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' REPLY BRIEF

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ARGUMENT

I.

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

A. Subsection 752.01(1)(e), Florida Statutes, violates Article I, Section 23, of the Florida Constitution.

The respondents/grandparents erroneously argue that subsection 752.01(1)(e), Florida Statutes, is constitutional despite the subsection's complete absence of any requirement that there be a showing of substantial harm to the child. [Respondents' Answer Brief on the Merits, 8]. In support of its improper contentions, the respondents inappropriately cite M.N. v. Southern Baptist Hospital of Florida, Inc., 648 So.2d 769 (Fla. 1st DCA 1994), for the proposition that the State can override the parents' fundamental liberty interest in the care and upbringing of their children without any showing of detriment or substantial harm. However, this case is dissimilar as to the legal issues presented. Whereas the instant case involves whether grandparents may be able to visit with the child over the objection of the child's two parents, the Southern Baptist case addresses the issue of whether a child should "receive reasonable medical treatment which is necessary for the preservation of life." See Southern Baptist, supra, at 770 (emphasis added). The respondents further mistakenly rely on Southern Baptist for the proposition that there need be no showing of substantial harm prior to overriding the parents' fundamental rights to the care and upbringing of the children.

However, the respondents conveniently overlook the fact that the Court would only override the parents' rights when necessary to preserve the child's life. In other words, the State would not get involved unless the parents' decision would result in substantial harm to the child.

Likewise, in J.V. v. State, 516 So.2d 1133 (Fla. 1st DCA 1987), the State required that the child be given a blood transfusion over the objections of the parents. The Court expressly stated:

> The overriding interest of the state as parens patriae in interfering with the parental custody and control of the child, for the purpose of ensuring that the child is given medical treatment necessary for the protection of his life, is judicially well-recognized.

Id. at 1134. Thus, had the blood transfusion ordered by the State in the J.V. case been in the best interest of the child but not medically necessary, the Court would not have had a compelling reason to interfere. Accordingly, despite the lack of the words "substantial harm" in the Southern Baptist or J.V. decisions, it is beyond dispute that Florida courts will not interfere with the fundamental rights of parents unless the parents' decision will result in substantial harm to the child's health or welfare. As subsection 752.01(1)(e) lacks any such requirement, it is unconstitutional in violation of Article I, Section 23, Florida Constitution.

The respondents similarly cite Schmitt v. State, 597 So.2d 404 (Fla. 1991), for the same incorrect proposition that the parents' fundamental rights in regards to the raising of their children can

be overcome without any showing of harm. In Schmitt, a father took photographs and made video recordings of his nude minor daughter. Id. at 408. This Court stated that the resulting "sexual exploitation of children is a particularly pernicious evil . . ." Id. at 410 (emphasis added). The petitioners will be shocked to learn that sexual exploitation could ever result in anything but substantial harm to the child. Sexual exploitation is evil in and of itself which necessarily entails harm. Accordingly, the grandparents' reliance on Schmitt is misplaced as there was a showing of substantial harm to the child before the State interfered.

The respondents, without any legal support, create what it calls the "best interest continuum," arguing that substantial harm is a subset of best interest. The respondents describe the self-serving continuum with "substantial harm" being at one end and "the best of all things for the child" at the other end. According to the respondents then, substantial harm is either at the minimum or the maximum range of best interest. The respondents' definition is not only confusing and misleading but also incorrect. Assuming that the minimum of "best interest" is substantial harm, that would mean that whenever the Court determined that certain action is in the best interest of the child, there would necessarily be substantial harm to the child if the action was not taken. However, this ignores the possibility that there are two positive alternatives for the child where the Court merely chooses the better alternative.

Similarly, if the substantial harm is at the maximum end of the "best interest continuum," then not every decision made in the best interest of the child will be made to prevent substantial harm. As this Court has previously held, parents' fundamental rights to the care and upbringing of their children can only be interfered with by the State if the parents' decision results in substantial harm to the child. A statutory requirement of showing only "best interest" which does not necessarily reach the level of substantial harm is not sufficient to satisfy constitutional requirements.

