IN THE SUPREME COURT
OF FLORIDA

DEWEY KEITH BEAGLE and
MELISSA DARLENE BEAGLE,

Petitioners,

vs.

CASE NO. 85,971

ROY THOMAS BEAGLE and
SHARON WHITMAN BEAGLE,

Respondents.

_____/

SAYGE SCHRECKENGOST and SCOTT SCHRECKENGOST and THE LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.'S BRIEF AS AMICUS CURIAE

AN APPEAL FROM THE FIRST DISTRICT COURT
COURT OF APPEAL, FLORIDA
CASE NO. 94-337

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PRELIMINARY STATEMENT

Dewey Keith Beagle and Melissa Darlene Beagle will be referred to hereafter as **PETITIONERS or PARENTS.**

Roy Thomas Beagle and Sharron Whitman Beagle will be referred to hereafter as **RESPONDENTS or GRANDPARENTS.**

Sayge Schreckengost and Scott Schreckengost and The Legal Aid Society of Palm Beach County, Inc. will be referred to hereafter as **AMICUS CURIAE.**

STATEMENT OF THE CASE AND FACTS

The Statement of the Facts and Case of the **PETITIONERS** is hereby adopted and incorporated by the **AMICUS CURIAE**.

SUMMARY OF THE ARGUMENT

Florida Statute Section 752.01(1)(e) is unconstitutional in that it abrogates the fundamental parental right to raise a child free from governmental intrusion, contrary to the right of privacy protected by both the United States Constitution and the Florida Constitution. The Florida Constitution contains a specific and enumerated right of privacy which is found in Article I, Section 23. Florida's right of privacy is stronger and broader in scope than similar guarantees found in the Federal Constitution, and at a minimum should be interpreted to encompass all privacy rights protected by the United States Constitution, prior to the 1980 enactment of Article I, Section 23.

The right to rear one's children has long been recognized under both federal and Florida law as falling within one's right of privacy, as such any law which interfers with this fundamental interest must satisfy a strict scrutiny standard or be stricken. In order to meet this standard, it is the state's burden to prove that the law in question serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. In order for the state to demonstrate a compelling state interest which allows interference with the parents' privacy right to raise their children as they see fit, there is a prerequesite that such state action is necessary to prevent harm to the child.

Florida Statute 752.01(1)(e) does not serve a compelling state interest in that it allows grandparents to request visitation against the wishes of the married natural parents without any showing of harm to the child being necessary. Further Fla. § 752.01(1)(e) also fails to meet the second prong of the strict scrutiny test in that the least intrusive means are not utilized to accomplish stated governmental goals.

The First District Court of Appeal in deciding the case at bar, placed heavy reliance on its earlier decision in Sketo v. Brown. This reliance was improper for the following reasons:

1. The First District Court of Appeal in Sketo v. Brown failed to do a proper constitutional analysis for governmental infringment upon the fundamental right of privacy;

2. The Sketo v. Brown decison failed to address the issue presented in the case at bar as Fla. §752.01(1)(e) was not yet in existence;

3. Due to its reliance on Sketo v. Brown the First District Court of Appeal failed to do any privacy analysis of Fla. § 752.01(1)(e); and

4. The First District Court of Appeal erroneously ruled that its decision in Beagle v. Beagle must be the same as its decision in Sketo v. Brown holding that there was no reason to treat parents in an intact family differently than parents in a non-intact family without providing any insight as to its Equal Protection analysis and the appropriate standard of review.

Florida statute 752.01(1)(e) is facially unconstitutional. This Honorable Court need not overrule Sketo v. Brown in order to reach this conclusion; however, the First District Court of Appeal was incorrect in its decision in Sketo v. Brown and compounded its mistake by using Sketo v. Brown as the basis for its decision in the case at bar.

ARGUMENT

Florida Statutes Chapter 752 was originally enacted in 1987 to establish a framework for the visitation rights of grandparents when a grandchild is no longer living with both parents or was born out of wedlock. Florida Statute Section 752.01 provided in relevant part:

> 1. The Court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child if:
>
> > a. One or both parents of the child are deceased;
> > b. The marriage of the parents of the child has been dissolved;
> > c. A parent of the child has deserted the child; or
> > d. The minor child was born out of wedlock and not later determined to be a child born out of wedlock as provided in Section 742.091.

Section 752.01 was amended in 1993 to expand the right of grandparental visitation to a grandchild living in an intact, family unit:

> 1 (e) The court shall, upon petition filed by grandparent(s) of a minor child, award reasonable rights of visitation to the grandparent with respect to the minor child if ... the minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.

