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

PETITIONERS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

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PRELIMINARY STATEMENT

Dewey Keith Beagle and Melissa Darlene Beagle will be referred to as "petitioners" or "parents." Roy Thomas Beagle and Sharron Whitman Beagle will be referred to as "respondents" or "grandparents." References to the record will be designated "R.," followed by the appropriate page(s) set out in brackets. For example, [R. 1].

STATEMENT OF THE FACTS AND CASE

The petitioners, Dewey Keith Beagle and Melissa Darlene Beagle, are the natural parents of Amber Beagle. The respondents, Roy Thomas Beagle and Sharron Whitman Beagle, are the paternal grandparents of Amber Beagle.

The grandparents filed a Petition to Establish Grandparent Visitation Rights on August 5, 1993, pursuant to §752.01(1)(e), Fla. Stat. (1993), alleging that the parents had prohibited them from having a relationship with the child. [R. 2-4]. On June 28, 1993, the grandparents filed a Motion for Temporary Visitation. [R. 7-9]. The parents filed a Motion to Dismiss the Motion for Temporary Visitation on July 6, 1993. [R. 10]. The parents also filed a Motion to Dismiss the Petition to Establish Grandparent Visitation Rights. [R. 12].

On July 30, 1993, the Fourth Judicial Circuit Court in and for Clay County (herein referred to as the "trial court") entered a temporary order granting grandparent visitation. [R. 18-20]. On November 19, 1993, an Order Granting Motion to Strike and Notice to Set Final Hearing was granted by the trial court. [R. 32]. The parties submitted memoranda of law as to the Motion to Dismiss Petition to Establish Grandparent Visitation Rights. [R. 33-46].

The trial court, on December 30, 1993, entered its Order granting the parents' Motion to Dismiss, holding that §752.01(1)(e), Fla. Stat. (1993), is unconstitutional because it violates the parents' right of privacy provided under Article I,

Section 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. [R. 48-57].

On January 28, 1995, the grandparents filed a Notice of Appeal in the First District Court of Appeal from the trial court's decision. Following appellate briefs, the First District on May 16, 1995, entered its Opinion reversing the trial court's order and certifying the following question to the Florida Supreme Court as one of great public importance:

> Is section 752.01(1)(e), Florida Statutes (1993), facially unconstitutional because it constitutes impermissible state interference with parental rights protected by either Article I, Section 23, of the Florida Constitution or the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Beagle v. Beagle, 20 Fla. L. Weekly D1203 (Fla. 1st DCA May 16, 1995).

Thereafter, on June 26, 1995, the parents timely filed its Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court. [Notice to Invoke Discretionary Jurisdiction]. The petitioners' Initial Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

Florida's grandparent visitation statute, §752.01(1)(e), Fla. Stat. (1993), violates Article I, Section 23 of the Florida Constitution. Article I, Section 23 provides greater privacy protection than the United States Constitution. Thus, parents have a fundamental and constitutional privacy right in raising their children without undue state interference. To intrude upon this right, the State must be serving a compelling state interest through the least intrusive means. The compelling state interest must involve the prevention of harm to the child. Since §752.01(1)(e) permits the State to interfere with the parents' constitutional privacy rights without a demonstration of harm to the child, it is unconstitutional. Further, the promotion of litigation, possibly directly involving the child, is not the least intrusive means to any purported state interest.

Section 752.01(1)(e) also violates the Fourteenth Amendment to the United States Constitution. Under the Federal Constitution, parents have a liberty and privacy interest in the care, custody and management of their children. To permit any governmental interference into these rights, there must be a powerful countervailing interest. The United States Supreme Court has interpreted this interest to mean that there must first be a showing of harm to the child as a result of the parents' decision. Accordingly, because §752.01(1)(e) allows the State to intrude upon the parents' rights to raise their children without any

demonstration of harm, it unconstitutionally violates the Fourteenth Amendment.

The First District incorrectly relied upon Sketo v. Brown, 559 So.2d 381 (Fla. 1st DCA 1990), when it improperly found §752.01(1)(e) facially constitutional. Sketo is both factually distinguishable from the instant case and fails to apply the correct constitutional standards. Therefore, the Sketo decision deserves no consideration, or in the alternative, should be rejected to the extent that it applies to §752.01(1)(e), Fla. Stat. (1993).

ARGUMENT

I.

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

A. Section 752.01(1)(e), Fla. Stat., Violates Article I, Section 23 of the Florida Constitution.

Article I, Section 23, of the Florida Constitution states that except as otherwise provided, "Every natural person has a right to be let alone and free from governmental intrusion into his private life...." This Court, in Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 546 (Fla. 1985), provided a concise background of the significance of the right of privacy of Floridians:

> The concept of privacy or right to be let alone is deeply rooted in our heritage and is founded upon historical notions and federal constitutional expressions of ordered liberty. Justice Brandeis, sometimes called the father of the idea of privacy, recognized this fundamental right of privacy when he wrote:
>
> > The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. Olmstead v. United States, 277 U.S.

> 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).
>
> The United States Supreme Court has fashioned a right of privacy which protects the decision-making or autonomy zone of privacy interests of the individual. The Court's decisions include matters concerning marriage, procreation, contraception, family relationships and child rearing, and education.

