IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 85,971

DEWEY KEITH BEAGLE and
MELISSA DARLENE BEAGLE,

Petitioners,

vs.

ROY THOMAS BEAGLE and
SHARON WHITMAN BEAGLE,

Respondents.

On Appeal from a Decision of the
First District Court of Appeal

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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EXPLANATORY STATEMENT

The Petitioners will be referred to as Dewey Keith Beagle and Melissa Darlene Beagle, "Petitioners" or "Parents". The Respondents will be referred to as Roy Thomas Beagle and Sharon Whitman Beagle, "Respondents" or "Grandparents". Reference to the Record will be designated by the abbreviation "R" . References to the Transcript of the hearing held July 26, 1993 will be by the abbreviation "T" followed by the appropriate page. The Appendix will be referred to by the abbreviation "App.". The Petitioners Initial Brief will be referred to by the abbreviation "IB". The Amicus Curiae Brief will be referred to by the abbreviation "ACB". Underlining has been added by the scrivener unless otherwise noted.

STATEMENT OF THE FACTS AND CASE

While not disagreeing with the Petitioner's Statement of the Facts and Case, the Respondent provides the following additions.

On June 28, 1993, the grandparents filed a motion for temporary visitation wherein they alleged that the minor child had been virtually raised by her paternal grandparents from the age of four weeks until the age of five years old and had a close and loving relationship with her grandparents (R.7,8). It was further alleged that it would be detrimental to the well being of the minor child to sever or thwart this relationship (R.8).

There was a hearing by the trial court on the Petitioner's Motion for Temporary Visitation on July 26, 1993. The grandfather testified that the grandmother had kept Amber from when she was four weeks old up until she was about five years old (T.6). The maternal grandmother, Sharon Beagle, testified that whenever there is a link between grandparents and child and that bond is broken after a five year close relationship, it is devastating to the child (T.24). The grandfather was of the opinion that the relationship between the grandparents and the parents deteriorated after Melissa Darlene Beagle told the paternal grandparents that their son was being sued in a paternity action (T.7,12). The paternal grandparents did not want to get involved and talk about it (T.7). The paternal grandparents did recognize and spend time with Laney, Dewey Keith Beagle's child who had been born out of wedlock (T.26,27,28). At the time of the July 26th hearing, one

temporary visitation between parents, grandparents and Amber had already occurred (T.18).

SUMMARY OF THE ARGUMENT

Petitioners and Amicus Curiae argue that §752.01(1)(e) of the Grandparent Visitation Statute violates Art. 1 §23 of the Florida Constitution because it intrudes upon married parents' parental authority without requiring proof of substantial harm to the chid. There is a compelling state interest in preserving children's close relationship with their grandparents, as demonstrated in precedent from Florida and other states and in the legislature history of this subsection. The Florida statute is particularly well-crafted to intrude upon parental authority in the least intrusive manner because it requires a prior long term and meaningful relationship between grandparent and child along with five other factors and it also requires mediation.

The issue in this case is actually the proper construction of the phrase "best interest of the child" found in §752.01(2) Fla. Stats. (1993). Does it mean that a trial court is provided with unbridled license to intrude upon parents' rights and require extensive visitation even in situations where grandparents have never had contact with their grandchildren? Respondents suggest that in construing this act, this court should consider those words, as they have in other cases involving intrusions upon parental rights by the state. The resulting examination of Florida law reveals that this statute provides that before parental rights are intruded upon there must be proof that the state action advances the best interests or welfare of the child.

Starting by its absence in the initial briefs is any recognition that minor children have a constitutional right to family autonomy, which this statute protects and advances.

Because this subsection meets the standards of Article 1, §23 of the Florida Constitution, which are even higher than the standards imposed under the Federal Constitution, the subsection therefore complies with the Fourteenth Amendment. However, to find this section unconstitutional would violate the equal protection clause of the United States Constitution. There is a liberty and privacy interest in family autonomy. The Grandparent Visitation Act treats all six classes of married and non-married parents, children of married and non-married parents, and parents of married and non-married parents equally. There is no basis for discriminating among these classes and any such discrimination could not survive a strict scrutiny or rational basis inquiry.

ARGUMENT

ISSUE ONE: WHETHER THE FIRST DISTRICT ERRED IN HOLDING SUBSECTION 752.01(1)(e), FLA.STATS. (1993), CONSTITUTIONAL BECAUSE IT CONSTITUTES IMPERMISSIBLE STATE INTERFERENCE WITH FUNDAMENTAL PARENTAL RIGHTS PROTECTED BY THE FLORIDA AND UNITED STATES CONSTITUTION.

A WHETHER SECTION 752.01(1)(e), FLA.STATS., VIOLATES ARTICLE 1, SECTION 23 OF THE FLORIDA CONSTITUTION.

The trial court opinion and Petitioners both relied heavily upon a law review article by Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise their "Bundle of Joy", 18 Fla. St. U.L. Rev. 533 (1991). Minerva addressed the issue of whether parental rights, provided under the U.S. Constitution and Article 1 §23 of the Florida Constitution were violated by grandparent visitation. His thesis is that parental rights are comparable to real property rights - the "bundle of sticks" concept - taught in Property I classes. "The phase refers to the quantum of ownership in a piece of property". Minerva at 533. Minerva doesn't claim the analogy is perfect, but it is actually very revealing. This approach treats children like inanimate objects, incapable of possessing any rights. Married parents have the most sticks; comparable to ownership in fee simple. Upon death, the surviving parent gets the whole bundle, analogous to the effect of a death upon tenancy by the entireties. A divorce would be comparable to a partition. Respondents deny that the comparison is valid. Children are not owned like property

and do have inherent rights themselves. Minerva excluded from consideration in his article any rights of children and potential equal protection issues. Minerva, ft.nt. 5, p. 534.

