**ORAL ARGUMENT — 10/12/99**
**99-0184**
**ABRAMS v. JONES**

LAWYER: Under the *Albertson* case, this court is required and does think about the effect of construction of a statute, not only the effect that that statute is going to have on the litigants, but it also the effect that the statutory construction is going to have for the State of Texas and its citizens.

I want to talk today about the construction of §611.004(5)(f), a copy of which is in front of everyone. As the CA has construed this statute, we have changed it from a statute designed to protect the rights of mental health patients, all mental health patients, to an automatic turnover statute. Because if the construction of the CA is upheld by this court, the only thing that any person would have to do, any parent particularly, is just walk in to the psychiatrist, a mental health professional's office and say, I want the records.

OWEN: Assuming - it's your position that it shouldn't matter under the statute whether a parent is a divorced parent or not. Let's talk about a parent who is married to the child's other parent, as we are not talking about a divorced parent here. Assuming the parent asked the child psychologist for the records and the psychologist says, No. You say that the procedure under the statute is for the parent then to choose a second mental health professional and ask them to give in essence a second opinion?

LAWYER: Yes. That's what the statute says. The statute says that you may...

OWEN: But what if that second mental health professional says, No, I don't think you should be entitled to your child's records. Is there any method of appeal or review of that in the statutory scheme?

LAWYER: Yes. Under the scheme as set out, you go and get another opinion and if you're not satisfied with that, you go to DC. And under DC you ask a judge to award you to look at those records.

OWEN: Where does the statute say that after you get the second opinion, you go into DC?

LAWYER: I'm sorry that I don't have the exact - it's in 611. But the significant thing about that statute is that if the person who is aggrieved chooses to do that, the burden of proof is not upon the person going to court. The burden of proof is upon the mental health professional who is trying to not give up the records. So I think the legislature has set up a relatively easy as these things go statutory scheme for a parent to be able to have redress.

HECHT: In fact, you say in your brief that if Mr. Jones had offered Dr. Abrams any

legitimate evidence that he was acting in his parental capacity and was concerned about Carisa's(?) care, protection or emotional health the parties probably would not be before this court.

LAWYER: I think that is correct.

HECHT: So all he has to say is, I'm very troubled about my daughter, and please show me these records so I can be able to handle it?

LAWYER: In all of these instances what we're talking about is the statutory intent. The intent is to give the mental health professional discretion. The legislature has chosen to do that and this is the same type of situation. If Dr. Abrams had felt that Mr. Jones was acting on behalf of Carisa, asking about Carisa's mental health, asking about her situation instead of trying to get records for a custody case, I'm sure we would not be here today.

HANKINSON: But then does he still have discretion even after hearing from the parent to deny access if the requirements of §611.0045b are met?

LAWYER: Yes, he does. And then we're back to the remedy we just talked about, you go and seek another opinion or you go into a DC and you seek injunctive relief and appropriate remedies.

HANKINSON: So your argument primarily hinges then on subsection (b) and the discretion that lies with the professional?

LAWYER: Absolutely.

HANKINSON: As opposed to hinging primarily "on the patient's behalf" language in (f)?

LAWYER: No. They are both independently important.

HANKINSON: What does "on the patient's behalf" mean in (f)?

LAWYER: In my opinion, there is no case law on it, it means that you must show some demonstrable interest in or reason for getting the records.

HANKINSON: And using accepted methods of statutory interpretation how would you ask us to attach that meaning to that language?

LAWYER: I would say that there has to be some demonstrable proof to the mental health professional that you are acting on behalf of the patient. And I think that's a discretionary...

HANKINSON: But couldn't "on the patient's behalf" though mean the same thing as

611.004(a)(4) in terms of a parent acting on behalf of the minor or in terms of someone asking on behalf of someone who is incompetent without attaching a qualitative aspect to it?

LAWYER: No, I don't agree with that.

HANKINSON: And my question is, what are we supposed to hang our hat on in agreeing with you as to your interpretation?

LAWYER: What you should hang your hat on is the legislative intent. The intent of this whole section of 611 was to protect the confidentiality of mental health records.

HANKINSON: Where do we find that legislative intent?

LAWYER: I have filed a brief, a post-submission brief, which is part of this record in which that legislative intent is put in there.