(emphasis added). Historically, this Court has acknowledged and affirmed parents' protected rights in the care, custody and management of their children. See, infra, Subsection B. However, with the enactment of Article I, Section 23, Florida has increased that protection:

> 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.
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> * * *
>
> We believe that the amendment should be interpreted in accordance with the intent of its drafters.

Winfield, supra, at 548; see Mozo v. State, 632 So.2d 623 (Fla. 1994); In re T.W., 551 So.2d 1186 (Fla. 1989) (Art. I, §23 provides for more protection from governmental intrusion into one's right of privacy than the United States Constitution).

Accordingly, it is indisputable that this Court has recognized that parents have a fundamental and constitutional right to raise their children without state interference as protected and bolstered by the right of privacy. In re Dubreuil, 629 So.2d 819 (Fla. 1993). "We recognize that a constitutionally protected interest exists in preserving the family unit and in raising one's children." In the Interest of E.H., 609 So.2d 1289, 1290 (Fla. 1992). "[T]his Court and others have recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism." Padgett v. Dept. of Health & Rehabilitative Services, 577 So.2d 565, 570 (Fla. 1991). Family matters such as child rearing and education are privacy rights "which are fundamental or implicit in the concept of ordered liberty." Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 76 (Fla. 1983). "[T]here is a constitutionally protected interest in preserving the family unit and in raising one's children." In the Interest of D.B. & D.S., 385 So.2d 83, 90 (Fla. 1980). "[W]e nevertheless cannot lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring." State ex rel. Sparks v. Reeves, 97 So.2d 18, 20 (Fla. 1957). "[A] parent has a

natural right to enjoy the custody, fellowship and companionship of his offspring." In re Guardianship of D.A. McW., 429 So.2d 699, 702 (Fla. 4th DCA 1983), approved, 460 So.2d 368 (Fla. 1984). "In our society the family unit is swathed in the protection of the constitution, and any substantial interference directly affecting the family must be supported by countervailing and superior interests." Franklin v. White Egret Condominium, Inc., 358 So.2d 1084, 1090 (Fla. 4th DCA 1978), aff'd., 379 So.2d 346 (Fla. 1980). "The right of the parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization." Foster v. Sharpe, 114 So.2d 373, 376 (Fla. 3d DCA 1959). The State of Florida has "recognized the superior rights of the parents to custody and control of their children." In re: Williamson, 3 Fla. L. Weekly Supp. 272, 273 (Fla. 6th Cir. Ct. 1995). Thus, §752.01(1)(e), Fla. Stat. is clearly an intrusion into the constitutionally protected rights of the parents.

Even the Florida House Judiciary Committee realized this would likely be the case when it considered the amendment to add subsection (e) to §752.01(1). Its Final Analysis noted "[t]his bill would create the first opportunity of court-ordered grandparent visitation involving an intact family and may implicate the right of privacy protected by Article I, s. 23, Florida Constitution, and by a series of U.S. Supreme Court cases." Paragraph V, Final Bill Analysis by the House of Representatives Committee on Judiciary on Bill CS/HB 1685, dated April 16, 1993 (emphasis added).

To combat such undue interference, this Court has established a strong standard of review in determining whether there has been a violation of one's privacy right under Article I, Section 23, as follows:

> Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. 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, supra, at 547 (emphasis added). This Court has stressed the difficulty of the State in overcoming this burden:

> We reaffirm, however, that this is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases cited above has survived.

T.W., supra, at 1192 (emphasis added). "To be sure, this standard is the most exacting applied on review by the judiciary."[1] Mozo, supra, at 633.

This Court has explicitly stated:

> [T]he concept of privacy encompasses much more than the right to control the disclosure of

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[1] It has been stated that "[t]he compelling state interest or strict scrutiny standard imposes a heavy burden of justification upon the state to show an important societal need...." Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 74 (Fla. 1984). However, the desire to promote relationships between grandparents and grandchildren over intact parental objection simply does not rise to the level of "societal need" necessary to justify the violation of the right of privacy of parenting.

> information about oneself. "Privacy" has been used interchangeably with the common understanding of the notion of "liberty," and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest.

In re Guardianship of Browning, 568 So.2d 4, 9-10 (Fla. 1990).

Accordingly, it is axiomatic that since the parents' authority to raise their children is a basic, fundamental right, it cannot be usurped or impinged by the government except when doing so serves a compelling state interest and accomplishes its goals with the least intrusive means. B.B. v. State, 20 Fla. L. Weekly S306, 307 (Fla. June 29, 1995); Winfield, supra, at 547 (Fla. 1985); D.A. McW., supra, at 702; see, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Rowe v. Wade, 410 U.S. 113, 155 (1973). In addition, this Court has held that when there is a dispute between a natural parent and a third party, such as a grandparent, the test must also include consideration of the natural parents' right to enjoy the custody, fellowship and companionship of the child. D.A. McW., supra, at 702; see Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy,", 18 Fla. State U. L. Rev. 533, 551 (1991) ("[W]hen the dispute is between a parent and a non-parent, the court must do more than simply decide in which situation the child will be better off.").