Minerva does assert and respondents agree that the most important criterion in the grandparental visitation rights statute is the length and quality of the relationship. "In situations where the two have a close relationship which the parents attempt to sever, the state's interest in intervening and protecting the child is strongest." Minerva at 537. "Because of the new statutory criteria, a court cannot perfunctorily award visitation without considering the quality of the existing relationship." Minerva at 540. The trial judge is left to determine, on a case by case basis, the effect upon the child caused by severance of the grandparent visitation.

Although it could never be suspected from a review of the Initial Briefs in this case, much case law exists extolling the importance of the grandchild/grandparent relationship. A recent Pennsylvania Supreme Court opinion addressed the general topic of grandparent visitation and children's rights in that regard:

> It does not take lengthy study of the writings of philosopher John Locke to conclude that our citizens retain natural rights. Article 1, Section 1, of our Pennsylvania Constitution states that:
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

> Nothing is more central to the happiness of many people than to look after the well being, and enjoy the society of, their grandchildren. Indeed, the only immortality most of us have in this life is the promise offered by children and grandchildren. After years of toil and worry in raising one's own children, grandparents look forward to the opportunity of spending time with their grandchildren, of spoiling them, and of passing on to them family history and the wisdom of ages. For too long this natural right was denied statutory recognition and protection. Now that it has been recognized, we find that the Act covers situations like the one presented in this case.
>
> It must be remembered that grandchildren, too, have the natural right to know their grandparents and that they benefit greatly from that relationship. Grandparents give love unconditionally - without entanglement with authority or discipline, and often without pressures of other burdensome responsibilities. Children derive a greater sense of worthwhileness from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained nowhere else. The benefits derived by a grandchild from the society of his or her grandparents have been touched upon by psychologists and psychiatrists including, most prominently, Erik Erikson, nl They are substantial benefits and should not be lightly regarded by our judicial system. The contention of the Appellant is directly contrary to the purposes of this statute which is intended to provide for the best interest of the child. Bishop v. Piller, 637 A2d 978, 536 Pa41 (Pa. 1994).

A reference list of law review articles regarding the benefits of the grandchild/grandparent relationship is provided. (App.21). The following is representative:

> Sociological literature has documented and analyzed the benefits children receive from a healthy relationship with their grandparents. Contact with grandparents produces children who are rooted in and proud of their family

> and culture, emotionally secure, and highly socialized. Additionally, interaction between grandparents and grandchildren mitigates ageism in children because older people love them, mitigates sexism because grandmothers and grandfathers do essentially the same thing, and eliminates fear of old age because grandparents serve as ancestor role models. Finally, grandparents can give grandchildren "an emotional sanctuary from the everyday world." These findings are consistent with those of other experts on child development, who generally agree that it is important for children to maintain ongoing meaningful relationships. Zablotsky, To Grandmother's House We Go: Grandparent Visitation After Stepparent Adoption, 32 The Wayne Law Review 46 (1985).

Respondents acknowledge that parents have a constitutionally protected privacy right in family relationship and child rearing. These parental rights exist equally for parents in an intact family and for single parents. Respondents acknowledge that in order for an intrusion upon parental rights to pass constitutional muster there must be a compelling state interest and the least intrusive means should be used.

Respondents dispute Petitioners' claim at the point where they argue that §752.01(1)(e) fails because it allegedly does not require proof of a showing of substantial harm to the child prior to requiring visitation (I.B 12).

Parents' rights to make decisions regarding their child was addressed in the recent case of MN v. Southern Baptist Hospital of Florida, Inc., 648 So.2d 769 (Fla. 1st DCA 1994). The parents appealed a trial court order authorizing chemotherapy and blood transfusions for their child, who was suffering from leukemia and

other medical problems. The First District analyzed the clash between interests of the state/child and the parents:

> [1-4] Ordinarily, decisions regarding the care and upbringing of minor children will be left to the parents. This parent-child relationship is a fundamental liberty interest which is constitutionally protected. Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 133 (Fla.1986); see In Re Dubreuil, 629 So.2d 819, 827 n. 11 (Fla.1993) But the parents' rights are not absolute, as the state has *parens patriae* authority to ensure that children receive reasonable medical treatment which is necessary for the preservation of life. J.V. v. State, 516 So.2d 1133 (Fla. 1st DCA 1987). And as between parent and child, the ultimate welfare of the child is the controlling factor. State v. Reeves, 97 So.2d 18 (Fla.1957). Indeed, the policy of advancing the best interest of the child is well rooted in this state and guides the Court in many diverse contexts. See e.g. Department of Health and Rehabilitative Services v. Privette, 617 So.2d 305 (Fla. 1993); Padgett; Dinkel v. Dinkel, 322 So.2d 22 (Fla. 1975). MN at 770, 771.

The court went on to state the familiar rule that to justify intrusion on parental rights there must be a compelling state interest and the state action must produce the least intrusion possible. Although finding no brightline rule for judging these situations, the court concluded:

> Medical treatment may thus be rejected when the evidence is not sufficiently compelling to establish the primacy of the state's interest, or that the child's own welfare would be best served by such treatment. See Barry; Newmark. On the other hand, the parents' wishes may be overcome when there is sufficient medical evidence to invoke the state's *parens patriae* authority; and to establish that the child's welfare will be best served by the disputed treatment. (citations omitted) M.N. at 771.

