by sections 5, 11 and 17, for the Supreme Court, the Circuit Courts and the County Judges, as stated above, are not delegable and cannot be abdicated in whole or in part by the courts." Id. at page 482. See also Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985).

Because of the very nature of the treatment administered, delivery of an infant, the Hospital cannot identify a distinct document that qualifies as the mother's patient record separate and apart from the infant's patient records. The information contained in the Hospital's record qualifies as a patient record of the infant as well as that of the mother because it is the record of his birth as well as the record of her having given birth to him. The information regarding the mother and the child is inextricably bound in one notation. Section 395.017, Florida Statutes (1985) makes no such distinction. The Statute does not place a newborn infant's patient records in a separate category from any other type of patient record. The Statute does not provide that either the infant (in this case an adult child) or the natural mother must obtain the other's consent to obtain a complete record of the child's birth. Consequently, if the natural mother of a child requested her patient record regarding her having given birth to a child, she would receive the entire record of that birth including the name given to that child and all relevant information regarding that incident.

Florida's Probate Code, Chapter 732, Florida Statutes (1985), recognizes the right of a foster child. Specifically, Section 732.108(2), Florida Statutes (1985) states:

> "For the purpose of intestate succession in cases not covered by subsection (1), a person born out

> of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. . ."

Atwell has potential property rights in his natural mother's estate. The probate statute recognizes those rights to share in a natural parent's estate and recognizes that a person born out of wedlock is a lineal descendant of his mother and is one of the natural kindred of all members of the mother's family. Without knowledge of his natural parents' identity, Atwell is a lineal descendant of no one nor is he one of the natural kindred of the members of his mother's family. Herein lies the tragedy of this case as well as the support for Atwell's argument as to his disclosural rights. He seeks only to know from whence he came. If Atwell's mother died intestate, he should be able to know if his rights as provided by the legislature exist, and yet, without the knowledge of his true identity, he is precluded from pursuing his legal rights.

The two competing interests involved in this case are the right to know the name of one's parent or, disclosural right, versus the right not to be discovered or, the right of privacy. This Court has been asked to balance these competing interests and to answer the ultimate question as to whose rights are greater. Atwell v. Sacred Heart Hospital of Pensacola, 504 So.2d 1367, 1370 (Fla. 1st DCA 1987). Atwell respectfully submits his natural mother's expectation of privacy is either non-existent or de minimis. There is no evidence in the record to indicate the natural mother ever requested the Hospital records concerning her delivery of Atwell be kept confidential. Furthermore, there is no evidence that she has ever been contacted by the Hospital and now objects to disclosure.

The natural mother of Atwell gave birth to a child. She knows that a child exists who is hers. As the natural parent, she maintained her parental rights. 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.

Atwell's right to know the name of his parent or parents is in effect a right to know one's own identity. Certainly, upon knowledge of his status as an adopted child, the child may have problems with his sense of identity, this problem is a fortiori concern for a non-adopted permanent foster child. The foster child may experience self-doubt and a sense of deprivation which may be compounded by the fact that he was not only rejected by a natural parent but was never released by that parent for adoptive purposes. On the other hand, if a natural parent desires protection from disclosure of identity, 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? What policy assertions to a right of privacy can this natural mother make which would exceed those of the natural mother of an adopted child? Yet, even the natural mother of an adopted child would be afforded less protection in her expectation of privacy

than the natural mother of a foster child if this Court were to find in favor of her rights to privacy. Florida's Adoption Statute, Section 63.162(4), Florida Statutes (1985), provides as follows:

> "No person shall disclose from the records the name and identity of a natural parent, an adoptive parent or an adoptee unless:
>
> (a) The natural parent authorizes in writing the release of his name;
>
> (b) The adoptee, if 18 or more years of age, authorizes in writing the release of his name; or, if the adoptee is less than 18 years or age, written consent to disclose his name is obtained from an adoptive parent;
>
> (c) The adoptive parent authorizes in writing the release of his name; or
>
> (d) Upon order of the court for good cause shown.
>
> In determining whether good cause exists, the court shall give primary consideration to the best interests of the adoptee, but shall also give due consideration to the interests of the adoptive and natural parents. Factors to be considered in determining whether good cause exists include, but are not limited to:
>
> 1. The reason the information is sought;
>
> 2. The existence of means available to obtain the sought-after information without disclosing the identity of the natural parents, such as by having the court, a person appointed by the court, the department, or the agency contact the natural parents and request specific information;
>
> 3. The desires, to the extent known, of the adoptee, the adoptive parents, and the natural parents;
>
> 4. The age, maturity, judgment, and expressed needs of the adoptee;
>
> 5. The recommendation of the department or the agency which prepared the preliminary study, or the department if no such study was prepared,

concerning the advisability of disclosure." (Emphasis added)

Thus, upon a showing of "good cause", the adopted child may pursue information regarding the identity of a natural parent. Why then should the natural mother of a foster child be afforded more protection of privacy than the legislature afforded to the natural mother of an adopted child? If the adoptee can pursue his birth record, then the adoptee has been treated as a special class and been afforded the right to discover his natural parents' identity, whereas a foster child is being constitutionally discriminated against because he is not afforded a similar right.

An individual's right of privacy extends to the decision whether to bear or beget a child, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, L.Ed.2d 349 (1972). Furthermore, Florida's Constitution provides:

> "Every natural person has the right to be left alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Art.I, S.23 Fla. Const.

However, as stated previously, had Atwell's birth certificate been recorded pursuant to Chapter 119, Florida Statutes (1985), and Chapter 382, Florida Statutes (1985), and specifically Section 395.017(5), Florida Statutes (1985), he could have sought the information as to his true identity. Atwell v. Sacred Heart Hospital of Pensacola, 504 So.2d 1367, 1370 (Fla. 1st DCA 1987). Thus, in this State the record of one's birth is a very public matter. The privacy of those records relating to adoption is the exception rather than the rule. There is no compelling reason to extend this

exception through judicial legislation to Section 395.017, Florida Statutes (1985).

The importance of the rights to conceive and raise one's children have been deemed essential and far more precious than property rights. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). And, as so eloquently stated in Sparks v. Reeves, 97 So.2d 18 (Fla. 1957):

> ". . . we nevertheless cannot lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring. State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31. This is a rule older than the common law itself and one which had its inception when Adam and Eve gave birth to Cain in the Garden of Eden. Gen. 4:1."

See also Behn v. Timmons, 345 So.2d 388 (Fla. 1st DCA 1977); and In Re Guardianship of D.A. McW., 429 So.2d 699 (Fla. 4th DCA 1983).

A child's rights should, at least, be equal and reciprocal to those afforded to a parent. In the case at Bar, Atwell must be permitted to enjoy the fellowship and companionship of his parents, or given his present age and the likelihood that his natural mother is deceased, at least to know his heritage.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the First District Court of Appeal's decision to affirm the trial court's order should be reversed. First, the court erred as a matter of law in finding Section 395.017(1) and Section 395.017(5), Florida Statutes (1985) did not control. The Statute is clear, unambiguous and mandatory. It does not provide for the alteration or editing of a patient's records. Atwell asserts he has a clear right under the relevant statutory provisions to receive the entire record of his birth, including the name of his parents.

However, if this Court finds there is a conflict between the statutory provisions of Section 395.017(1), Section 395.017(3), and Section 395.017(5), Florida Statutes (1985), then this Court must balance the competing interests of the disclosural rights and privacy rights. Atwell respectfully submits his right to learn his true identity far exceeds his natural parents' unasserted right to or expectations of privacy. Therefore, this Court should answer the question certified to it in the affirmative and direct the trial court to order the Hospital to release all of Atwell's birth records to him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner has been furnished to Patrick G. Emmanuel, attorney for Respondent, at 30 South Spring Street, Pensacola, Florida, by hand delivery on this the 2nd day of June, 1987.

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