In recognizing the importance of parental rights, this Court has clearly established that a "compelling state interest" is one which involves the prevention of harm to the child, whether by abuse, neglect or abandonment. E.H., supra at 1290; Padgett, supra at 570. Therefore, there must be a demonstration of harm to the

child caused by the parents before the State can interfere into the fundamental right of privacy of the parents. In other words, there must also be an actual threat to the child's physical, emotional or mental well-being prior to the State intruding into the parents' fundamental right. Padgett, supra, at 570 (compelling interest justifying state interference in dependency contacts protects children "against the clear threat of abuse, neglect and death"). Absent such a demonstration of substantial harm, as in the instant case, the parents' constitutional authority would be usurped in violation of Art. I, §23 of the Florida Constitution.

> [W]ithout a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the best interest of the child when an intact, nuclear family, with fit, married parents is involved.

Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993). Thus, §752.01(1)(e) is unconstitutional because it fails to require a demonstration of harm to the child prior to unduly intruding upon the parents' constitutional privacy rights.

In addition to the fact that there must be a compelling state interest, the challenged statute must also be the least intrusive means of furthering that state interest. Even if one were to argue that there was a compelling state interest being served by granting grandparent visitation over the objection of the parents, the resulting effect of promoting litigation between family members, bringing the intrafamily problems to court and possibly subjecting minor children to judicial inquiry is not the "least intrusive" means of furthering the state interest.

In light of the consistent recognition this Court has given to parental rights, it is proper for parents to expect privacy regarding their decisions as to with whom their children can and cannot visit, even if it regards visitation with grandparents. Besides, "[u]nder this view, any margin of error with regard to the interpretation of the right of privacy in Florida should be in favor of the individual." Mozo, supra at 634.

In Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993), the Tennessee Supreme Court held that the Tennessee Grandparents' Visitation Act violated the state constitutional right to privacy in parenting decisions. Just as in Florida, Tennessee's statute provided for court-ordered grandparent visitation upon a showing of the "best interests of the child." Although Tennessee's state Constitution does not contain a specific section granting the right to privacy as does the Florida Constitution, the Tennessee Supreme Court has expressly found that the right to privacy "is nevertheless reflected in several sections of the Tennessee Declaration of Rights...." Id. at 579, quoting, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). The Hawk court concluded "that the same right to privacy espoused in Davis fully protects the right of parents to care for their children without unwarranted state intervention." Hawk, supra, at 579.

As in the instant case, the grandparents in Hawk directly challenged the privacy rights of the parents by seeking court-ordered visitation, arguing that grandparent visitation is in the

best interest of the child. However, the Hawk court specifically held:

> We find, however, that without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the "best interest of the child" when an intact, nuclear family with fit, married parents is involved.

Id. In reaching this holding, the Court reasoned:

> By holding that an initial showing of harm to a child is necessary before the State may intervene to determine the "best interests of the child," we approve the reasoning of both Tennessee and federal cases that have balanced various state interests against parental privacy rights. 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.
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> * * *
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> The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.
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> * * *
>
> We, too, agree that neither the legislature nor a court may properly intervene in parenting decisions absent significant harm to the child from those decisions. In so holding, we approve the logic of Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), which applied a two-step process to child neglect cases leading to foster family placement.... An approach requiring a court to make an initial finding of harm to the child before evaluating the "best interests of the child" works equally well in this case to prevent judicial second-guessing of parental decisions. As one scholar has written:
>
> > If the courts attempt to resolve these disputes when the only thing at stake is a grandparent's argument

> that visitation is a "better" decision for the child, the placement of the child with the parent becomes subject to the court's supervision and judgment of what are the best decisions for that child.

Id. at 580-81.

The Hawk court properly rejected the argument that the grandparent-grandchild relationships always benefit children, because it "overlooks the necessity of a threshold finding of harm before the State can intervene in the parent-child relationship." Id. at 581 (emphasis added). The Hawk court concluded its decision by stating:

> We hold that Article I, Section 8 of the Tennessee Constitution protects the privacy interest of these parents in their child-rearing decisions, so long as their decisions do not substantially endanger the welfare of their children. Absent some harm to the child, we find that the State lacks a sufficiently compelling justification for interfering with this fundamental right. When applied to married parents who have maintained continuous custody of their children and have acted as fit parents, we conclude that court interference pursuant to T.C.A. §36-6-301 constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution. We therefore reverse both the judgment of the trial court and that of the Court of Appeals granting visitation in this case.

Id. at 582.

The Hawk case is directly analogous and persuasive to the instant case. This Court should apply the same reasoning to find §752.01(1)(e), Fla. Stat. (1993), unconstitutional under the more explicit privacy provision of the Florida Constitution.

B. Section 752.01(1)(e), Fla. Stat., Violates the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court, as this Court, has also recognized parents' protected rights in the care, custody and management of their children without undue governmental interference. In fact, the "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 753 (1982); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Fourteenth Amendment liberty interest includes freedom "to bring up children."); see Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984) (parents' right to child rearing deserves "a substantial measure of sanctuary from unjustified interference by the State"); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (parents' right to conceive and raise their children has been deemed essential); Ginsburg v. New York, 390 U.S. 629, 639 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (the custody, care and nurture of the child reside first in the parents); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parents have liberty interests to direct the upbringing and education of their children).