It is interesting to note that Judge Webster, who in his concurring opinion in the instant case argued so fervently that parental rights could not be invaded without proof of detriment to the child, concurred in the M.N. opinion which does not refer to detriment or substantial harm. Obviously, the facts of that case address a possibly life threatening situation, which would be detrimental. The M.N. opinion speaks of "advancing the best interests of the child", "best serving the child's welfare", and of "the ultimate welfare of the child". Why was there no specific reference to harm or detriment? Because it is inherent that the first step in promoting a child's welfare is eliminating harm.

In the case of Schmitt v. State, 590 So.2d 404 (Fla. 1991) the constitutionality of the sexual performance by a child statute, §27.071, Fla. Stat. was challenged. A father took nude photos and videos of his 12 year old daughter. This court found that "...sexual exploitation of children is a particularly pernicious evil that sometimes may be concealed behind the zone of privacy that normally shields the home. The state unquestionably has a very compelling interest in preventing such conduct." Schmitt at 410. "Substantial harm" to children is not mentioned. It is implicit that it is in children's best interest to prohibit conduct that would harm them.

Respondents do not deny that parents have a longstanding and fundamental interest in raising their children free from governmental interference. One of the many cases cited by

Petitioners, Padgett v. Department of Health & Rehab., 577 So.2d 565 (Fla. 1991) also contains the following language:

> [2] In fact, "the only limitation on this rule of parental privilege is that as between the parent and the child the ultimate welfare of the chid itself must be controlling." Id.
>
> While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly that the right is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail. In re Camm, 294 So.2d 318, 320 (Fla.), cert. denied, 419 U.S. 866, 95 S.Ct. 121, 42 L.Ed.2d 103 (1974). Padgett at 570.

The Padgett decision also contains language requiring proof of a substantial risk of significant harm to a child prior to terminating parental rights. There is no inconsistency in this close juxtaposition of "best interests" and "substantial harm". Best interest is a more broadly embracing term than substantial harm. Best interests can be thought of as a continuum. At one end is substantial harm and at the other end is the best of all things for the child. The two phrases are not opposing. "Best interests" is used frequently and in many different contexts to guide family law trial courts. Respondents' claim that the trial courts of Florida, after considering all of the factors listed in §752.01(2)(a-f) will not order grandparent visitation unless they also determine that to fail to do so would harm the child and not promote the child's best interests.

As the foregoing cases illustrate, when there is state action to advance a child's best interest, the action is being taken to

prevent substantial harm to the child. The absence of the actual words "substantial harm" does not automatically toll the death knell for the constitutionality of §750.01(1)(e) as Petitioners suggest. When this statute is considered in the context of other statutes intruding upon parental rights and the decisions construing them, it becomes clear that the statute does meet constitutional requirements.

The legislative history of §752.01 (i)(e) is very clear as to the specific intent of the legislature. The legislature was fully aware that it was expanding the scope of grandparent visitation to "intact" families. Senate Staff Analysis and Economic Impact Report on S.B. 484 (February 23, 1993) (App.22). Florida Senate Judiciary Committee Meeting, tape recording of proceedings (February 24, 1993) (tape available from Florida Senate). The motivation behind passage of subsection (1)(e) was to emphasize children's rights. Legislative reports confirm further awareness of a similar statute adopted in Kentucky, which withstood a federal constitutional privacy challenge in the Kentucky Supreme Court. [See King v. King, 828 S.W. 2d 630, 631 (Ky. 1992)]. The United States Supreme Court denied review in King v. King, 113 S.Ct. 328 (1992). Senate Staff Analysis and Economic Impact Report on S.B. 484. (See App.22). See also House of Representative Committee on Judiciary Final Bill Analysis & Economic Impact Statement, CS/HB1685. (App.28). When the bill was presented in the Florida Senate, the sponsor, Senator Grogan, stated that the motivation was not to take rights away from parents or to grant special rights to

grandparents, but to place a greater emphasis upon the best interest of the child. Florida Senate Judiciary Committee Meeting, tape recording of proceedings, (February 24, 1993) (tape available from Florida Senate).

Petitioner's acknowledge that Section 752.01(1)(e), Fla.Stats. does impinge upon the parents' constitutionally protected rights to raise their children. The effect of the statute, to require visitation in proper circumstances, is a relatively slight intrusion compared to other permissible state actions involving bodily integrity, constitutional touchstones, etc. Minerva at 548. Upon a proper showing the state can temporarily take custody of children from parents, can require medical care for a child which the parents object to and can also permanently terminate all parental rights. Parental expectations regarding privacy in visitation issues are lesser than in the foregoing circumstances.

Throughout their briefs, Petitioners argue that parents' rights regarding visitation are paramount and insurmountable. It is assumed that no one else has any constitutionally protected rights that must also be protected. This court's opinion in In Re: T. W., a minor, 551 So.2d 1186 (Fla. 1989) is instructive in demonstrating that minor children also have constitutionally protected rights. In that case, the constitutionality of §390.001(4)(a) Fla. Stats (Supp. 1988), the abortion/parental consent statute, was challenged. This Court determined that the privacy right that Article 1, Section 23 of the Florida

Constitution provides is clearly implicated in a woman's decision of whether or not to continue a pregnancy. The court went on to hold that this privacy right extends to minors.