The respondents further inappropriately argue that the rights of the child are to be protected, not the rights of the parents. [Respondents' Answer Brief on the Merits, 13]. However, respondents fail to realize that the statute is challenged as it violates the parents/petitioners' fundamental right, pursuant to Article I, Section 23, Florida Constitution, to the care and custody of their child. The respondents, as grandparents, have no standing in this case to present the claims of the child. As the grandparents do not have a fundamental right to visit with the child, it is apparent that they are merely presenting the child's "constitutional rights" to misdirect the focus of this appeal away from the fundamental rights of the parents. Besides, the respondents are unable to cite to any case holding that children have a fundamental right to visit with their grandparents over the objection of their natural parents. Also, allowing grandparents to seek visitation when there is an intact family "would conflict with

the constitutionally protected paramount right of parents to custody, care, and control of their children and consequently with their right to determine with whom their children shall associate." McIntyre v. McIntyre, ___ S.E. 2d ___, 1995 W.L. 540164 (N.C. 1995).

The respondents further improperly attempt to distinguish Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993), on the grounds that it is legally and factually distinguishable. However, the underlying facts of the grandparents' relationship with the child is irrelevant. The issue is whether subsection 752.01(1)(e) is constitutional on its face. Accordingly, any comparison between the underlying facts of the Hawk case and the instant case is completely inappropriate and misleading. [See Respondents' Answer Brief on the Merits, 19-20].

Similarly, the respondents are wrong in their contention that Hawk is legally distinguishable because subsection 752.01(1), unlike the Tennessee statute, requires that factors be considered in determining the best interest of the child. None of the factors require a showing that the parents' decision will substantially harm the child. Accordingly, the respondents' reasons for distinguishing between the Hawk and instant case is simply wrong.

The respondents, despite the strictly legal issue presented, continue to attempt to bring in the facts of the grandparent-child relationship. In their brief, the respondents state that 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." [Respondents' Answer Brief on the Merits, 21]. As this appeal is solely for the determination of the facial validity of subsection 752.01(1)(e), which the respondents conveniently ignore, the facts surrounding the grandparent-child relationship is totally irrelevant. Besides, the respondents offer no support, as there is no support, that they substantially raised the child. Once again, the respondents attempt to misguide this Court away from the real issue.

It is also significant that throughout their brief, the respondents are unable to cite to any Florida cases stating that children have the fundamental right to visit with their grandparents or that grandparents have a fundamental right to visit with the children. However, the law is clear that parents have a fundamental constitutional right to raise their children without state interference in accordance with the right of privacy of Article I, Section 23, Florida Constitution. In re Dubreuil, 629 So.2d 819 (Fla. 1993); In the Interest of E.H., 609 So.2d 1289 (Fla. 1992); Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991); Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983); In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980); State ex rel. Sparks v. Reeves, 97 So.2d 18 (Fla. 1957).

B. Subsection 752.01(1)(e), Florida Statutes, violates the Fourteenth Amendment to the United States Constitution.

The respondents essentially ignore any discussion of the federal liberty and privacy rights of parents. Instead, the

respondents merely contend that the privacy rights protected by the Florida Constitution are more extensive than those of the United States Constitution. According to the respondents, since the Florida privacy rights are not violated, the federal rights are likewise not violated. [Respondents' Answer Brief on the Merits, 23]. However, the respondents, consistent with their previous arguments, overlook an essential point. Subsection 752.01(1)(e), Florida Statutes, violates the right of privacy as guaranteed by Article I, Section 23, Florida Constitution. The subsection also violates the federal rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court, as this Court, has recognized parents' protected right in the care, custody and management of their children without undue governmental interference. "[F]reedom of personal choice in matters of family life and fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Cramer, 455 U.S. 745, 753 (1982); Meyer v. Nebraska, 262 U.S. 390 (1923); see Roberts v. United States Jaycees, 468 U.S. 609 (1984); Stanley v. Illinois, 405 U.S. 645 (1972); Ginsburg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Even beyond this liberty interest, this Court acknowledges that "the United States Supreme Court has recognized the privacy right that chills the individual's autonomy in deciding matters concerning a 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 Parimutuel Wagering, 477 So.2d 544 (Fla. 1985). Parental rights are protected under the federal constitution as both liberty rights and as privacy rights. Subsection 752.01(1)(e), Florida Statutes (1993), violates both these protected rights under the United States 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 subsection 752.01(1)(e) is to interfere with parental rights regarding the custody, care and management of their children. To permit such interference by the State, there must be a powerful countervailing interest. Santosky, supra at 607. Indeed, the United States 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 (1972); Pierce, supra at 403. Therefore, because subsection 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.