Even beyond this liberty interest, as previously noted, this Court acknowledges that "the United States Supreme Court has recognized a privacy right that 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); see Mozo v. State, 632 So.2d 623 (Fla. 1994); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). Thus, parental rights are protected under the Federal Constitution as both liberty rights and as privacy rights.

Section 752.01(1)(e), Fla. Stat. (1993), violates both these protected rights under the U.S. Constitution. The Florida grandparent visitation statute infringes upon the parents' liberty rights to make decisions as to the raising of their children and likewise intrudes upon their privacy in making such decisions.

The effect of §752.01(1)(e) is to interfere with parental rights regarding the custody, care and management of their children. There must be a powerful countervailing interest to permit such interference. Santosky, supra, at 607. Indeed, the U.S. Supreme Court has interpreted this to mean that there must first be a showing of harm to the child. Id.; Stanley, supra; see, e.g., Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (the children of Amish parents were not harmed when they received an Amish education as opposed to a public education); Pierce, supra, at 403 (parents' decision that child be proficient in foreign language was determined not to be injurious to health, morals or understanding of child). Therefore, because §752.01(1)(e) allows the government to intrude upon the parents' fundamental rights without any requisite demonstration of harm to the child, it violates the Fourteenth Amendment to the United States Constitution.

The Georgia Supreme Court has persuasively addressed the same issue. In Brooks v. Parkerson, 454 S.E.2d 769, 770 (Ga. 1995), the child's maternal grandmother petitioned for visitation under Georgia statute OCGA §19-7-3. This petition was opposed by the child's parents who subsequently filed a motion to dismiss on the grounds that the statute was unconstitutional on its face. OCGA §19-7-3 allows the court to "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." Id. at 771. The court properly held that the grandparent visitation statute failed to require a showing of harm to the child prior to ordering visitation, and thus unconstitutional. In reaching its ruling, the court recognized well-established law that parents have an interest to raise their children without unreasonable state interference protected by the United States Constitution. Id. Relying on U.S. Supreme Court precedent, the court explained that "state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child." Id. at 772. It reasoned that even if a special bond exists between the child and grandparent which would benefit the child, the impact of a lawsuit to enforce maintenance of that bond over the parents' objection could only have a deleterious effect on the child. Id. at 773. Further, the court appropriately rejected the irrelevant argument that it might be

"better" or "desirable" for a child to maintain contact with a grandparent since the Constitution requires the focus to be whether the parents' decision is harmful to the child. Id.

Similarly, in the instant case, §752.01(1)(e), Fla. Stat. (1993), allows the court to award grandparent visitation if in the best interests of the child even when one or both parents have prohibited the relationship between the child and grandparents. However, identical to the statute in Brooks, the statute in the instant case lacks the constitutional requirement that there be a showing of harm to the child's health or welfare reflecting from the parents' decision. Accordingly, for the exact reason the statue in Brooks was struck down as unconstitutional, the statute in the instant case should also be struck down. Otherwise, the statute, in contravention of the United States Constitution and a long line of U.S. Supreme Court precedent, will have the substantial and injurious effect of depriving parents of their fundamental rights to raise their children.

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

Relying solely on a strict application of Sketo v. Brown, 559 So.2d 381 (Fla. 1st DCA 1990), the First District improperly held that §752.01(1)(e), Fla. Stat., was constitutional on its face. By doing so, the district court inappropriately disapproved of the parents' right of privacy in family relationships and child rearing.

In Sketo, the trial court found it to be "in the best interest of the minor child" to award grandparent visitation with the child where one or both of the child's parents were deceased. Sketo, supra, at 382. On appeal, the mother in Sketo argued that the statute was unconstitutional on its face as a violation of Article I, Section 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. Id. The district court found the statute constitutional by the following reasoning:

> We find nothing in those cases, however, that would preclude the state from passing a statute providing for reasonable visitation by a grandparent with the grandchildren upon the finding that such visitation is in the children's best interest. 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 best interest. Since that is all the challenged statute purports to do, it is not facially unconstitutional.

Id. at 382. However, this reasoning, which ignores the question presented in the instant case, is contrary to the decisions of this Court and the United States Supreme Court and must be rejected here. In Sketo, the district court reached the unsupported conclusion that there was a compelling state interest to provide for grandparent visitation. Yet, the mere conclusion that the State has a compelling interest does not justify any intrusion into parental privacy and authority. Michael J. Minerva, Jr., Grandparent Visitation: Parental Privacy Right to Raise Their "Bundle of Joy", 18 Fla. St. U. L. Rev. 533, 551 (1991).