HANKINSON: And it goes specifically to the interpretation of that "on the patient's behalf" language?

LAWYER: No, it's a general legislative intent.

HANKINSON: But even if we don't agree with you as to that, does your client still prevail as a result of the discretionary language that is contained in (b)?

LAWYER: Yes.

O'NEILL: Aren't you equating "on the patient's behalf" within the patient's best interest?

LAWYER: I think it's similar. And I think that examples that we can use there have got to be situations where parents should not have records.

O'NEILL: But the legislature clearly knows how to articulate in the patient's best interest, and have done that throughout the family code. And they chose not to use that terminology and simply stated "on the patient's behalf." So isn't that an indication that they are not really in that language looking at what's in the best interest of the child and looking at subjective motivation as opposed to as Justice Hankinson _____ the language in §611?

LAWYER: I think that's correct. And I think it's correct to the extent that they - what they are doing here, the whole statutory scheme here is to give the people that the state of Texas has licensed and trained, that's mental health professionals, discretion as to when and when not to turn over a record. And I think that that is a determination that has to be made by the mental health professional. And if he determines that the person is not acting in the best interest, then I think he

can withhold the records.

ABBOTT: But if there was that discretion they would not have used the word "shall" in subpart (f).

LAWYER: Yes. And the difference between the two: 611.004(a) and this court has already held that it's a discretionary statute. What .004(5) says is you don't have discretion to turn over the record unless this situation exists. And in this case it's our position that there was no action on behalf of the patient.

HECHT: Why doesn't the family code give this decision to the DC?

LAWYER: There's a couple of different reasons that it will be bad public policy. One is the fact that we are creating two classes of people. A parent who happens to have been divorced or named as a conservator has a remedy under 157, whereas a parent who has not been divorced only has one remedy and that's under 611. We're creating two classes of people. Furthermore, we have submitted with our post-submission briefs to the appellate court, the legislative intent. The legislative intent of that statute was clearly to equalize the rights between parents: managing conservators had one set of rights; possessory conservators had another set of rights; and joint managing conservators had another set of rights. And if you read in the legislative intent the comment from Judge Bill Morris of Houston, he said: We are trying to equalize conservator's rights as to the things enumerated therein.

HECHT: Your argument is that under these statutes, the mental health provider has the absolute right to decide whether a parent should get the access to the records of not?

LAWYER: I also hesitate to use the words like "absolute right." I think under the statute that the mental health professional has not only the duty and the obligation but the responsibility to its patient, in this case the minor, to use his discretion to say whether or not those records are going to be harmful to the patient.

GONZALES: Inaudible.

LAWYER: Well we go to DC under 611, and we ask for injunctive relief and any other relief available. I think if the doctor is acting arbitrarily, then I think that the DC can not only issue injunctions, I'm sure they could issue attorney's fees, they could issue anything they want to. It's a pretty broad statute. It gives the DC power. We're giving the ultimate protections against arbitraring this to a DC.

O'NEILL: In fact there's an action for damages against the aggrieved party, the aggrieved party can sue for damages if in fact it's arbitrary?

LAWYER: That's correct. And I think that's not a situation that is going to happen very often. For the most part when parents incite mental health professionals to talk they want to cooperate. They want to be cooperative for the children.

GONZALES: What would be the minimum that a parent would have to show or say to the doctor (inaudible)?

LAWYER: There's a very important distinction here and it's important that the court understand this, because there's a difference between access to records and access to information. In this case, Dr. Abrams gave both parents information about this child. And that's exactly - it's kind of a situation when you have a horrible situation where a child has been sexually abused let's say, and the parents then come in and they talk to the psychiatrist and he says, I just don't think it's in that child's best interest that I release these records to you with all these details in them. But let's talk about what we can do to help this child. And in this case, this is what Dr. Abrams did. He gave the parents information. He just had promised this child in order to get his confidentiality relationship that he would not reveal this stuff to the parents, and he did it in good faith believing that the statute allowed him to do it.

OWEN: Is it your position we should be or that we are under the provision that allows a parent to go to DC?