In their Answer Brief, the respondents once again attempt to distinguish relevant case law by improperly attacking Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995), petition for cert. filed, 63 U.S.L.W. 3908 (U.S. June 15, 1995). The respondents inappropriately contend that the statute in Georgia, unlike the

Florida statute, provides no guidance to a trial court in determining the best interest of the child. [Respondents' Answer Brief on the Merits, 24]. However, despite this immaterial difference, the Florida grandparent visitation statute nonetheless completely fails to require any showing that the parents' decision not to allow the grandparents to visit with the child would substantially harm the child. This Court, as well as the United States Supreme Court, has consistently mandated that there be a showing of harm to the child, not merely "best interest" prior to interfering into the parents' liberty and privacy rights to the care and custody of their child as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Brooks court held that "State interference with the parents' right to raise their children is justified only when the State acts in its police power to protect the child's health or welfare, and where parental decisions of the area would result in harm to the child." Id. at 772 (emphasis added). Also, the Brooks court recognized, in direct contravention of the respondents' arguments, that the focus is whether the parents' decision is harmful to the child. Id. Thus, the Court found that the Georgia statute violated the Constitution as it failed to require a showing of harm to the child prior to ordering visitation. Accordingly, subsection 752.01(1)(e), Florida Statutes, which similarly lacks any such requirement, should be struck down in violation of the Fourteenth Amendment to the United States Constitution.

It is significant to note that the respondents attempt to distinguish both Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993), and Brooks v. Parkerson, 454 S.E.2d 769 (Ga. 1995), on the grounds that they do not give guidance to what is meant by "best interest" unlike the Florida grandparent visitation statute. However, the cases relied upon by the respondents in their own brief involve grandparent visitation statutes which do not give any more guidance than the statutes in Hawk or Brooks. In fact, many of the cases do not even involve grandparent visitation statutes in regards to an intact marriage. See King v. King, 828 S.W.2d 630 (Ky. 1992) (grandparent visitation statute requires only determination of best interest of child without any factors to consider for guidance); Bishop v. Piller, 637 A.2d 978 (Pa. 1994) (the grandparent visitation statute interpreted dealt only with deceased, divorced, or separated parents); Roberts v. Ford, 493 A.2d 478 (N.H. 1985) (grandparent visitation statute dealt only with marital dissolution situations); People ex rel. Sibley v. Sheppard, 429 N.E.2d 1049 (N.Y. 1981) (grandparent visitation statute interpreted requires only determination of best interest without any guidance as to what is meant by best interest). Another case relied upon by the respondents is Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993). The grandparent visitation statute in that case was declared valid under the United States Constitution since it allowed the grandparents to visit with the child if in the best interest of the child and if it does not endanger the child's physical or emotional development. Id. at 209. Thus, "best interests" and harm to the

child are not the same, as mistakenly argued by the respondents. Before the State may interfere with parents' fundamental rights to the care, custody, and management of their child, there must be a showing that the parents' decision will substantially harm the child. Subsection 752.01(1)(e) lacks any such requisite demonstration and thus, violates the Fourteenth Amendment to the United States Constitution.

In Gertner v. Gertner, 3 F.L.W. Supp. 409 (Fla. 17th Cir. Ct. August 28, 1995), the court addressed the federal constitutionality of subsection 752.01(1)(e), and found it to be facially invalid under the Due Process Clause of the Fourteenth Amendment. The court recognized that parents have a fundamental right to raise their children unfettered by governmental interference except for the most compelling of reasons. Id. The court further recognized that the State has a compelling interest in the health and safety of the child and a compelling interest in preserving the family unit. Id. at 410. However, subsection 752.01(1)(e) addresses neither the child's health or safety nor does it strive to protect the family unit. Id. at 410-11.