> Minors are natural persons in the eyes of the law and constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults,...possess constitutional rights. Danforth, 428 US at 74, 96 S.Ct. at 2843. H.L.V. Matheson, 450 US 398, 101 S.Ct., 1164, 67 L.Ed. 2nd 388 (1981) and Bellotti. In re T.W. at 1193.

The challenged abortion statute required that prior to undergoing an abortion, a minor must obtain parental consent or else must convince a court that she was mature enough to make the decision or that if she was immature, the abortion was in her best interest. (Again, "best interest" is the standard, not substantial harm.) Justice Shaw concluded that the statute failed because it invaded the privacy of the pregnant minor. Despite parents' rights of raising their minor children as they see fit free from interference by the state, this was an instance where the minor child's rights conflicted with and overcame parental rights. This court stated therein:

> However, where parental rights over a minor child are concerned, society has recognized additional state interest - protection of the immature minor and preservation of the family unit. For reasons set out below, we find that neither of these interests are sufficiently compelling under Florida law to override Florida's privacy amendment. In re T.W. at 1194.

As this Court pointed out, an unwed pregnant minor or minor mother has the right under Section 743.065, Fla.Stats. to consent

without parental approval to any medical procedure involving her pregnancy or her existing child - no matter how dire the possible consequences - except abortion. This court noted that Florida does not recognize the interest of protecting minors and preserving family unity as being sufficiently compelling to justify a parental consent requirement where procedures other than abortion are concerned. The state's adoption act contains no requirement that a minor child must obtain parental consent prior to placing a child up for adoption. The foregoing examples indicate significant decisions which children are allowed to make without parental consent. These are decisions which the minor children's parents would obviously be intensely interested in and which one would normally expect to fall within their control. However, the state had recognized that minor children do have constitutionally protected rights that will be observed without first deferring to parental rights. Respondents' allege that in situations such as that anticipated in Section 752.01(1)(e), where there has been a long term, close and loving relationship between a minor child and grandparents, the minor child's interest cannot be simply ignored as petitioners assume.

Thus, while not disparaging the long established rights of parents, it should be also acknowledged that children themselves have constitutionally protected rights regarding family relationships that should also be protected. In Re: T.W., a minor at 1193. See Also Planned Parenthood v. Dansforth, 428 U.S. 42, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); Planned Parenthood Ass'n v.

Ashcroft, 462 U.W. 476, 103 S.Ct. 2571, 76 L.Ed. 2d 733 (1983); City of Akron v. Adron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed. 2d 687 (1983); H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); Bellotti v. Baird, 443 U.S. 633, 99 S.Ct. 3035, 61 L.Ed. 2d 797 (1979); and Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989). Possession of a right is meaningless unless there is a remedy for enforcing that right. The grandparent visitation statute provides a remedy for enforcing children's rights and thus advances the welfare of children, as the legislature intended. The compelling state interest is protection of the minor child and preservation of the family unit as it has been developed in that family to include grandparents and grandchildren.

Furthermore, it should be recognized that grandparents are not strangers to the parents. The parents were at one time minor children themselves, and stood in the same relationship with their parents as they now maintain over their own minor children.

The appellants advance the case of Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) to support their argument that §752.01(1)(e) is unconstitutional. That case is distinguishable both legally and factually from the case at hand. In Hawk, the Tennessee Supreme Court held that the application of that state's Grandparent's Visitation Act to married couples, whose fitness was not at issue, violated the Tennessee constitutional right to privacy in parenting decisions. Id. at 582. The Tennessee court found that it in order to secure a parent's right to raise his or her child, the

Visitation Act must require a showing of "a substantial danger of harm to the child". Id. at 579. The reason for this, the court stated, was because the trial court may not make decisions on "**its own subjective notions of the "best interest of the child"** (emphasis added) when an intact, nuclear family with fit married parents is involved". Id at 579. It is interesting to note that the Tennessee Supreme Court tacitly acknowledges that there is a compelling state interest. The statute failed only because of the failure to require a showing of substantial harm to the child.

The Tennessee statute clearly failed to provide the courts with any guidance as to the legislative intent of the meaning of "best interest". Tenn.Code §036-6-301 (1991) states:

> Grandparents' visitation rights. - (a) The natural or legal grandparents of an unmarried minor child may be granted reasonable visitation rights to the child during such child's minority by a court of competent jurisdiction upon a finding that such visitation rights would be in the best interest of the minor child. The provisions of this subsection shall not apply in the case of any child who has been adopted by any person other than a relative of the child or a stepparent of the child. (See App.37, entire text provided).

The Hawk court stated that pursuant to the statute the parents may raise as a defense the "implication" of petitioning grandparent's sexual misbehavior against family members. Hawk, ft.nt. 2 at 577.

The Tennessee Supreme Court, having no set criterion upon which to rely in its determination of the best interests of the child standard, referred to Tennessee and U.S. Supreme Court cases Id. at 577-580. It found that the law implicitly maintains that a

"child's welfare must be threatened before the state may intervene" in parental decision-making. Id at 580.

Unlike the Tennessee statute, Section 752.01 Fla.Stat. (1993) contains provisions substantially more precise and well defined with regard to the meaning of 'best interest'. This was well noted by the appellate court in the present case which stated that such "features make the statutory subsection in question different than the Tennessee statute which was interpreted in Hawk". (App.7) Section 752.01(2) Fla.Stat. (1993) provides the trial court with a necessary standard to follow in its determination of the best interests of the child.