This amendment amounts to an abrogation of the fundamental parental right to raise a child free from governmental intrusion and is contrary to the Constitutions of both Florida and the United States, as well as to long recognized judicial precedent.

As early as 1923, the United States Supreme Court held that, "... the individual has certain fundamental rights which must be respected." Meyer v. Nebraska, 262 U.S. 390, 401 (1923). The United State Supreme Court recognized that these fundamental rights were derived from the "liberty" interest guaranteed by the Fourteenth Amendment. "No State shall ... deprive any person of life, liberty, or property, without due process of law." Id. at 399. For the first time the Court defined the concept of "liberty" as:

> ... not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, ***establish a home and bring up children***, to worship God according to the dictates of his own conscience, and ***generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.***

Id. at 399. (emphasis added).

Based on substantive due process principles, which the federal courts now recognize as the privacy right, one of the first rights to be recognized as fundamental was "the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925). "The child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce, 268 U.S. at 535.

In 1972, the United States Supreme Court once again affirmed the importance and integrity of the family unit in both Stanley v. Illinois, 405 U.S. 645 (1972), and Wisconsin v. Yoder, 406 U.S. 205 (1972).

It is plain that the interest of a parent in the companionship,

> care, custody, and management of his or her own children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 U.S. 77,95, 69 S. Ct. 448,458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring).

Stanley, 405 U.S. at 651.

It is with this history in mind that Federal Courts now recognize a federal right to privacy applicable to all the states through the Fourteenth Amendment,

> ... [a]lthough '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the fourteenth amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' Cary v. Population Services International, 421 U.S. 678, 684 (1977) (quoting Roe, 410 U.S. at 152).

Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right To Raise Their "Bundle of Joy", 18 Fla. St. L. Rev. 533, 541 (1991).

In 1980, the citizens of Florida voted to amend the Florida Constitution to include a specific and enumerated right of privacy.

> Right of privacy - Every natural person has the right to be let 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.

Fla. Const., Art. I, § 23.

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or

> "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, ***it can only be concluded that the right is much broader in scope than that of the Federal Constitution.***

Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544,548 (Fla. 1985). (emphasis added).

> Although the guarantee of a right to privacy in the United States Constitution has been attacked by an increasingly conservative Supreme Court, Florida's state constitution seems to keep intact the persuasive authority of federal cases which have recognized a strong right of privacy.

Minerva, Bundle of Joy at 541. As such, the right of privacy found in the Florida Constitution, at a minimum, encompasses all privacy rights protected by the United States Constitution according to the case law in existence prior to 1980. (*See* Minerva, Bundle of Joy, at 541, and In re: T.W., 551 So. 2d 1186 (Fla. 1989)).

As discussed earlier, the United States Supreme Court has long recognized the right to raise one's children as a "liberty" interest. Meyer, 262 U.S. at 390, Pierce, 268 U.S. at 510, Stanley, 405 U.S. at 645, and Yoder, 406 U.S. at 205. As early as 1957, the Florida Supreme Court recognized, "that a parent has a natural Godgiven legal right to enjoy the custody, fellowship, and companionship of his offspring. Sparks v. Reeves, 97 So. 2d 18, 19 (Fla. 1957). In fact, the Florida Supreme court specifically acknowledged that,

> 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. In cases such as this one the

> only limitation on this rule of parental privilege is that as between the parent and the child the ultimate welfare of the child itself must be controlling.

Sparks, 97 So. 2d at 20. In In the Interest of D.B. & D.S., the Florida Supreme Court recognized that there was a constitutionally protected interest in preserving the family unit and raising one's children. In the Interest of D.B. & D.S., 385 So. 2d 83, 90 (Fla. 1980). In the case of In re: D.A. McW., Florida's Fourth District Court of Appeal acknowledged, "the fundamental interest of natural parents in the care, custody, and management of their children, and the strong public policy which exists in this state in favor of the natural family unit ...." In Re: D.A. McW., 429 So. 2d 699, 703 (Fla. 4th DCA 1983) (upheld in In re: Guardianship of D.A. McW, 460 So. 2d 368 (Fla. 1984); see also Sparks, 97 So. 2d at 18).