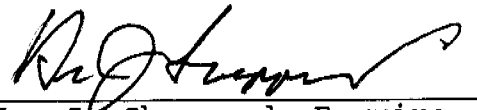
Indeed, Judge Webster in his specially concurring opinion to the decision below recommended that the court recede from Sketo. Beagle v. Beagle, 20 Fla. L. Weekly D1203 (Fla. 1st DCA May 16, 1995). He appropriately found that the Sketo decision begged the question in the instant case, rather than answered it. The Sketo court did not address the "harm to the child" requirement necessary to find a compelling state interest. Moreover, the Sketo court failed to apply the second prong of the strict scrutiny test, i.e., that the regulation "accomplishes its goal through the use of the least intrusive means." Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985).

In addition, the instant case is factually distinguishable from Sketo. Sketo involved the question of court-ordered grandparent visitation when one of the child's parents was deceased. In the instant case, this Court is confronted with the issue of whether the rights of intact, married parents are intruded upon through court-ordered grandparent visitation pursuant to §752.01(1)(e). Subsection (e) was not even a part of §752.01(1) when Sketo was rendered. Accordingly, the court below reads the Sketo decision too broadly. Sketo should be rejected to the extent that it applies to the instant case because it is factually distinguishable and fails to apply the proper standards under the Florida and United States Constitutions.

CONCLUSION

For the foregoing reasons, §752.01(1)(e), Fla. Stat. (1993), should be held unconstitutional as violating Art. I, § 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Barry S. Sinoff, Esquire,** 6960 Bonneval Road, Suite 202, Jacksonville, Florida 32216-6076; and to **Nancy Nowlis, Esquire** and **Tracy Tyson, Esquire,** 1200 Riverplace Boulevard, Suite 630, Jacksonville, Florida 32207, by mail, this 24th day of July, 1995.

ATTORNEY

lh.0108

IN THE SUPREME COURT
OF FLORIDA

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DEWEY KEITH BEAGLE and
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 94-337

ROY THOMAS BEAGLE and SHARRON WHITMAN BEAGLE,

Appellants,

v.

DEWEY KEITH BEAGLE and MELISSA DARLENE BEAGLE,

Appellees.

_____/

CORRECTED COPY

Opinion filed May 16, 1995.

An appeal from the ~~Duval~~ Clay County Circuit Court, L. Haldane Taylor, Judge.

Nancy N. Nowlis and Tracy Tyson, Jacksonville, for Appellants.

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MINER, J.

In this grandparent visitation case, Roy and Sharron Beagle, the paternal grandparents of a minor child, Amber Beagle, (grandparents) seek review of the trial court's order finding section 752.01(1)(e) to be facially unconstitutional because it violates the privacy rights of Dewey and Melissa Beagle, Amber's parents, (parents) guaranteed by Article I, Section 23 of the Florida

Constitution. The parents also contend that their federal constitutional rights are implicated as well. Because we conclude that the statutory section in question is not facially unconstitutional under either the state or federal constitutions, we reverse and remand for a hearing to determine whether grandparent visitation is in Amber's best interest under the facts of the case.

In 1978, the Florida legislature enacted the first statutory provision related to grandparent visitation with minor grandchildren. Section 61.13(2)(b) Florida Statutes (Supp.1978) authorized courts in dissolution proceedings to award such visitation if deemed to be in the child's best interest. However, under this section, grandparents had no standing to intervene in such proceedings to petition for visitation. During that same year, the legislature gave courts "competent to decide child custody matters" jurisdiction to award grandparent - grandchild visitation upon proper petition where one or both of the minor's parents were deceased. Again, the best interest of the minor child was the determining factor in any award of visitation. See § 68.08, Fla. Stat. (Supp. 1978).

In 1984, the legislature repealed section 68.08, Florida Statutes and enacted Chapter 752 entitled: "Grandparent Visitation Rights" which involved a more comprehensive treatment of the issue. If in the minor's best interest, grandparents could now petition for visitation in the event of death, divorce or desertion---death

of either of the minor's parents, divorce of the minor's parents or desertion by either parent. Additionally, a grandparent petition for visitation was disallowed if the grandchild was placed for adoption unless the adopting person was a stepparent.

In 1990, section 6 of Ch. 90-273, Laws of Florida, added subsection (2) to section 752.01 which subsection set forth certain criteria which the court was required to consider in determining whether grandparent visitation would be in the "best interest of the minor child". Additionally, in that same year, the legislature adopted section 752.015, Florida Statutes requiring mediation in the event that families were unable to resolve differences related to grandparent visitation once a petition seeking such visitation was filed.

In Ch. 93-279, Laws of Florida, effective May 15, 1993, the legislature again amended section 752.01 to provide that upon a finding that such would be in the best interest of the minor child, the court, upon the filing of a proper petition, should grant grandparent visitation in those instances where 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. (Codified as section 752.01(1)(e), Florida Statutes).

It is the 1993 amendment to section 752.01 that is the subject of

the instant appeal.

Amber's parents (appellees) contended below and urge on appeal that this provision, which they argue grants per se visitation rights to grandparents, violates Article I, Section 23 (the so-called right of privacy amendment) in that there is no compelling state interest in granting even temporary visitation rights to grandparents of a child in an intact, nuclear family which would justify state interference into the privacy rights of parents in the absence of proof of substantial harm which threatens the welfare of a grandchild.