> (2) In determining the best interests of the minor child, the court shall consider.
>
> (a) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
>
> (b) The length and quality of the prior relationship between the child and the grandparent or grandparents.
>
> (c) The preference of the child if the child is determined to be of sufficient maturity to express a preference.
>
> (d) The mental and physical health of the child.
>
> (e) The mental and physical health of the grandparent or grandparents.
>
> (f) Such other factors as are necessary in the particular circumstances.

These safeguards adequately protect against grandparents who maintain questionable motives. In addition, section 752.015 Fla. Stat. requires that families attempt to resolve differences over grandparent visitation within the families through formal or informal mediation (App.35). In the event mediation proves unsuccessful, and such service is available in the circuit court,

the trial court, in going one step further to preserve harmony, shall refer the case to family mediation. This statutory provision attempts to alleviate any type of animosity between the parties and avoids dragging any family dirty laundry into court.

In conclusion, section 752 Fla. Stat. (1993) is clearly distinguishable from Tenn.Code §036-6-301 (1991) and fails to support Petitioner's argument for the unconstitutionality of §752.01(1)(e).

In the instant case, the District Court was only considering whether the statute was constitutional on its face. The actual facts of the case below were never addressed. In Hawk, the Tennessee Supreme Court considered the unhappy facts of the Hawk family saga at some length. These facts included many arguments, bickering, and a volatile incident that was reported to the police. The parents were concerned because the grandparents exposed the children to an uncle who was a convicted drug violator. Id. at 576. After entry of the trial court's order, the father was found in contempt for conspiring with his wife to remove the children from the court's jurisdiction. Id. at 579. The facts in the instant case are notably different. There was no history of avid animosity, etc. In fact, the trial court expressed surprise at the situation, because the grandfather testified that the only reason his son had given for the severance was that they didn't want Amber expending time with 50 year old people (T.20, 21). The facts in the Hawk case, where the trial court ordered that the grandparents "don't have to answer to anybody when they have the children" (Id

at 577) obviously influenced the Tennessee Supreme Court. There was a legitimate concern that that trial court, unfettered by any definition of best interest, had gone amuck. The Hawk case supports the old maxim, "bad cases make bad law". The Tennessee Supreme Court did recognize that not all fact situations present such an extreme situation as in Hawk:

> We recognize that, under normal circumstances, children are "fortunate to have caring and loving grandparents, and ...that everything possible should be done to foster and maintain a close, loving relationship between the grandparents and the[ir grandchildren]." Clark v. Evans, 778 S.W. 2d 446, 449 (Tenn.App.1989). The circumstances of this case were far from normal, however. Hawk at 575.

In the instant case, the grandmother had cared for Amber on an almost daily basis for her first five years of life. There was no history of animosity. At the temporary hearing, the parties reported that there had been a recent voluntary meeting with the child, parents and grandparents present. The trial court did order specified and restrained temporary visitation. The Hawk decision was strongly influenced by the facts of that case. In the instant case, the facts were ignored. Also, the Hawk decision invites inquiry into fitness of the parents because of its repeated emphasis that its holding only applied to "fit" parents.

The constitutionality of grandparent visitation has been affirmed by the appellate courts of other states. Herndon v. Tuhey, 857 S.W. 2d 203 (Mo.1993) and King v. King, 828 S.W. 2d 630 (Ky.1992). Bishop v. Piller, 637 A2d 978, 536 Pa41, (Pa. 1994); Spradling v. Harris, 13 Kan. App.2d 595, 788 P.2d 365; Roberts v.

Ward, 126 N.H. 388, 493 A2d 478,481 (1985); People ex rel. Sibley v. Sheppard, 54 N.Y.2d 320, 445 N.Y.2d 420, 423, 429 N.E.2d 1049, 1052 (1981); Bailey v. Menzie, 542 N.E.2d 1015, 1020 (Ind.App.1989); R.T. v. J.E., 277 N.J. Super. 595, 650 A2d 13 (Ch. 1994); Deweese v. Crawford, 520 W.S. 2d 522 (Tex.Civ.App. 1975).

As already stated, the state has a compelling state interest in protecting the minor child and preserving the family unit as it has in each case defined itself. Petitioners never denied that there was a compelling state interest. When grandparents have enjoyed a long term and loving relationship with a grandchild they are an integral part of the child's family. The grandparents should not then be arbitrarily kept from the child.

The state recognizes such sufficiently compelling grounds for interference in parental rights in divorce cases in the belief that the child's welfare becomes threatened by the discontinuity of the parental relationship, thus compelling the court to determine child custody. Hawk. at 580. The public policy of Florida requires frequent and continuing contact between a noncustodial parent and child after divorce. §61.13(2)(b)(1) Fla.Stat. (1993). It has been recognized that harm befalls a child from severance of the relationship between grandparent and child, where the child has been substantially raised by her grandparents from birth. In Guardianship of D.A. McW., 429 So.2d 699, 704 (Fla. 4th DCA 1983), Appr'd Guardianship of D.A. McW, 460 So.2d 368 (Fla. 1984). The court made such a finding and then ordered visitation for the grandparent who had raised the child.