In Florida Board of Bar Examiners Re: Applicant, the Florida Supreme Court recognized that family relationships and child rearing come within the zone of privacy because they are "fundamental or implicit in the concept of ordered liberty." Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71, 76 (Fla. 1983). Further, the Florida Supreme Court observed in In Re: T.W., that a privacy right, "shields an individual's autonomy in deciding matters concerning marriage, procreation, contraception, family relationships, and child rearing and education." In Re: T.W., 551 So. 2d 1186, 1191 (Fla. 1989) (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973)).

Based upon the above cited authorities, it is clear that family relationships and child rearing fall within the right of privacy stringently protected by the Florida Constitution.

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test

> shifts the burden of proof to the state to justify an intrusion on privacy. ***The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.*** Winfield, 477 So. 2d at 547.

In Re: T.W., 551 So. 2d at 1192. (emphasis added).

In evaluating whether Florida Statute 752.01(1)(e) survives a strict scrutiny standard, we must first examine the existing case law to determine how the Florida and the Federal courts have defined a "compelling state interest." Both Florida and federal law require an initial showing of harm to a child before the state may intervene to determine the best interest of the child. Florida case and statutory law hold that a child's welfare must be threatened before the state may intervene in parental decision making.

In Chapter 39 of the Florida Statutes entitled "Dependency Proceedings," there is a prerequisite that prior to the state or any third party interfering with the parents' rights to control and custody of their children, there must be a showing of harm to the child in the form of abuse, abandonment or neglect by the parents. Fla. Stat. ch. 39 (1993). Furthermore, Chapter 63 of the Florida Statutes, entitled "Adoption," requires that absent parental consent, a third party must show that the natural parent has abandoned the child, which action by its very nature will cause harm to the child. Fla. Stat. ch. 63 (1993). Additionally, Florida Statutes, Chapter 751, entitled "Temporary Custody of Minor Children by Extended Family," states that, for a member of one's extended family to gain temporary custody of the subject minor children, absent parental consent, there must be a showing that the parent(s) is/are unfit. Fla. Stat. ch. 751 (1993). In order to show parental unfitness, the Court must find that the parent has abused, abandoned or

neglected the child by clear and convincing evidence. Id. Once again, requiring that there be some form of harm to the child prior to third party intervention into the parents' rights to have custody and control of their children. Moreover, in In the Interest of J.V. v. State of Florida, a case which dealt with parents' rights to deny a blood transfusion for their minor child, the Court held that state has an overriding interest in interfering in parental custody and control of a minor child for the purpose of ensuring the child is given medical treatment necessary for the protection of life. In the Interest of J.V. v. State of Florida, 516 So. 2d 1133, 1134 (Fla. 1st DCA 1987). As such, Florida law upholds the state's authority to interfere with parents' "liberty" interest of raising their children *only* when necessary to prevent serious harm to their children.

As far back as 1957, the Florida Supreme Court recognized that the only limitation on one's parental privilege is the ultimate welfare of the child. Sparks, 97 So. 2d at 18. In D.A. McW, Florida's Fourth District Court of Appeal held that when a custody dispute is between a natural parent and a third party, applying a best interest standard would be improper, and in fact, the natural parent should be denied custody only if, to grant custody to the natural parent would be detrimental to the welfare of the child. D.A. McW, 429 So. 2d at 703-04. Once again Florida Courts ruled that a prerequisite of "harm to the child" must be shown prior to the state or a third party interfering with parents' privacy interest in raising their children.

Federal cases also support parents' privacy interest in raising their children without state interference, subject to a finding of "harm to the child."

> In Yoder, for example, the United States Supreme Court deemed significant the fact that Amish children would not be

> harmed by receiving an Amish education rather than a public education. Yoder, 406 U.S. at 203. Likewise, in Pierce, the Court found that parents' decisions to send their children to private schools were "not inherently harmful", as there was "nothing in the ... records to indicate that [the private schools] have failed to discharge their obligations to patrons, students, or the state." Pierce, 268 U.S. at 534. In Meyer, a case in which a teacher had been convicted of teaching a child German, the Court found that "proficiency in a foreign language ... is not injurious to the health, moral or understanding of the ordinary child", and thus the state's desire "to foster a homogeneous people with American ideals" was insufficient justification for forbidding foreign language instruction. 262 U.S. at 420-3. In Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), the Court required an individualized finding of parental neglect before stripping an unwed father of his parental rights. ... ***Federal cases, therefore, clearly require that some harm threaten a child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child.***

Hawk v. Hawk, 855 S.W. 2d 573, 580 (Tenn. 1993). (emphasis added).