For their part, Amber's paternal grandparents (appellants) note that while grandparent visitation was unknown at common law, all 50 states now have some form of legislation on the subject. Twenty-two states, including Florida, permit grandparent visitation in intact families. They argue that there exists a special bond between grandparents and grandchildren and that, in striking the statute at issue as facially unconstitutional, the trial court considered only the privacy rights of married parents, ignoring the rights of single parents, children and grandparents. They find no basis in Florida law or logic for assuming that single parents somehow do not measure up to married parents in terms of the quality of their parenting. Finally, the grandparents assert that the part of section 752.01 challenged here does nothing more than expand the rights of children in intact families and place them on a par with children in non-intact families and, further, that taken

as a whole, section 752.01 gives all parents across-the-board fair treatment regarding appropriateness of grandparent visitation and invades the privacy rights of parents in the least intrusive manner.

This court has previously had occasion to consider the facial constitutionality of another portion of the contested statute. In Sketo v. Brown, 559 So. 2d 381 (Fla. 1st DCA 1990), Mrs. Brown, the paternal grandmother, sought visitation with her two grandchildren, the issue of the marriage of her deceased son, Ben, and Mrs. Sketo. For whatever reason or reasons, the relationship between Mrs. Brown and Mrs. Sketo progressively deteriorated and, in time, Mrs. Brown, under section 752.01(1)(a) petitioned for visitation. The trial court granted a rather extensive visitation schedule[1] and Mrs. Sketo appealed. Among other points raised on appeal, she contended that section 752.01(1)(a) was facially unconstitutional because it violated her privacy rights under Article I, Section 23 of the Florida Constitution. In rejecting this argument, the court held:

> We find nothing...that would preclude the state from passing a statute providing for reasonable visitation by a grandparent with the grandchildren upon the finding that such visitation is in the children's best interest. The state has a sufficiently compelling

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[1]Although the court held the challenged portion of section 752.01 facially constitutional, the case was reversed upon a finding that the trial court abused its discretion in awarding overly extensive visitation.

> 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 best interest. Since that is all the challenged statute purports to do, it is not facially unconstitutional.

Procedurally, in the case at hand, pursuant to Section 752.01(1)(e), the grandparents filed a petition seeking visitation with Amber. Appellees filed a motion to dismiss the petition, which petition was subsequently dismissed upon a finding that the statutory provision under which the petition was filed unconstitutionally violated the parents right of privacy. The order of dismissal concluded:

> This Court finds that when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental and natural rights of parents to raise their children as they see fit. Therefore, without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notion of the "best interests of the child" when an intact, nuclear family with fit parents is involved. Since subsection (e) of Florida Statute 752.01 does not provide for a finding of substantial danger of harm to the child in order for the state to intervene in an intact nuclear family with fit parents, this court finds subsection (e) of Florida Statutes 752.01 unconstitutional. Per se right to visitation by grandparents violates the parents' right to privacy under the Florida Constitution.

We first observe that the statutory subsection in question does <u>not</u> establish a <u>per se</u> right of visitation between

grandparents and grandchildren. It only permits a grandparent to petition for visitation which may be denied should the court conclude that visitation would not be in the minor grandchild's best interest. Mandatory criteria which the trial court must consider in making this determination are included as is mandatory mediation upon the filing of a visitation petition if parents and grandparents are at odds regarding visitation. These latter features make the statutory subsection in question different than the Tennessee statute which was interpreted in Hawk v. Hawk, 855 S.W. 2d 573 (Tenn. 1993), and which case is cited in support of the trial court's order below.

Reduced to its essence, the parents' primary argument which was adopted by the court below is that, to comport with Article I, Section 23 of the Florida Constitution, an order granting grandchild-grandparent visitation over the objection of parents who are married to each other and living together must contain a finding that the minor child would be substantially harmed if visitation was not awarded (emphasis supplied). Presumably, the petitioning grandparents would bear the burden of proving this negative. We cannot agree. We construe the statute to require only that, before visitation can be ordered over parental objection, grandparents seeking visitation (1) must allege and establish that "either or both" parents have used their parental authority to prohibit a relationship between the child or children involved and themselves and (2) that visitation is in the best interest of the

child or children. Moreover, since the parents challenge only the facial constitutional validity of Section 752.01(1)(e) in this appeal, we do not address the hypothetical case in which it is urged that this statutory subsection is unconstitutional as applied.

Having previously determined in Sketo, supra at p.382 that section 752.01 is not facially unconstitutional in providing for grandparent visitation where death has intruded upon the family unit, it remains for us to decide whether the subsequent addition of subsection (1)(e) renders section 752.01 constitutionally infirm. The trial court sought to distinguish Sketo from the case at bar because, in Sketo the natural father was deceased and in the case at hand there was an intact family. From this allusion, we glean that the court below indulged the presumption that an intact family was deserving of more constitutional consideration and deference from the state than was a family unit visited by death. We presume that such reasoning would apply with equal force to family units rent by divorce or desertion. However, the trial court does not offer and we do not find any support for this proposition. Because appellees rely almost wholly on the trial court's order as authority for the position they take in this regard, we assume that they are equally hard pressed to find case support for their argument.