LAWYER: Oh no, they could have gone to DC. This is an unusual situation because Judge Montgomery is a family DC judge in Harris county, and he chose to - there's an order entered where he said that he has jurisdiction under 157. When we went to court I made vigorous objection to being under 157. Mr. Jones never pled anything under 611 and I had a continuing objection to that. And it made a big difference because you see if I'm in court on 611, I have the burden of proof. But because the judge chose to think he could hear it under 157 or 611, they put the burden of proof on Mr. Jones' lawyer.

OWEN: You said, or 611. The DC was proceeding under both?

LAWYER: The judge - if you read the transcript on the first page he said, Well I have the power to proceed under 157 or 611. And I said, Judge there's no pleadings and I object to it. And he said, Well I will give you a continuing objection and then we went on with the hearing.

OWEN: But did you offer any proof that would meet the requirements of 611.005?

LAWYER: I offered very specific proof in there. I put Dr. Abrams on the stand and he said, that there has been no interest articulated by Mr. Jones. And Mr. Jones was on the stand and he never articulated any reason for the records other than the fact that he was the father and he wanted the records.

O'NEILL: Isn't that then shifting the burden that he didn't put on any evidence? Doesn't the statute require you to put on evidence?

LAWYER: If you're having a hearing under that statute and the judge is aware of it, yes, it does. And, I, in the abundance for caution met my burden of proof by putting Dr. Abrams on and having him explain why it was not in the child's best interest to reveal the records.

ENOCH: Let's forget about the parent/child relationship and let's just talk about a person who has been appointed as a guardian for competence of the patient. And the doctor can choose not to release the information to the patient because it might be harmful to the patient's physical, mental and emotional health.

LAWYER: Right. Which is what the statute says.

ENOCH: But the court has appointed a guardian whose sole job is to protect the guardian of the person, to protect that person. And under subsection (f) says, The content of confidential records shall be made available to a person listed, which is a guardian. Is it your statement that the "who is acting on a patient's behalf" is an additional threshold that the guardian has to do before the guardian gets access to that patient information?

LAWYER: I think anyone listed in that statute has that additional burden. But I think it's rather academic on that case.

ENOCH: But the court has already determined that this is the person whose care, custody and control is to be placed in their possession. There's already a court determination. I'm saying (f) says in addition to that, the guardian has to go back to the court and get another decision on whether or not the guardian should have access to the patient's records.

LAWYER: And the reason for that is if you go along with the CA, then you have to buy-in to the proposition that a parent always act in the best interest of their child.

GONZALES: But the statute doesn't say that.

LAWYER: I understand that. But I'm saying that's what the assumption of the appellate court is, that's what the argument of respondent is, and we know there are situations where that doesn't exist.

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RESPONDENT

O'NEILL: Mr. Brown, can we presume for purposes of this case that the information that's in dispute is or will be detrimental to the minor's emotional well being?

BROWN: No, you cannot.

O'NEILL: Well why can't we, because there's a second opinion option, there's an option to go to the court. It doesn't really matter to your argument that it could be detrimental to the child's emotional well begin. You're relying on a strict construction of the statute that presumes even if it is detrimental it's nevertheless producible?

BROWN: We know that it's not detrimental because a district judge in the State of Texas after reviewing the documents in camera found that they should be released to Mr. Jones.

O'NEILL: But again presuming, let's presume that the information is detrimental for purposes of argument, that would not matter for your argument because under your argument it's a strict turnover statute?

BROWN: No. I believe that if there is language that is truly detrimental, then under 611 a mental health care professional may go to a DC in the State of Texas and say, Judge this is why you ought not let anybody, a parent, anybody else see these records.

O'NEILL: And is that what happened here?

BROWN: Yes. Because when we asked the records be brought down, when we filed our motion to obtain the records, Dr. Abrams brought the records to the court, Judge Montgomery took them, made an in camera inspection, and then ordered that the records be turned over to Mr. Jones after that inspection had been made.

O'NEILL: So you would disagree then with the CA's strict statutory construction analysis that it's an automatic turnover statute?

BROWN: Yes.

GONZALES: Does a parent always act in the child's __________________(inaudible)?

BROWN: Unless there is a written finding under Texas Family Code §153.072, that limits the parental rights. I think there is a presumption that a parent is acting in his child's interest.

GONZALES: (inaudible)

BROWN: I could conceive of ways where the parent would not be acting in the child's best interest.

