IN THE SUPREME COURT OF TEXAS

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NO. 99-0184

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LAURENCE ABRAMS, PETITIONER

v.

DONALD PAUL JONES, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

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Argued on October 12, 1999

JUSTICE HECHT, dissenting.

In this Term's decisions construing the Parental Notification Act,[1] the Court has exhibited a disturbing lack of regard for the rights of parents to raise and care for their children.[2] This case continues in that vein, holding that under chapter 611 of the Texas Health and Safety Code, mental health care professionals — who, as defined by statute,[3] include everyone from physicians to pretenders — have broad discretion to deny parents access to their children's mental health records, broader discretion than even a district judge has to order disclosure. As eager as the Court has been

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[1]T EX. FAM. CODE §§ 33.001-.011.

[2] *In re Doe 1(I)*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 2*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 3*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 4(I)*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 4(II)*, ___ S.W.3d ___ (Tex. 2000); *In re Doe 1(II)*, ___ S.W.3d ___ (Tex. 2000).

[3]T EX. HEALTH & SAFETY CODE § 611.001(2) ("'Professional' means: (A) a person authorized to practice medicine in any state or nation; (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.").

to find justification for allowing a child to have an abortion without telling her parents, contrary to a trial court's view of the evidence, it will come as no surprise that the Court has no difficulty keeping parents ignorant of their children's mental health records, contrary to the trial court's conclusion. As in the parental notification cases, the Court casts responsibility for its decision in this case on the Legislature. But this steady erosion of parental authority is judicial, not legislative; it results from the Court's view of statutory language through a prism of presumed diminution in parental authority. I respectfully dissent.

It should go without saying that parents generally need to know information contained in their children's health records in order to make decisions for their well-being. To remove any doubt that this is true, even after divorce, for any parent with custodial responsibility for a child, section 153.073(a)(2) of the Texas Family Code states that "[u]nless limited by court order, a parent appointed as a conservator of a child has at all times the right . . . of access to medical, dental, psychological, and educational records of the child . . . ." A parent's right to this information is not an insignificant matter and should not be restricted absent compelling reasons.

Section 611.0045 of the Texas Health and Safety Code, the pertinent parts of which are quoted in the margin,[4] permits a mental health care "professional", broadly defined as stated above,

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[4] Section 611.0045. Right to Mental Health Record

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.

to deny a patient access to his own mental health records if disclosure would harm the patient's physical, mental, or emotional health. For the same reason, access may be denied to a patient's representative, including a parent if the patient is a child.[5] In a suit to obtain the records, the professional has the burden of proving that denial of access is proper.[6] Nothing in the statute suggests that this burden should be anything but substantial. Certainly, a patient should not be denied access to his own mental health records absent solid, credible evidence that disclosure will cause him real, demonstrable harm. A general concern that disclosure to the patient would not be in his best interest should not be enough to deny him access. The statute sets no different harm standard for denying a parent access to a child's records. Denial of access cannot be based on some general concern that the child may be displeased or discomfited, even severely, about the disclosure. Rather, denial must be grounded on evidence of actual impairment to the child's health.

As the parental notification cases recently demonstrate, the meaning the Court gives a

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(d) The professional who denies access to a portion of a record under this section shall redetermine the necessity for the denial at each time a request for the denied portion is made. If the professional again denies access, the professional shall notify the patient of the denial and document the denial as prescribed by Subsection (c).

(e) If a professional denies access to a portion of a confidential record, the professional shall allow examination and copying of the record by another professional if the patient selects the professional to treat the patient for the same or a related condition as the professional denying access.

(f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.

* * *

(h) If a summary or narrative of a confidential record is requested by the patient or other person requesting release under this section, the professional shall prepare the summary or narrative.

[5] The persons referred to in section 611.0045(f) who can act on behalf of a patient are "a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs", *id.* § 611.004(a)(4), or "the patient's personal representative if the patient is deceased", *id.* § 611.004(a)(5).

[6] *Id.* § 611.005(b) ("In a suit contesting the denial of access under Section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access.").

statutory standard is best demonstrated not by the words used to describe it but by its application in specific circumstances. This case illustrates how little evidence the Court believes is necessary not simply to raise the issue of whether a parent should be denied a child's mental health records but to *conclusively establish* — so that no court can rule otherwise — that a parent is not entitled to the records. The Court's decision to deny access to the records in this case rests entirely on the testimony of Abrams, a licensed clinical psychologist, who stated at a hearing in the district court: that Jones's former wife brought their eleven-year-old daughter, Karissa, to him in February 1996 because Karissa was agitated and showed signs of worry and sleeplessness; that Karissa refused to open up to him until he promised her that he would not reveal the details of their conversations to her parents, even though she understood that a judge might later order disclosure; that Karissa then told him she was troubled that if when she turned twelve in October she had to express a preference for living with one parent or the other, as her stepmother (her former nanny) had suggested she might,[7] it would provoke more hostility between her parents; that after meeting with Karissa six times in five months, she seemed much better; that Karissa had reiterated her desire for confidentiality in their last meeting four months earlier in June 1996, and in a note her mother had brought to him a few days before the October 15 hearing; and that he had told Karissa's father, Jones, that his former wife had hired him to "get a leg up on" Jones in their continuing court proceedings. On the specific issue of whether disclosing Karissa's records to Jones would harm

[7] *Cf.* TEX. FAM. CODE § 153.134(a)(6) ("If a written agreement of the parents is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors: . . . (6) if the child is 12 years of age or older, the child's preference, if any, regarding the appointment of joint managing conservators . . . ."); *id.* § 153.008 ("If the child is 10 years of age or older, the child may, by writing filed with the court, choose the managing conservator, subject to the approval of the court."); *id.* § 153.009(b) ("When the issue of managing conservatorship is contested, on the application of a party, the court shall interview a child 10 years of age or older and may interview a child under 10 years of age.").