Florida Statute Section 752.01(1)(e) does not meet the high standards demanded by the Strict Scrutiny Test which is set forth in both Winfield and In re: T.W.. Article I, Section 23 of the Florida Constitution protects the privacy interests of parents in their child rearing decisions so long as those decisions do not endanger the welfare of their children. Absent harm to the child, the state lacks a compelling justification for interfering with the parents' fundamental right of privacy. Florida Statute Section 752.01(1)(e) allows grandparents, who are third parties, to petition for visitation with their grandchildren who are "living with both natural parents who are still married to each other..." with no requirement that there be any harm to the minor child. As such, the state of Florida lacks a compelling interest for interfering with the parents' fundamental right of privacy, obviating the necessity for further analysis regarding the intrusiveness of this state action.

Thus, the second prong of the Strict Scrutiny Test set forth in Winfield and In re: T.W., is never reached.

Assuming *arguendo*, that this state action were to meet the first prong of the Strict Scrutiny Test, Florida Statute Section 752.01(1)(e) fails once again on the second prong of this test in that the statue does not establish the least intrusive means of protecting the welfare of the child through the grandparent-grandchild relationship. To accomplish the state's compelling interest in protecting the welfare of children *via* the least intrusive means possible, there must be a preliminary showing of the harm to the child which would result were the child deprived of the opportunity to have a relationship with the child's grandparents.

Further, even ignoring the state and federal law which requires a showing of harm to the child prior to state usurpation of parental privacy interests, Fla. Stat. § 752.01(1)(e) still does not accomplish its compelling state interest in protecting the welfare of children in the *least* intrusive manner. While Fla. Stat. § 752.015 (1993) states,

> it shall be the public policy of this state that families resolve differences over grandparent visitation within the family. It shall be the further public policy of this state that when families are unable to resolve differences relating to grandparent visitation that the family participate in any formal or informal mediation services which may be available,

there is no requirement within the statute that those policies be followed by any means prior to initiating litigation. Grandparent visitation through court intervention is the most intrusive and invasive way for the state to promote the welfare of children through grandparent visitation. If the state wished to promote its compelling interest in protecting the welfare of children through grandparent visitation, it could have done so by less

intrusive means. For example, the statute could have required a ninety day cooling-off period prior to allowing the grandparents to initiate hostile litigation. Further, the statute could have required that the parties mediate prior to the initiation of litigation. However, Fla. Stat. § 752.01(1)(e) does none of the above. Unlike other states, (*See* Mo. Stat. § 452.402 which provides for a 90 day cooling off period prior to initiating litigation, Herndon v. Tuhey, 857 S.W. 2d 203 (Mo. 1993),(en banc)), Fla. ch. 752 does not provide for a cooling off period. Further, although the statute does require mediation, it does not mandate that the mediation take place prior to the initiation of litigation. Therefore, Fla. Stat. § 752.01(1)(e) does not accomplish its purported goals through the least intrusive means possible.

In 1993, the Supreme Court of Tennessee struck down a statute virtually identical to Fla. Stat. § 752.01(1)(e). Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993). Tennessee Code Annotated §36-6-301 (1985) allowed a court to order "reasonable visitation" with grandparents if it is "in the best interests of the minor child." Hawk, 855 S.W. 2d at 576. Under this statute, grandparents could seek visitation over the objections of both parents in an intact family unit.

Much like the federal constitution, the Tennessee Constitution has no explicit right of privacy. "No man shall be . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. Art. I, § 8; Hawk, 855 S.W. 2d at 579. In Hawk, the Tennessee Supreme Court recognized that although the right to privacy is not specifically mentioned in the Federal or the Tennessee State Constitutions, "there can be little doubt about its grounding in the concept of liberty

reflected in those two documents." Hawk, 855 S.W. 2d at 579.

Analyzing the statute in light of the right to privacy found in the Tennessee Constitution, the court found, " that when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." Hawk, 855 S.W. 2d at 577. In order to reach this conclusion, the Tennessee Supreme Court did a complete analysis of both Tennessee and Federal law. In both instances, it found that harm to the child was a prerequisite to a state's ability to interfere with parents' rights to rear their children.

> Implicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened before the state may intervene in parental decision-making....The federal cases that support the constitutional right to rear one's child and the right to family privacy also indicate that the state's power to interfere in the parent-child relationship is subject to a finding of harm to the child.

Hawk, 855 S.W. 2d at 580.

It is important for this court to note that while the Tennessee Constitution only has an implied right of privacy, similar to the right of privacy found in the Federal Constitution, Florida has a specific and enumerated right of privacy. It would certainly be reasonable to expect that, at a minimum, the enumerated right of privacy found in the Florida Constitution would afford the same protection to its citizens as the implied right of privacy found in the Tennessee Constitution.