GONZALES: Why shouldn't we resolve that question ___________?

LAWYER: I think it's worthwhile to resolve that question. I think this case resolves that. Because here there was an in camera inspection by a Texas district judge.

HANKINSON: This is a slightly different argument than you made to the CA and that you've made in your briefs in this court?

LAWYER: That's correct.

HANKINSON: You've changed your position now and are not in disagreement with your opponent about interpreting the statute, and you're just saying on this record your client is entitled to the records?

LAWYER: No. The reason there's a slightly different approach is, I didn't have these questions asked at the lower appellate court.

HANKINSON: So we understand your position, do you now agree with your opponent about interpreting the statute, that there are circumstances in which a parent could be asking for records and it would not be on the patient's behalf?

LAWYER: I've always agreed with that proposition.

HANKINSON: And that in fact the provision in (b) that gives discretion to the mental health professional in fact is determinative of whether or not the records are turned over?

LAWYER: Yes.

HANKINSON: Your position then in this case is that what happened was you had a proceeding in the TC and in fact the TC determined that it was not detrimental and therefore the records should be turned over. Is that where you are today?

LAWYER: That's one of the places I am today.

HANKINSON: Well where else are you?

LAWYER: It is my belief that the parents in the State of Texas have a duty to raise their children. When we go to the parent/teacher conferences we don't see members of the State of Texas there to check how our children are doing. We are looked to by the State to raise our minors to their majority. To do that, parents and guardians need to have access to information for their children. Now if it please the court, the Texas Family Code, the Probate Code when it defines minors puts undivorced parents in de facto control of their children. It is only when there is a divorce action that it's necessary to look to 153.073 of the Texas Family Code that says both divorced parents have equal rights to information.

HANKINSON: But I don't think your opponent is arguing in any way, shape or form that the Texas Family Code does not give the parents equal right. What he's arguing is that that doesn't have anything to do with the question before us, which is interpreting how to handle the confidentiality of mental health records under ch. 611.

LAWYER: The reason it has something to do with this court is because Mr. Jones and Ms. _______ are divorced, and that's the only reason.

OWEN: Well do they have greater rights than parents who are not divorced?

LAWYER: Absolutely not. They have the same equal rights.

HANKINSON: Then why does the Family Code have anything to do with what we're being asked to decide today?

LAWYER: Because as part of the proof to show Dr. Abrams that Mr. Jones was entitled to the records as heretofore he may not have been prior to the passage of 153.073.

O'NEILL: He would not have been as a nondivorced parent?

LAWYER: No. Prior to the enactment, a divorced parent that did not have those rights, powers and privileges awarded to that parent in the decree would not have had the right of access to the records.

O'NEILL: I thought you just said that despite the Family Code statute that parents whether divorced or not divorced have that right?

LAWYER: I'm saying that prior to the time a parent is divorced, they have equal rights of access to their children: school records; hospital records; doctor's records. Prior to the passage of 153.073 there was a question as to whether a nonprimary parent (possessory/conservator) would have the same rights as the sole managing conservator to information about the children.

O'NEILL: Aren't we talking about burden of proof here? I'm a little bit confused as to whether you're saying you've complied with 611 or you've complied with the Family Code. My understanding is under the Family Code it's your position that they have to get a finding from the family Code that it's not in the best interest of the child under the Family Code?

LAWYER: Before a parent is not entitled to the same access to information about a child that the other parent has.

OWEN: Let's hone in on what parents are entitled to. Parent's who are not divorced. Assuming as I think we all do the Family Code puts a father who's divorced in the same shoes as the

father who is not. A parent who comes into court and says, I want my records, I am acting on behalf of my child, what proof do they have to make to satisfy the "on behalf of" requirement of 611?

LAWYER: That under 611.004(4), that they are a parent of a minor patient. Once we show that under 611.004(4), if they show that they are the parent of a minor or the guardian of an incompetent, or the personal representative of a deceased person that the mental health care professional may disclose confidential information to them. Now if you go to the next page to 611.004(5) and read the points in the mental health care person's relationship with the patient when he may or may not be able to give access to the records, when you drop down to (f) it says, the content of a confidential record shall be made available to a person listed by 611.004(a)(4) or (5) who's acting on the patient's behalf.