Petitioner make a general, unsupported allegation that the statute does not provide for the least intrusive means of furthering state interests. Petitioners suggest no less intrusive means (1B12), but Amicus Curiae do. Amicus Curiae suggest that mediation should be required prior to initiating litigation and/or there should be a 90 day cooling off period (ACB 9,10). These suggestions are not substantive. Section 752.015 does not require prior mediation, but the language certainly suggests that state policy promotes mediation both prior to and after filing. The suggested "cooling off period" is an arbitrary time period. As a practical matter, application of the rules of Civil Procedure produces a cooling off period before a case comes to trial, which duration is in the control of the trial court. Furthermore, when children's rights are at issue, application of a non-discretionary cooling off period is not appropriate and could allow substantial harm to occur while the mandatory period is observed.

Section 752.01(1)(e) does not violate Article 1 §23 of the Florida Constitution. The subsection addresses a compelling state interest and it intrudes upon parental rights in the least intrusive manner.

B WHETHER SECTION 752.01(1)(e), FLA.STATS., VIOLATES THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondents don't deny that parental rights are protected under the Federal Constitution as both liberty rights and privacy rights.

In determining whether this subsection is in violation of the United States Constitution, one must recognize that visitation is not as intrusive an interference with parent's rights as are those addressed in many other statutes. Occasional visits with the grandparents are not as intrusive as terminating parental rights, forcing children to attend only public schools, etc. It has been established that the privacy rights provided Florida citizens pursuant to Article 1, §23 are even more extensive than those found in the U.S. Federal Constitution. In Re TW at 1191-92. Therefore, U.S. Constitutional cases regarding protection of privacy "merely serve to compliment post 1980 Florida cases by defining the minimum level of protection allowable in Florida." Minerva at 542. Since Florida privacy rights aren't's violated, federal rights are not, either.

Petitioner's argument regarding parent's liberty interests in raising their children all address the substantial harm issue, which was answered in part A of the Argument.

Petitioners rely on Brooks v. Parkerson, 454 So.2d 769, (Ga. 1995). The Georgia supreme Court found the Georgia grandparent visitation statute unconstitutional under both the federal and Georgia constitution 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 at 774. Once again, it is very enlightening to examine the Georgia statute at issue.

The statute, OCGA §19-7-3, so far as pertinent (for entire statute, see App.7) states:

> (b) Any grandparent shall have the right to file an original action for visitation rights to a minor child...
> (c) Upon the filing of an original action... under subsection (b) of this Code section, the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interest of the child. There shall be no presumption in favor of visitation by any grandparent, and the court shall have discretion to deny such visitation rights...

Again, the Georgia statute provides absolutely no guidance to a trial court in determining best interest of the child. The "special circumstances" could refer to anything. There is no requirement of a long term relationship. By contrast, the Florida act requires an inquiry into the willingness of the grandparent to encourage a close relationship between parent and child, the length and quality of the relationship between child and grandparent, the child's preference, if appropriate, the health of the child and grandparents, and other necessary factors. The Florida act, because it is so much more complete, accommodates the 14th Amendment rights of both parent and child, without requiring undue compromise from either. This is done in full accord with the intent of the legislature. The Respondents argument that proof of

substantial harm is required in the statute in §752.01(2) is applicable to this issue, also.

The majority opinion compared grandparent visitation to circumstances of severe intrusion, such as termination of parental rights. The intrusion caused by visitation is not nearly so serious.

There was a finding of the deleterious effects upon children created by litigation. Surely it can be said that any family litigation puts stress upon a family. The stress of litigation must be weighed against the welfare of the child if no litigation is pursued. Clearly in many instances state action is pursued, despite the stress of litigation upon the child, because the child's welfare demands it.

The Brooks opinion does not once address the privacy and liberty rights of children.

C SKETO v. BROWN, 559 So.2d 381 (Fla. 1st DCA 1990)

Petitioners urge this court to disapprove of Sketo, or distinguish it because the parent in Sketo was widowed and in the instant case married parents' constitutional rights are at issue. The Petitioners do not suggest that single parents' constitutional rights are not as worthy of protection as married parents' rights. Such an argument would immediately raise equal protection concerns. J. Miner, in his opinion below noted that the trial court apparently had indulged such a presumption regarding the superiority of intact families and noted the lack of citation to authority for such a position.

> When we consider that the justification for Florida's grandparent visitation statute is the best interest of the child, 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, the loving home headed by a working mother whose husband has deserted the family or with a loving father devastated by a divorce not of his asking. Article 1, Section 23 protects the privacy rights of each of these family units in precisely the same way. None of these loving parents is more or less equal than any other and none is entitled to more or less privacy protection than are the others. None of the children whose best interest is protected by Section 752.01 is the child of a lessor parent because he or she belongs to the family unit defined by a loving mother and loving father or loving mother or loving father. (App.8,9).

By striking only the portion of the statute which allows grandparents in an intact family to petition for visitation, the trial judge created two discrete classes of similarly situated parents to be treated differently. Additionally, the classes of similarly situated grandparents and the classes of grandchildren are also treated differently.

An equal protection analysis under the constitution depends upon two factors: the distinction between the classes and the right at issue. In the instant case, distinction between the classes is marital status and the right at issue is the right to family autonomy. Although marital status is not given any special treatment under the law, the right to family autonomy is a fundamental right. When a fundamental right is at issue and classes of similarly situated people are treated differently, the court should employ a strict scrutiny analysis. Skinner v.

Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Thus, the fundamental right of privacy and the different protections regarding grandparent visitation that the trial court's order creates requires a strict scrutiny analysis: Is there a compelling state interest to treat intact and non-intact families differently?