In Brooks v. Parkerson, the Supreme Court of Georgia held that Georgia's "Grandparent Visitation Statute," O.C.G.A. § 19-7-3 was "unconstitutional under both the

State and Federal Constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized." Brooks v. Parkerson, 454 S.E.2d 769, 774 (Ga. 1995). The Georgia grandparent visitation statute, very much like the grandparent visitation statutes found in Florida and Tennessee, allows any grandparent reasonable rights of visitation upon a showing of that such visitation is in the 'best interests' of the child. (*See* O.C.G.A. § 19-7-3(c)) Similar to the right of privacy found in the Federal Constitution and the Tennessee Constitution, the Georgia Constitution has no explicit right to privacy, rather the right of privacy in the Georgia Constitution is found within the meaning of the word 'liberty' found in the due process clause. Once again, it should be noted that the right of privacy found in the Florida Constitution is specific and enumerated, *Fla. Const.*, Art.I, § 23. Thus, Florida's specifically enumerated right to privacy mandates even greater protection against government interference to its citizens.

For similar results in other states, see: Olds v. Olds, 356 N.W.2d 571, 574 (Iowa 1984); Van Cleve v. Hemminger, 415 N.W.2d 571 (Wis.App. 1987); Theodore R. v. Loretta J., 476 NYS.2d 720 (Sup. 1984); Thompson v. Vanaman, 515 A.2d 1254 (N.J.Super.A.D. 1986); Towne v. Cole, 478 N.E.2d 895 (Ill. App. 2 Dist.1985); In re Meek, 443 N.E.2d 890 (Ind.App. 1983); McCarty v. McCarty, 559 So.2d 517 (La.App.2 Cir. 1990); B.R.O. v. G.C.O., 646 So.2d 126 (Ala. Civ. App. 1994); Steward v. Steward , Case No. 24563 (Nev. 1995).

The Supreme Court of Missouri and the Supreme Court of Kentucky have issued rulings which uphold a grandparent's right to have visitation with the grandchildren of an

intact marriage. Neither of these decisions is consistent with the Florida Constitution, and each shall be addressed separately.

In Herndon v. Tuhey, 857 S.W. 2d 203 (Mo.1993)(en banc), the court's constitutional analysis was based on the right of privacy found in the Federal Constitution. Missouri does not appear to have a right of privacy in its state constitution. Citing Justice O'Connor in several post-1980 United States Supreme Court abortion cases, the court concluded that even where privacy interests are concerned, "the requirement that state interference 'infringe substantially' or 'heavily burden' a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context." Herndon, 857 S.W. 2d at 208. The court concluded that the Missouri statute did not substantially infringe on the parents' federal right of privacy and as such decided the case without applying a strict scrutiny analysis.

It is important to note that while recent Federal decisions may require a "substantial infringement" test be used prior to applying a strict scrutiny analysis to cases involving the right of privacy, Florida has no such requirement. The state of Florida does not utilize this lower standard of analysis. The law in the State of Florida is clear, in order for the State to infringe upon an individual's right of privacy, it must demonstrate that the challenged regulation "serves a compelling state interest and accomplishes its goal through the least intrusive means." Winfield, 477 So. 2d at 547.

Further, since Florida voters amended their state constitution in 1980 to provide for a specific and enumerated right of privacy, it is doubtful that the right of privacy found in the Florida Constitution was intended to be restricted by any Federal case law which

was not in existence at the time of its enactment. (*See* Minerva, Bundle of Joy and In re: T.W., 551 So.2d 1186 (Fla. 1989).

Finally, the Missouri Supreme Court cited the Tennessee Supreme Court decision of Hawk v. Hawk, in Herndon, 857 S.W. 2d at 203. The Missouri Supreme Court recognized that where a state constitution provides for a right of privacy, the standard to be applied to cases dealing with privacy issues may be different than the standards under the Federal Constitution.

> Therefore, under Tennessee's law the state may not interfere in any parental decision that may adversely affect a child unless the parent's action 'substantially endanger[s] the welfare of their children.' (citing Hawk 855 S.W. 2d at 582) ... We do not believe that this same standard applies under the federal constitution unless there is a substantial infringement by the state on a family relationship.

Herndon, 857 S.W. 2d at 210.