Now by definition of 611.004(4), a parent is acting on behalf of a minor...

OWEN: I thought you conceded earlier in your argument that parents don't always act on behalf of a child just because they are the parent?

LAWYER: No. If you've got that from my argument, I have confused what I am saying. I can conceive situations where a parent may not act in his child's best interest.

HANKINSON: What if we put aside the best interest idea, and you have a parent who has been abusing their child. The child is in therapy and the professional has won the confidence of the child and the child is receiving help dealing with this circumstance. A parent comes in and wants those records for purposes of his or her own interest because they have been abusing the child. Now we're not talking about "in the best interest." We are talking about "on the patient's behalf." Is that abusing parent seeking those records on the patient's behalf if what they want them for is for purposes of defending themselves or dealing with what they are concerned is going to happen to themselves?

LAWYER: Possibly. But that's going to be handled by a DC.

HANKINSON: Before the DC can handle this, this statute has to be interpreted. And so what we are trying to get to the bottom of is is what your position is on what's "on the patient's behalf" means. In those circumstances is that parent acting on the patient's behalf when he or she seek records?

LAWYER: Yes.

GONZALES: How?

LAWYER: Because he or she is a parent of the child as defined by 611.004(4) "as a person who can act on the behalf of the patient" just like a guardian of an incompetent or the

personal representative of a deceased person would act on their behalf in dealing with the mental health care professional.

GONZALES: What would be the public policy argument?

LAWYER: In support of my position?

GONZALES: All you have to do is show __________(inaudible).

LAWYER: That because parents have such a high status...

GONZALES: (inaudible).

LAWYER: They can go and hire other mental health care experts. They can pay $200 per hour to some other psychiatrist to go down and have a conference. So now people have paid $200, 300, 400 - 600 or $1000 to determine whether the parents have a right to see their children's records, which 611, not the Family Code statute gives them a right to.

OWEN: You said at some point a DC can get involved. Let's suppose the parent comes in and all the parent shows is I am the parent, I want my minor's records. The doctor puts on a record and says I think this would be detrimental to the child and puts in evidence of why in that professional's opinion it would harm the child. What do we do with that record? What is the DC permitted to do based on that record?

LAWYER: The DC at that point in time will make an inquiry into what's in the confidential records, will take a look at them, will have an in camera viewing of them and then will make a decision just like Judge Montgomery did in this case as to whether or not it is indeed somehow contrary to the child's best interest to release the records to the parent who has requested them.

O'NEILL: Is there a finding to that effect in the record?

LAWYER: There are no findings of facts because they weren't recorded because they weren't requested.

OWEN: What evidence other than the record themselves is there that the release of these records will not be detrimental to the child?

LAWYER: The uncontroverted testimony in the record that the child did not mind the release of the records to her father, Mr. Jones, whom I represent.

OWEN: Does the child know what's in the records?

LAWYER: One would presume so, because she was there in conference with the psychologist when the records were being made. And the psychologist testified that it was because if she knew what was in the records, that she according to him did not want them released. But there's uncontroverted testimony in the record that the child did not object to the records being released to Mr. Jones.

ABBOTT: Other than the fact that it's been established that Mr. Jones is the father of the patient, what other evidence at all is there that Mr. Jones was acting on the patient's behalf?

LAWYER: By showing that under a valid decree of divorce in the State of Texas, that he had the rights guaranteed to a parent under 153.073 of the Texas Family Code, the right to the mental health care records at all times of his child, which was presented to Dr. Abrams and to the court.

O'NEILL: There seems to be a bit of disconnect here. I thought that the TC ruled on a strict construction of the statute basis under 611.004(5)(f) "shall be made available." And that the CA decided the case on that basis, and that your position before this court was that that was correct. Now am I hearing the TC took testimony, heard evidence, looked at the evidence in camera and made a determination that in fact he reviewed the doctor's records and determined that it would not be detrimental to the child to turn them over?

LAWYER: Of course, we don't know because there were no finding of facts or request for conclusions of law filed. But we do know that we had an evidentiary hearing, that the court took the records and made an in camera review of them, and then issued its order sometime after that.

GONZALES: (inaudible)

LAWYER: Because Dr. Abrams did not turn the records over.