The instant case is remarkably similar to Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1209, 31 L.Ed.2d 349 (1972). In Eisenstadt, the constitutionality of a statute which prohibited pharmacists and physicians from distributing contraceptives to people unless they are married was at issue. The United States Supreme Court looked to Griswold v. Connecticut, 381 S. 479, 85 S.Ct. 1678, 14 L.Ed. 510 (1965) the case which set forth the right of married people to have access to contraceptives. In Eisenstadt, that right was extended to unmarried people, with the Supreme Court stating:

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right to privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so affecting a person as the decision whether to bear or beget a child...by providing dissimilar treatment to married and unmarried persons who are similarly situated, (the state statutes) violated the Equal Protection Clause. Eisenstadt at 453.

With this decision, the United States Supreme Court specifically noted that the constitutional right to privacy belongs to

individuals. All individuals, whatever their marital status, possess the same privacy rights.

The Florida Supreme Court has also demonstrated its concern for equal protection of parents regardless of their marital status. In Grapin v. Grapin, 450 So.2d 853 (Fla. 1984), the issue presented was whether a court could order a divorced father to pay for his emancipated daughter's college education. The Florida Supreme Court acknowledged that it would be

> fundamentally unfair for courts to enforce these moral obligations of support only against divorced parents while other parents may do as they choose. Grapin at 854.

The Court also quoted Owens v. Owens, 415 So.2d 855, 858 (Fla. 5th DCA 1982):

> It denies such divorced parents their constitutional right to equal treatment under the law; that being the same right to voluntarily make other decisions concerning their adult children as other, undivorced parents have under the law. I cannot agree with a rule of law that permits domestic relations judges to create and enforce special duties of support in favor of adult children against divorced parents which are not provided by general law equally applicable to all parents. Grapin at 854.

Thus, the Florida Supreme Court adopted the position that married and divorced parents should be treated the same under the law. The Court specifically stated that it would be "fundamentally unfair" to treat parents differently based upon marital status. The Grapin decision has subsequently been cited for the idea that such dissimilar treatment based upon marital status is unfair. Carter v.

Carter, 511 So.2d 404, 406 (Fla. 4th DCA 1987); Zakarin v. Zakarin, 565 So.2d 790, 792 (Fla. 3rd DCA 1990).

Although Florida has not specifically addressed marital status as it relates to grandparent visitation, other states have addressed this issue. In Frances E. v. Peter E., 479 N.Y.S.2d 319 (N.Y. Fam. Ct. 1984), the court upheld a statute allowing grandparents to petition for visitation in an "intact family." Although every state has a legislative provision addressing grandparent visitation, most cases analyzing the state statutes limit their inquiry to the privacy issues inherent in the laws. Frances E. is one of the only cases to look to the issue with an eye toward the equal protection question. The parents in Frances E. asserted that because they were an "intact family," they had a Fourteenth Amendment privacy right to raise their children as they saw fit.

The court dismissed the parents' assertion, finding that the right to be free from state interference

> inures to all parents and should have no greater application to parents who are married and residing together in an "intact family." To assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater state interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child. Id. at 322.

The court correctly noted that by basing standing to petition for visitation upon marital status, the legislature would be interpreting a statutory provision as providing grandparents with derivative rights as opposed to statutory rights, which are non-

derivative in nature. The opinion criticized statutes which limit a grandparent's right to petition for visitation to non-intact families, stating that it had an improper "focus only on the grandparent's right to visit and ignore[s] the child's right to know his grandparent." Id. at 322.

The legislative history of the broad-based New York statute did not demonstrate any intention to enact a statute which would exclude a petition for visitation with a grandchild living in an intact family. Id. at 323. Legislative history of §752.01(e) Fla. Stat. (1993) demonstrates a clear intent of the Florida Legislature to enact legislation that would specifically target grandparents whose grandchildren were living in intact families and give them standing to seek visitation, in an attempt to promote and protect the interests of children.

The Frances E. opinion additionally noted that New York courts have consistently concerned themselves with the benefits that grandchildren may get from visitation as opposed to the rights of grandparents. Florida legislative history demonstrates a similar concern. Senator Grogan, the sponsor of subsection (e), specifically intended that the bill promote the best interest of minor children and not necessarily grant special interests to grandparents. Florida Senate Judiciary Committee Meeting (tape recording of proceedings available from Florida Senate) (February 24, 1993).

The Supreme Court of Connecticut cited to the Francis E. opinion when upholding a statute that permitted grandparents to

petition for visitation into intact families. Lehrer v. Davis, 571 A.2d 691 (Conn. 1990). The court noted that there was no constitutional requirement that the legislature defer to the child-rearing preferences of a nuclear family. Moreover, "the constitutional concerns are not entirely parental because the preservation of family integrity 'encompasses the reciprocal rights of both parents and children.'" Id. at 694-695.

In Emanuel S. v. Joseph E., 573 N.Y.S.2d (N.Y. 1991), the court again had the opportunity to determine whether New York's statute impermissible permitted a grandparent to petition an intact family for visitation. The court looked to the legislative history which stated:

> ...the amendment would apply in a "variety of potential situations where the utilization of such a resources [visitation] could be of invaluable consequence to the children and ultimately in the society" (cites omitted) Id. at 38.

Thus, it is clear that treating married and single parents differently under the law creates drastic equal protection problems. Although the inherent privacy issues that are raised with any grandparent visitation statute may be more visible, the equal protection considerations are just as important in terms of an individual's rights under the constitution.