The Supreme Court of Kentucky also upheld a statute which allows grandparents visitation with their grandchildren of an intact marriage. King v. King, 828 S.W.2d 630 (Ky. 1992). The weakness in the Kentucky Supreme Court's decision can be best summarized by one of the dissenters, Justice Lambert:

> The opinion of the majority makes little pretense of constitutional analysis but depends entirely on the sentimental notion of an inherent value in visitation between grandparent and grandchild regardless of the wishes of the parents. The fatal flaw in the majority opinion is its conclusion that a grandparent has a 'fundamental right' to visitation with a grandchild. No authority is cited for this proposition as there is no such right.

King 828 S.W. 2d at 633.

In 1990, the Florida First District Court of Appeal in the case of Sketo v. Brown, 559

So.2d 381 (Fla. 1st DCA 1990) found that Fla. Stat. 752.01, passed in 1987, was not facially unconstitutional. It is important to note, however, that:

1. At the time Sketo v. Brown was decided, in 1990, Fla. Stat. 752.01(1)(e) was not in existence. The court did not address a situation where grandparents were seeking visitation in an intact marriage.

2. The court found that, "the state has a sufficiently compelling interest in the welfare of children that it can provide for the continuation of relations between children and their grandparents under reasonable terms and conditions so long as that is in the children's interest." Sketo, 559 So. 2d at 382. The court in Sketo failed to address the requisite "harm to the child" necessary to find a compelling state interest. (See Hawk, 855 S.W. 2d at 573). It is questionable whether the court did a proper analysis in determining that Fla. Stat. 752.01 (1987) met the compelling state interest standard required in the first prong of strict scrutiny analysis.

3. The court failed to apply the second prong of strict scrutiny analysis, "that the regulation accomplishes its goal through the use of the least intrusive means." Winfield, 477 So. 2d at 547.

Based on the points outlined above, the constitutional analysis in Sketo is suspect.

More importantly, the decision in Sketo never addresses the privacy concerns present in the case at bar.

In the case currently under review, Beagle v. Beagle, 654 So.2d 1260 (Fla. 1st DCA 1995), the First District Court of Appeal ruled that Fla. § 752.01(1)(e) was constitutional on its face and was not violative of the right to privacy found in Article I, section 23, of the Florida Constitution. In so holding, the First District Court of Appeal failed to use the proper constitutional analysis requiring a strict scrutiny standard to determine the validity of Fla. § 752.01(1)(e). Instead, the appellate court chose to reaffirm its decision in Sketo v. Brown, 559 So.2d 381 (Fla. 1st DCA 1990), rather than conducting an independent constitutional analysis of Fla. § 752.01(1)(e).

In Judge Webster's special concurrence in Beagle, he "believe[s] that *Sketo* was incorrectly decided. I would recede from that opinion and hold that the statute at issue here violates both article I, section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution." Beagle, at 1263. In reaching this conclusion Judge Webster states:

> Frankly, I fail to perceive what interest it is that is sufficiently compelling to justify the state's intrusion into one of the most delicate areas of parental decision-making -- with whom their child shall form and maintain relationships -- whenever a judge determines that it would be "in the best interest of the minor child" to do so. It seems to me that the statute in question sends the clear message that the state knows better with whom a child should associate than do the child's parents to raise their child as they see fit, absent a concrete threat of harm to the child's physical, emotional or mental well-being, is antithetical to the principles upon which our society was founded.

Beagle at 1265. Further, the First District Court of Appeal attempts to distinguish Beagle

from Hawk, 855 S.W.2d 573, by inferring that the best interest standards found in the Florida and Tennessee statutes are somehow different because the Florida statute lists criteria for the court's consideration in determining 'best interest' (*See* Fla. § 752.01(2)) and because the Florida statute provides for a mandatory mediation (*See* Fla. § 752.01(5)). Beagle at 1262.

While the above listed features may make the statutory subsection in question different than the Tennessee statute in form, in substance neither statute requires any showing of the requisite "harm to the child" which is necessary in order to allow government interference with parental decision-making. As such the Florida statute fails to survive constitutional scrutiny for the identical reason the Tennessee statute failed.

Finally, the First District Court of Appeal, as part of its justification for upholding the constitutionality of Fla. § 752.01(1)(e) in Beagle relies on its holding in Sketo and determines that there is no reason to distinguish the protection afforded to parents in an intact family and those parents in a non-intact family. Beagle at 1263.

> ... it seems to us that it matters little whether the child whose interest is to be protected lives in a loving, nurturing home with both parents, a loving home headed by a working mother whose erstwhile husband has deserted the family or with a loving father devastated by a divorce not of his asking.