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, 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. Article I, 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 lesser parent because he or she belongs to the family unit defined by a loving father and mother or father or mother. Accordingly, we now extend the Sketo holding to grandparent visitation as contemplated by section 752.01(1)(e). However, in view of the disparate views expressed in the majority and specially concurring opinions, we certify the following question to the Florida Supreme Court as one of great public importance:

> IS SECTION 752.01(1)(e), FLORIDA STATUTES (1993), FACIALLY UNCONSTITUTIONAL BECAUSE IT CONSTITUTES IMPERMISSIBLE STATE INTERFERENCE WITH PARENTAL RIGHTS PROTECTED BY EITHER ARTICLE I, SECTION 23, OF THE FLORIDA CONSTITUTION OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

REVERSED and REMANDED for further consistent proceedings.

BENTON, J., CONCURS; WEBSTER, J., SPECIALLY CONCURS WITH WRITTEN OPINION.

WEBSTER, J., specially concurring.

I agree with the majority that no logical and legally sustainable basis exists for distinguishing this case from our prior decision in Sketo v. Brown, 559 So. 2d 381 (Fla. 1st DCA 1990). Accordingly, I find myself obliged to recognize the precedential effect of that decision, and to concur in the result reached by the majority. However, I believe 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.

Sketo involved a challenge to section 752.01(1)(a), Florida Statutes (1987), which permitted a court to award grandparent visitation with a child when it was found to be "in the best interest of the minor child" to do so and "[o]ne or both parents of the child [were] deceased." Ms. Sketo, the mother, argued that, on its face and as applied to her status as a widowed single parent, the statute violated both article I, section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. The court addressed only the argument that the statute was unconstitutional on its face, concluding that it was not. After listing the numerous cases (both state and federal) relied upon by Ms. Sketo in support of her argument, the court rationalized its holding as follows:

> We find nothing in those cases, however, that would preclude the state from passing a statute providing for reasonable visitation by a grandparent with the grandchildren upon the finding that such visitation is in the children's best interest. 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. Since that is all the challenged statute purports to do, it is not facially unconstitutional.

559 So. 2d at 382. While it seems to me that this begs, rather than answers, the question posed in Sketo, I am unable to say that such reasoning need not, necessarily, lead to the same result when the statute at issue here is considered. Therefore, I find myself constrained to concur. However, for the reasons which follow, I believe that Sketo was incorrectly decided, and that we should recede from it to the extent that it requires the result reached by the majority.

Article I, section 23, of the Florida Constitution mandates that, "except as otherwise provided" by that document, "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life." Our supreme court has held that this "right of privacy is a fundamental right" which "is much broader in scope than that of the Federal Constitution." Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547, 548 (Fla. 1985). It has said, further, that:

> [T]he concept of privacy encompasses much more than the right to control the disclosure of information about oneself. "Privacy" has been used interchangeably with the common understanding of the notion of "liberty," and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest.

In re Guardianship of Browning, 568 So. 2d 4, 9-10 (Fla. 1990). This right of privacy has been implicitly recognized as extending to decisions involving family relationships and the raising and education of children. In re T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989).

Even before the adoption of article I, section 23, the courts of this state had recognized the fundamental nature of the right of parents to raise their children unfettered by governmental interference, except for the most compelling of reasons. E.g., In the Interest of D.B., 385 So. 2d 83, 90 (Fla. 1980) (acknowledging existence of "fundamental" "constitutionally protected interest in preserving the family unit and raising one's children"); State v. Reeves, 97 So. 2d 18, 20 (Fla. 1957) (acknowledging "basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring"); Franklin v. White Egret Condominium, Inc., 358 So. 2d 1084, 1090 (Fla. 4th DCA 1978) (acknowledging that, "[i]n our society the family unit is swathed in the protection of the Constitution, and any substantial interference directly affecting the family must be supported by a countervailing and superior interest"), aff'd, 379

So. 2d 346 (Fla. 1979). Thus, in Foster v. Sharpe, 114 So. 2d 373, 376 (Fla. 3d DCA 1959), the court said:

> The right of the parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization. The emphasis upon the importance of the home unit in which children are brought up by their natural parents is one of the great humanizations of western civilization as contrasted with the ideologies of some nations where family life is not accorded primary consideration.

See also In the Interest of E.H., 609 So. 2d 1289, 1290 (Fla. 1992) (acknowledging that "constitutionally protected interest exists in preserving the family unit and in raising one's children"); Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565, 570 (Fla. 1991) (acknowledging "longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism"); In re Guardianship of D.A. McW., 429 So. 2d 699, 702 (Fla. 4th DCA 1983) (acknowledging that, under Florida law, "a parent has a natural right to enjoy the custody, fellowship and companionship of his offspring"), approved, 460 So. 2d 368 (Fla. 1984).

Because of their fundamental nature, before the state will be permitted to impinge upon any of the rights contained in the bundle protected by article I, section 23, it must establish "that the challenged regulation serves a compelling state interest and

accomplishes its goal through the use of the least intrusive means." Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985). 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. It seems to me, further, that such interference with the basic right of 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.