Karissa's health, Abrams's testimony in its entirety is as follows:

> Q Is it your opinion at this time that the release of those records would be physically or emotionally harmful to Karissa?
>
> A Yes, sir.
>
> Q And what is that opinion?
>
> A That *would have harmed* her, as a matter of fact. It would be the very essence, it would make her get better, to give her protection.
>
> Q As we sit here on October 15th of 1996, *is it still your opinion* that it would be harmful to her mental or emotional health if these records are released?
>
> A Yes, sir.
>
> Q And can you tell the Judge *why* you believe that?
>
> A *I've had no communications from her to be otherwise.* I asked her the last time I saw her, in June about it, she reaffirmed her need for it. I received a note from her last week asking for it again.

(Emphasis added.)

The Court holds that this testimony, which did not persuade the district judge, *conclusively established* that Karissa's health would be harmed by disclosing her records to her father. The Court not only denies the trial court any meaningful role in determining credibility and weighing evidence, it reaches a conclusion, as a matter of law, on evidence that is inconclusive. Assuming that Abrams's testimony established that *Karissa's health would have been harmed in February 1996* if he could not have promised her a measure of confidentiality because she would not have opened up to him and he could not have counseled her, the only evidence that disclosure of the records *would harm Karissa's health in October 1996*, when Abrams was no longer seeing her, was that she continued to request confidentiality. Jones disputed whether Karissa still wanted Abrams's records

kept from him, testifying that based on his conversations with his daughter, his opinion was that she wanted him to have the records. The Court concludes that Jones's testimony is no evidence that disclosure would not harm Karissa because an eleven-year-old is not qualified to say what would be harmful to her health. But if that is true, as I agree it is, then Abrams's testimony that Karissa continued to request confidentiality must likewise be disregarded. Karissa is no more qualified to say that disclosure of her records to her father would harm her health than that it would not. If Abrams's opinion cannot be based on Karissa's wishes, then it has no basis at all. Asked why he believed that disclosure would harm Karissa's health, Abrams answered, "I've had no communications from her to be otherwise."

Surely the Court does not think that a need for confidentiality at one point in time precludes disclosure of information forever. Nothing in the evidence before us suggests that Abrams would ever see Karissa again. Her twelfth birthday was three days after the hearing, and her anxieties about any choices she would have to make at that point were soon to be resolved one way or the other. No reason that Abrams gave for denying Jones access to his daughter's records remained valid. Had the trial judge found from this evidence that there might yet be some lingering need for nondisclosure, I could understand this Court's deference to that finding. But I do not understand how this Court can conclude that *no reasonable trial judge* could find from this evidence that Karissa's health would not be harmed by allowing her father access to her records.

It is no answer to say, as the Court seems to, that section 611.0045 allows a parent to take a child to other professionals until one is found who will release the records. True, Jones could simply have taken his daughter to one professional or another until he found one willing to turn over her records, and the statute gives Abrams no way to object. But the statute is not a full-employment

guarantee for mental health care professionals, and no parent should be forced to shop a child as a patient merely to obtain the child's records. More importantly, I see no justification for applying section 611.0045 to permit one professional to trump another, regardless of their relative qualifications, and yet let any professional trump a district judge.

The Court's determination to restrict parental access to mental health records despite and not because of the statute is further demonstrated by its conclusion that section 611.0045 authorizes nondisclosure not only when the child's health may be harmed but when a parent is not "acting on the patient's behalf" as provided in subsection (f) of the statute. These words cannot, in my view, be sensibly read to create a separate standard for access to records. One might think that a parent could easily meet such a standard by stating that his or her request for a child's records was motivated out of love and concern for the child, but the Court concludes that evidence that parents are hostile to one another is enough by itself to support an inference that they are selfishly motivated and therefore not acting on their child"s behalf. The evidence the Court points to in this case is especially problematic. Abrams told Jones — Jones did not merely have his suspicions — that he believed he had been hired by Karissa's mother to counsel Karissa in order to give the mother "a leg up" in her ongoing disputes with Jones over custody of Karissa and her sister. The Court is troubled by Jones's frank admission in the October hearing that Abrams's statement to him was part of his motivation for obtaining Karissa's records, even though it could not have been important to Jones when he first went to meet with Abrams the preceding February — which was before Abrams had expressed the view that he himself was being used by Karissa's mother. It is difficult to imagine any reasonable, candid parent who would not acknowledge a similar motivation under the circumstances; indeed, one might have been less inclined to believe Jones if he had denied any such motivation.

To rest denial of access to a child's medical records merely on inferences drawn from disputes between the parents conflicts with their rights under section 153.073(a)(2) of the Texas Family Code.

By construing section 611.0045 as establishing an acting-on-behalf-of standard for gaining access to a child's mental health records, the Court requires inquiry into, and inevitable disputes over, a parent's subjective motivations, instead of focusing on the more objective harm-to-the-patient's-health standard. I do not read section 611.0045 to require such an inquiry, which will almost always exacerbate difficulties between divorced parents.

While Abrams appears to have been professional in his dealings with the parties, and the district court did not suggest the contrary, the court was not bound by Abrams's views. Today's decision, coming as it does four years after the events at issue, cannot be of much importance to these parties. Karissa will soon be sixteen. Its importance lies in the difficulties it will cause future parties and in its further deterioration of parents' rights to raise their children.

Nathan L. Hecht
Justice

Opinion delivered: July 6, 2000