Beagle at 1263. The flaw with this analysis is that the First District Court of Appeal pays lip service to Equal Protection concerns but fails to make any effort to perform an Equal Protection analysis. It is the position of this *Amicus Curiae* that even if the decision of the First District Court of Appeal in Sketo v. Brown is correct, an Equal Protection analysis using the appropriate standard of review, does not mandate that the case at bar reach

the same result as Sketo.

Should the court determine that an equal protection analysis is necessary, the appropriate level of judicial scrutiny is the rational basis test. The rational basis test is the proper test to determine the constitutionality of a statute to which there has been an equal protection objection. Estate of Greenberg, 390 So.2d 40 (Fla. 1980). Strict scrutiny should not be used in analyzing any possible equal protection violation *unless* there is a suspect classification or a fundamental interest involved in the statute. Greenberg, 390 So.2d at 40.

Here, grandparents are a classification, but not a suspect classification, and grandparents have no fundamental interest involved in the right to petition for visitation with their grandchildren. Therefore, under the rational basis test, the state only has to show a rational basis for the classification. This is a very low threshold, and one which the state easily meets, given that the Florida courts have recognized the "strong public policy which exists in this state in favor of the natural family unit...." In Re: D.A. McW., 429 So.2d 699, 703 (Fla. 4th DCA 1983) (upheld in In Re: Guardianship of D.A. McW.. 460 So 2d 368 (Fla. 1984). See also Sparks, 97 So.2d at 18 (Fla. 1957).

There is no suspect classification involved in the instant case. Eisenstadt v. Baird stated that the Supreme Court, in deciding Equal Protection issues "'has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat people in different ways....'" but further stated that different classes created by a statute cannot be treated differently "'on the basis of criteria wholly unrelated to the objective of that statute.'" Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (quoting Reed v. Reed, 404

U.S. 71, 75-76 (1971)).[1] The courts have often differentiated married people from unmarried in many important areas of the law, while not discriminating against one or the other. For example, In Re Adoption of Baby E.A.W., 647 So.2d 918, 923 (Fla. 4th DCA 1994) suggested "there is a substantial legal difference between the legal status of a birth father married to a birth mother and one who fathers a child out of wedlock." and in Lindenau v. Alexander, 663 F.2d 68, (10th Cir., NM, 1981), single parents of minors were found not to be a suspect class. Thus, differentiation has been held constitutional,(*See* In Re E.A.W., 647 So.2d at 918) when it is not arbitrary or wholly unrelated to the purpose of the legislation. Eisenstadt, 405 U.S. at 448.

Parts (a) through (d) of the statute deal with marital relationships that somehow have broken down (through death, divorce or desertion) or that never existed (for children born out of wedlock). Clearly, the classification of married and unmarried bears a rational relationship to the objective of Fla. Stat. 752.01(1) (a) through (d), which is to ensure that non-intact family units maintain and strengthen the family ties which have been weakened by the lack of an intact marriage and an intact family. The state's interest in encouraging the *intact* family unit and the marital relationship is not only a rational basis, but a compelling reason, for justifying classes based on marital status.

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[1] Eisenstadt, 405 U.S. at 438, has been said to hold that providing dissimilar treatment to married and unmarried people violates the Equal Protection Clause. This is too broad a statement of its holding, since the statute at issue in Eisenstadt was struck down, not because a distinction between married and unmarried was a suspect or arbitrary classification, but because in Eisenstadt, that classification was not rationally related to the stated governmental purpose. It does not stand for the principle, as has been implied, that differentiating between married and unmarried creates a suspect classification.

Intact families have not invited state interference into their domestic relationships the way that non-intact families have, therefore, intact families have a higher expectation of privacy in raising their children. For example, the couple that has divorced has asked the state to step in and dissolve their marriage, and has, more often than not, asked the state to decide on matters of parental custody and visitation. Also, the loss of one parent or both, due to death, desertion, or out of wedlock birth, invites the state to assume a stronger role in loco parentis in order to fill the void left by a missing partner. It is in these instances, where family autonomy has worn thin, or where it never existed, that the state has not only a rational reason, but a compelling interest in interfering in the family relationship by offering guidance or input in loco parentis.