GONZALES: (inaudible)

LAWYER: I think it is unless someone comes forward with a pleading to show some reason why under this statute the record should not be turned over.

ENOCH: You said something that I had not heard before. Is it your position that if I come to a professional and say, I'm the parent and that's a true fact, the professional can turn over all these records and there's nothing, no further ramifications to the professional for having done so?

LAWYER: That's correct.

ENOCH: If I come to you and I say, I'm a parent and that's a true fact, and you're the professional and you say, I'm not going to turn over those record to you, then it's your position that we then jump down to the second part and the professional is protected up to the point that a court

then determines that there is no valid basis for the professional to withhold it. But the professional could withhold that. This whole issue doesn't come up to any significance unless a professional makes an initial decision to withhold, and then the parent can't do anything but go to court and flush out this other part?

LAWYER: If we're talking about the parent of a minor and the records are of a minor, yes, I'm saying that when the parent goes and demonstrates that he is a parent of that minor or a guardian of the incompetent or the personal representative and goes to the professional and makes a demand for the records, at that point in time the records should be given to him. If in 611.004(5) there is a decision by the professional that for some reason the record should not be turned over, then the balance of that statute comes into play and a DC determines if there are good reasons why they should not be turned over. However, it is my belief under 611.004(5) that the legislatures use of the word "shall" in (f) compels the turnover to the parent, the guardian or the personal representative unless a DC upon review of that finds some reason not to.

I guess what I want this court to see, there's a built-in safeguard for children's privacy. If there is some reason as Justice Hankinson was talking about, that a parent should not see the records because they are trying to get the records to protect themselves from criminal prosecution, some type of liability, sure, the parent should not have those records. He will get them anyway because when the case is filed against the parent over at the criminal courthouse, then the discovery comes in and he will see those records. But there is protection in place. That protection was utilized here and after a review by the court was ordered that the records be turned over.

O'NEILL: I'm not sure I understand the disagreement between you and opposing counsel then. From what I understand, you both read the statute the same way.

LAWYER: I think we read the statute the same way. We come to a different conclusion about how it should be applied. I suggest to the court that under (f) that when the legislature says "shall be made available" that it means simply that. I also suggest that under this statute that a professional has the ability to go to a DC and attempt to for some reason not turn those records over.

HECHT: He says it comes down to the burden of proof. He didn't have to say a word. All he had to do was sit there and you had the burden and you say he has some burden to make a showing why he shouldn't have to give them?

LAWYER: That's correct.

HECHT: And in any event both of you claim to have put on evidence and the TC looked at the records?

LAWYER: That's correct.

O'NEILL: But this is an evidentiary review and not a statutory interpretation.

LAWYER: That's correct.

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REBUTTAL

LAWYER: In answer to your question Justice O'Neill, we have preserved the evidentiary point from day one, because the only evidence in this record is the evidence from Dr. Abrams that it was not in the child's best interest and he explained why.

O'NEILL: I think I heard your opposing counsel say it was okay with the daughter and there was evidence to that effect?

LAWYER: I think you need to look at the record. I think we objected to that on the basis of hearsay and I think it was sustained. Mr. Jones did make that statement but I believe it was objected to and I believe the objection was sustained because it was hearsay.

PHILLIPS: But doesn't the trial judge have some power by making an in camera inspection of the records to make this determination?

LAWYER: There's no question about that. But this trial court did not try this case under 611. That's the problem.

PHILLIPS: But the trial court said that the TC had the power to decide it under...

LAWYER: He did, but he decided under 157 because he was a family district court judge and he decided under 157. That's part of the problem we have here because the burden of proof was reversed. I put my case on in an abundance of caution and I welcome y'all to read the transcript. It's a very short transcript and look at the evidence.

BAKER: If he tried the case under the family code, but you objected to it and said it really ought to be 611, and now we get to this court and all we're talking about is 611, which the TC rejected, is that what your real point is, he should have done 611 and when you do that here we are?

LAWYER: I don't think there's any question it should be tried under 611. That's our whole case.

BAKER: Why is it that the family code 153.073 doesn't apply?

LAWYER: Because first of all it creates - if you read the legislative intent, the legislative intent was to put all conservators on the same level. That's why the statute was passed. What the

respondent is saying is because it's...