The proposition that there must be a real threat to a child's physical, emotional or mental well-being before the state may interfere with parental decision-making is not new in this state. See, e.g., Padgett v. Department of Health and Rehabilitative Services, 577 So. 2d 565, 570 (Fla. 1991) ("compelling interest" justifying state interference in dependency context is protecting children "against the clear threat of abuse, neglect and death"). Given the fact that the nature of the interference is not different in kind pursuant to the statute at issue here from that involved in the dependency context, I fail to see why a lesser showing should

be permitted to satisfy the requirement of a "compelling state interest" with regard to the former than is required for the latter.

Appellants concede that the statute in question "infringes upon a parent's right to privacy." However, they argue that such intrusion "is minimal," when weighed against "the children's right to know their grandparent, and the grandparent's interest in knowing their [sic] offspring." In light of the fundamental nature of the parental rights that are implicated, and of the requirement that a "compelling state interest" be offered to support such an intrusion, I find this argument unpersuasive. To argue that the interference with the parents' rights "is minimal" in such circumstances is to trivialize the importance of the parents' role in molding the character of their children. Clearly, deciding what associations a child will be permitted to have, and what relationships are to be encouraged or discouraged, is an important part of child-raising. While most would probably agree that, generally, it is beneficial for a child to have contact with his or her grandparents, I fail to see why that means that, absent evidence of a concrete threat to a child's physical, emotional or mental well-being justifying state intervention, the parents should not be the ones to make that decision. If the state can trump the parents' wishes in cases where grandparent visitation is at issue, why can it not also do so when aunts or uncles, cousins, former stepparents, or anyone claiming to have a special bond with the

child, seeks similar visitation? If a "compelling state interest" sufficient to justify state interference requiring objecting parents to permit visitation between a child and grandparents can be found whenever a given court concludes that "it is in the best interest of the minor child," why would such a finding not also be sufficient to justify state interference whenever it appeared that a child's life would be improved by placement with a more attentive, loving or affluent couple?

Like the Florida courts, the United States Supreme Court has frequently recognized the fundamental nature of the right of parents to raise their children unfettered by governmental interference, except for the most compelling of reasons. Most often this right has been recognized as subsumed within the concept of "liberty" which is protected by the Due Process Clause of the Fourteenth Amendment. Thus, concluding that parents have a constitutionally protected interest in engaging a teacher to instruct their children in the German language, the Court said that the right of parents to raise their children as they see fit, without unreasonable governmental interference, is one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" and, therefore, is subsumed within the concept of "liberty," as that word is used in the Fourteenth Amendment Due Process Clause. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). Similarly, the Court affirmed lower court rulings enjoining

enforcement of a state statute requiring that children attend public, rather than private school, concluding that the statute "unreasonably interfere[d] with 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, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).

Perhaps the most forceful expression of the importance attributed to the right of parents to raise their children free from state interference is found in Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). There, the Court said:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her 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).
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> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S.

> 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S. at 541, 62 S.Ct. at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

See also Roberts v. United States Jaycees, 468 U.S. 609, 618-20, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (child-raising entitled to "a substantial measure of sanctuary from unjustified interference by the State"); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ("natural parents" enjoy a "fundamental liberty interest . . . in the care, custody, and management of their child"); Ginsberg v. New York, 390 U.S. 629, 639, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) ("the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society").

When government attempts to impose intrusive regulations upon the family, the usual judicial deference accorded to legislative enactments is inappropriate. Instead, such legislation will be subjected to a strict scrutiny test. E.g., Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977). Under strict scrutiny review, such a statutory intrusion "may be justified only by a 'compelling state interest,' . . . and th[e] legislative enactment[] must be narrowly drawn to express only the

legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Thus, the analysis to be employed to determine the federal constitutionality of the statute in question is essentially the same as that used to determine the statute's constitutionality pursuant to article I, section 23, of the Florida Constitution. That analysis should, I submit, result in the conclusion that the statute violates the Due Process Clause of the Fourteenth Amendment, as well as article I, section 23, of the Florida Constitution.

Some years ago, in Kersey v. State, 124 So. 2d 726, 730 (Fla. 1st DCA 1960), this court said:

> Particularly should it be true in this age of creeping paternalism at all levels of government in this country that individuals may confidently look to the courts to fulfill their historic role of guardians of the rights and liberties of the people, one of which rights is to rear, train, care for, and enjoy the companionship of their children, without the threat of unreasonable interference of governmental authority.

It may be true that the decision to uphold the statute at issue is but the first step, and a small one at that, down the path toward the emasculation of the fundamental right of parents to raise their children as they see fit, free from governmental interference, absent evidence of a concrete threat to the physical, emotional or mental well-being of the child. However, it is a step in the opposite direction from that in which the courts of this state are traveling when called upon to decide the constitutionality of state

interference with other rights contained in the bundle protected by article I, section 23. It is a step that I would not take. Instead, I would hold that, on its face, section 752.01(1)(e), Florida Statutes (1993), violates both the Florida and the United States Constitutions; affirm the trial court's order to that effect; and recede from our prior decision in Sketo v. Brown to the extent that it can be read to require a different result.