This is in no way a statement that single or unwed parents are lesser parents, only that the children of an intact marriage are more likely to maintain ties with *both* maternal and paternal relatives. In a single parent relationship, the tendency is for parents to maintain ties with their own relatives, while letting their childrens' ties with the absent parent's relatives lapse. Additionally, it would seem that two parents in an intact marriage are more likely to be in harmony, and in bringing two different viewpoints to decision making, can better decide, autonomously, what is in the best interest of the children in a way that a single parent or two divorced parents can not. These are the evils that Fla. Stat. 752.01(1) (a) through (d) was originally designed to combat.

Suspect classifications are those involving a discriminatory class such as race, religion, national origin, alienage, wealth, or sex. These classes are either saddled with such a disability or subject to a history of such purposeful unequal treatment or so

politically powerless as to require extraordinary protection. Mathews v. Lucas, 427 U.S. 495 (1976). Clearly, of the classes created by the statute; grandparents whose children are not married versus grandparents whose children are married, parents who are not married versus parents who are married, and children whose parents are not married versus children whose parents are married, none could possibly be considered a suspect classification. Therefore, even though Fla. Stat. § 752.01(1) (a) through (d) creates classes, they are not suspect classifications, and as such require only a rational relationship to the governmental interest sought to be attained in order to be upheld.

There is no fundamental interest on the part of the Grandparents which requires strict scrutiny analysis, since grandparents do not have an overriding or an independent liberty interest in visitation with their grandchildren, nor is such a right provided for in the common law. [2] It was not until 1987, when Fla. Stat. § 752.01(1) (a) through (d) was enacted, that grandparents even acquired a right to petition for visitation.[3] The only right

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[2] Rodriguez v. Rodriguez, 295 So.2d 328 (Fla. 3rd DCA 1974), Sheehy v. Sheehy, 325 So.2d 12, (Fla. 2nd DCA 1975), and Tamargo v. Tamargo, 348 So.2d 1163 (Fla. 3rd DCA 1977), all stand for the principle that awarding visitation to a non-parent of a child whose custody is in the hands of fit parents is "unjustified and unenforceable." All these cases show that there was never a common law right to visitation, or even to petition for visitation.

[3] "[T]he Supreme Court of the United States has refused to expand fundamental rights beyond those explicitly or implicitly guaranteed by the constitution" stating that ... "the Court does not pick out particular human activities, characterize them as fundamental, and then give them added protection ..." and adding that it is "not in the court's province to create substantive rights in the name of guaranteeing equal protection." Greenberg, 390 So.2d at 43. The court cannot, and must not, create a new liberty interest or fundamental right for the benefit of grandparents as a whole, where it is clear that none has ever existed.

which the grandparents have here is a statutory right, and not an inherent fundamental right, and as such, fails to demand a strict scrutiny analysis. Additionally, children have no fundamental right, nor even a statutory right, in visitation with their grandparents.

CONCLUSION

In accordance with the preceding argument, Fla. § 752.01(1)(e) is unconstitutional in that it violates an indivdual's right of privacy protected by both the United States Constitution and the Florida Constitution.

An invalid proviso later added to the original statute by amendment is to be regarded as separable. Frost v. Corporation Commission of Oklahoma, 278 U.S. 515 (1929). A statute can be constitutional in one part and unconstitutional in another, and if the invalid part is separable, then the part that is constitutional shall continue to be valid. State ex rel. Landis v. Green, 107 Fla. 335, 144 So. 681 (1932); Harper v. Galloway, 58 Fla. 255, 51 So. 226 (1910). It is the position of this *Amicus Curiae* that Sketo v. Brown was erroneously decided. Assuming *arguendo* that Sketo v. Brown was correctly decided, Fla. § 752.01(1)(e) still violates both Florida's and the federal right of privacy and as this section is separable from the rest of the statute it should be declared unconstitutional and void resulting in the First District Court of Appeal decision in the case at bar being reversed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing brief titled SAYGE SCHRECKENGOST and SCOTT SCHRECKENGOST and THE LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.'S BRIEF AS AMICUS CURIAE has been delivered by U.S. Mail this 7th day of August, 1995, to **NANCY NOWLISS, ESQUIRE and TRACY TYSON, ESQUIRE, counsel for Respondents**, at 1200 River Place Boulevard, Suite 630, Jacksonville, Florida 32207 and to **WILLIAM J. SHEPPARD, ESQUIRE, Sheppard and White, P.A., co-counsel for Petitioners**, 215 Washington Street, Jacksonville, Florida 32202 and to **STEPHEN DONOHOE, ESQUIRE, co-counsel for Petitioners**, at 1817 Atlantic Boulevard, Jacksonville, Florida 32207.

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