Amicus Curiae suggest that the different treatment afforded parents, children and grandchildren based upon marital status if §752.01(1)(e) is found unconstitutional requires only a rational basis test in considering equal protection concerns. Two fundamental interests, privacy and family autonomy are at issue,

however. Surely that fact has already been established. When a fundamental right is at issue and classes of similarly situated classes are treated differently, the court should employ a strict scrutiny analysis. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

Single parents do not usually "invite" governmental interference as Amicus Curiae suggest (ACB 20). Many persons do not wish to be divorced and do not wish their spouses to die or desert them. Amicus Curiae also wrongly assume that in grandparent visitation cases, the grandparents seeking visitation will be relatives of the "missing" parent. This speculation is not supported, however. [See Griss v. Griss, 526 So.2d 697 (Fla. 3 DCA 1988), concurring opinion of Judge Pearson]. The detrimental effect upon the children whose grandparents are ruthlessly removed from their lives will not be altered because of the marital state of their parents. Certainly the phenomena of one marital partner enforcing his or her will upon the other partner is also not unknown. The fact that a child has two parents married to each other cannot be relied upon to ensure superior decision making to that performed by single parents. Amicus Curiae attempt to avoid this issue by simply denying that children could have any fundamental rights at issue in these cases (ACB 22). They cite no authority for that proposition.

Respondents argue that treating the three classes of people involved in this issue differently based upon the marital status of

parents fails a strict scrutiny analysis. Petitioners and Amicus Curiae have not proved differently.

The state has a compelling interest in maintaining a significant grandchild/grandparent relationship. Section 752.01(1)(e) does not violate the federal constitution. However, invalidating that portion of the statute concerning grandparents visitation with children of married parents is a violation of equal protection under the 14th Amendment.

D STANDARD OF REVIEW

It is well established that in construing a statute, courts are required to uphold statutes as constitutional if possible.

> It is the fundamental principal that this court has a duty, if reasonably possible, consistent with the protection of constitutional rights, to resolve all doubts as to the validity of the statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with a constitution. Courts are inclined to adopt that reasonable interpretation of a statute which removes it furthest from constitutional infirmity. Tornillo v. Miami Herald Publishing Company, 287 So.2d 78, 85 (Fla. 1973). See Powell v. State, 345 So.2d 724, 725 (Fla. 1977); see also State v. Mayhew, 288 So.2d 243, 250 (Fla. 1974).

It is also this court's duty, when interpreting a statute, to determine the legislative intention and to effectuate such intentions. State v. Aiuppa, 298 So.2d 391 (Fla.1974). In Aiuppa, the court held an obscenity statute to be constitutional. Id. at 398. The court recognized how easy it would be to dispose of many repulsive cases merely by construing the statute more liberally to envelop a definition suggested by the Supreme Court of the United States. Id. at 397. This court however stated that "such a construction would usurp the power of the legislature to enact statutes", a power vested exclusively in our State Constitution. Id. The court found that it's own construction to be congruous with common sense and the legislative intent, and did not wish to "in effect, rewrite (the) statute by incorporation of the definition offered by the Supreme Court of the United States" in that case Id. Such reform is better left to the legislature. Id.

In Felts v. State, 537 So.2d 995, 999-1000 (Fla. 1st DCA 1988), the court held that "...an act of the legislature should not be struck down if there is any reasonable theory on which it can be upheld." The court went further and stated that the presumption of constitutionality continues until the contrary is proven beyond all reasonable doubt. Id. at 1000.

This position has been continuously espoused by the Florida Supreme Court. In State v. Mitchell, 652 So.2d 473, 476 (Fla. 1995), the court stated that "...in assessing a statute's constitutionality, [the court] must resolve 'all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent.'" (citing State v. Stalder, 630 So.2d 1072, 1076 (Fla. 1994). See State v. Globe Communications Corp., 648 So.2d 110, 113 (Fla. 1994). If a statute is open to more than a single construction, one of which would effectuate it and one which would defeat it, the former construction is favored. McKibben v. Mallory, 293 So.2d 48 (Fla. 1974). See Burnsed v. Seaboard Coastline R.R., 290 So.2d 13 (Fla. 1974). Statutes enjoy a strong presumption of validity. Id. at 76. See United States v. National Dairy Products Corp., 372 U.S. 29, 32, 83, S.Ct. 594, L.Ed.2d 561 (1963); see also Pallas v. State, 636 So.2d 1358 (3D DCA 1994).

When applying the foregoing case law to the interpretation of §752.01(1)(e), it is clear that the challenged section of the

statute is constitutional. The statute should be fairly construed to effectuate the legislature's intentions.

CONCLUSION

For the foregoing reasons of fact and law § 752.01(1)(e), Fla.Stat. (1993) should be found to be constitutional under both Article 1, §23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William J. Sheppard, Esquire, 215 Washington Street, Jacksonville, Florida 32202; Stephen H. Donohoe, Esquire, 1817 Atlantic Boulevard, Jacksonville, Florida 32207; Barry S. Sinoff, Esquire, 6960 Bonneval Road, #202, Jacksonville, Florida 32216; and Ross Baer, Esquire, Sue-Ellen Kenny, Esquire, and Jeanine Germanowicz, Esquire, The Legal Aid Society of Palm Beach County, Inc., 423 Fern Street, Suite 200, West Palm Beach, Florida 33401 by U.S. Mail this 13th day of September, 1995.

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