LAWYER: There's this discussion: Well when you are in a conservator position you are not a "ordinary parent". So now we have to do something to equalize and balance conservator's rights, which sounds like a simple plan. So all this is saying is that if you are a conservator each one has the same rights. So what difference is there now statutorily between ordinary parents and conservator parents?

LAWYER: Only that one has come under the jurisdiction of the family code by virtue of some domestic appeal.

BAKER: But they are still parents. And the scheme was to resolve disputes between divorced parents on who gets what, why and when wasn't it?

LAWYER: Correct.

BAKER: And this basically says, Well you get the same thing you had as if you were still married. And then the family code says, if you are one of these parents you get access to the records, period. Why doesn't that control over this what seems to be a...

LAWYER: Because I don't think the family code can conflict with the obvious intent of the legislature to protect these records. What that means is that they have equal access...

BAKER: What about a policy argument? There's obviously a policy reason to protect the confidentiality of professional records in areas like this.

LAWYER: Correct.

BAKER: But there's also an obvious public policy as articulated by opposing counsel that parents have the duty and obligation to raise their children and that they should have access to records that would assist in that. Why doesn't that public policy interact with what we have here and we make a decision...

LAWYER: Because the legislature has always treated mental health professionals and mental health in a wholly different way, because it's a special area. And that's why it's a weighing process. And the legislature has chosen to give mental health professionals discretion and that's what they do. There's a brand new statute that's just been passed. It's the abortion information statute. There's an obvious example where the legislature knew there's going to be a conflict between parent and children.

O'NEILL: Without getting into that let me ask you to follow through with Mr. Brown's argument. If I understand it correctly ________ this case was tried under 611, the professional came

forward with testimony that it would be detrimental to the child to release this information, the TC reviewed it in camera and came out and determined that that was not so. If that is in fact the case are we to then do a no evidence review?

LAWYER: Judge, that's been preserved by my brief because there is no evidence as far as there was anything on behalf of the child. But what I'm asking you to do and I think it's very, very important is to not put a period after the word five here or after the number 5, because that's what the respondent is doing and that's what the court is ______________________.

PHILLIPS: Let's assume you're right and you say under 157 the parent has the burden and under 611 the mental health professionals. Right, did I get that?

LAWYER: No, I am not saying that. Judge Hankinson was absolutely correct. The family code has nothing to do with this case.

PHILLIPS: Well I thought you said that the burdens of proof were different.

LAWYER: I did because of the way this was tried at the court level.

PHILLIPS: Who has the burden under 611?

LAWYER: The mental health professional has the burden.

PHILLIPS: If you had the burden in this case and error was that the TC thought it was under 157 where the other side have the burden, that would seem to ________ it down to your benefit wouldn't it?

LAWYER: I think that's probably correct. And understand that we brought this case up on appeal when nobody except myself had any idea that 611 existed.

OWEN: You keep arguing 611, but Dr. Abrams didn't file a written statement or give a written statement to the parent as required by 611. So what do we do about that?

LAWYER: I think Dr. Abrams should have done it. If you read the records it says that he informed them verbally about why he wasn't doing it. But I think he should have done it.

OWEN: What's the consequences though under the statute when the statute says a mental health professional shall provide a written statement?

LAWYER: Had Mr. Jones pled and proved a 611.005 case, perhaps the court would have chastised Dr. Abrams for not doing that. But the important thing is that they knew they weren't getting the records and they knew the reason that they weren't getting the records. And not that they

weren't getting information about their child. They were not getting the specific records. This court can think of multiple examples where it would be improper for a parent to have records. You also can think of multiple examples where it would be improper for a person to get the records if that is taken out of the statute.

ABBOTT: You just stated that it's your position that it is the doctor's burden of proof under 611.

LAWYER: That's what the statute says.

ABBOTT: Does that mean that it's the doctor's burden to prove that the father is not acting on the patient's behalf?

LAWYER: I think it's a mixed burden. I think what the doctor has to prove is why he's denying access to the records under 611.004(5)(b).

ABBOTT: What evidence is there in the record that the father was not acting on the patient's behalf?

LAWYER: There is no evidence in the record whatsoever about that issue.