> Rather, the statute creates a right in a non-custodial third party to participate in the upbringing of the child, to the extent the court, in its discretion, orders. It strips a parent of a fundamental right without requiring any showing that the parent is unfit or has harmed the child. The statute completely flouts constitutional jurisprudence.

Id. at 411.

The court, moreover, reasoned that subsection 752.01(a)(e) violates the Fourteenth Amendment because it does not establish the least intrusive means of encouraging grandparent relationships. Instead, "it establishes the harshest intrusion - grandparent visitation via court order." Id. The court suggests that school programs instructing children on the importance of grandparents would be a less intrusive manner in encouraging relationships. Id. "Any scheme, other than court-ordered visitation, would be less intrusive." Id.

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

Relying on Sketo v. Brown, 559 So.2d 381 (Fla. 1st DCA 1990), the First District Court found that the grandparent visitation statute was constitutional. However, the Sketo decision failed to address the issue at hand. Further, that there must first be a showing that the parents' decision will harm the child was not addressed in Sketo. Moreover, the Sketo court failed to determine if the statute could accomplish "its goal through the use of the least intrusive means." Winfield v. Division of Parimutuel Wagering, 477 So.2d 544, 548 (Fla. 1985).

The respondents improperly counter-argue that if subsection 752.01(1)(e), Florida Statutes, is declared unconstitutional and stricken from the grandparent visitation statute, the remainder will be unconstitutional for violating the Equal Protection Clause. [Respondents' Answer Brief on the Merits, 26]. The respondents rationalize their argument by stating that this will create two discrete classes of similarly situated parents who will be treated

differently. The respondents, as grandparents, however, do not have standing to argue that the parents will be subjected to unequal protection. Besides, the grandparent visitation statute was held to be constitutional prior to the amendment which added subsection 752.01(1)(e). See Sketo, supra.

Furthermore, the grandparents, if their argument has any merit, are attempting to correct what they perceive will be an unconstitutional statute by including subsection (e) which is facially unconstitutional. If the grandparents' arguments have any worth, the proper procedure would be to attack all of the unconstitutional parts of the statute, not add on additional unconstitutional provisions. However, the issue presented before this Court is not whether the entire statute is unconstitutional for treating similarly situated parents differently. In fact, the parents have not themselves raised that issue for this Court's discretionary review. The relevant issue, as certified by the First District Court, is as follows:

> 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, 654 So.2d 1260 (Fla. 1st DCA 1995). Therefore, the entire argument of the respondents' that section 752.01(1) will be unconstitutional if subsection (e) is deleted is meritless and irrelevant.

The respondents also suggest that similarly situated classes of grandparents and children will be treated differently based upon

the marital status of the parents. [Respondents' Answer Brief on the Merits, 32]. However, the respondents do not cite any authority for their argument or explain how the classes will be treated differently. The respondents' suggestion is nothing more than a tiresome attempt to misdirect the focus of this review.

In conclusion, the respondents desperately request that this Court find subsection 752.01(1)(e) constitutional based on the premise that statutes are presumed valid. However, a statute is presumed valid unless it impinges on a constitutional right. State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985). Since the subsection at issue is unconstitutional under Article I, Section 23, Florida Constitution, and the Fourteenth Amendment to the United States Constitution, the respondents' desperate plea should not be granted. Subsection 752.01(1)(e), Florida Statutes, lacks any requirement that there be a demonstration of harm to the child and thus violates both the Florida and the United States Constitutions.

CONCLUSION

For the foregoing reasons, subsection 752.01(1)(e), Florida Statutes (1993), should be held unconstitutional as violating Article I, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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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; **Nancy Nowlis, Esquire** and **Tracy Tyson, Esquire,** 1200 Riverplace Boulevard, Suite 630, Jacksonville, Florida 32207; **Andrew H. Kayton, Esquire,** American Civil Liberties Union, 225 N.E. 34th Street, Suite 102, Miami, Florida 33137; and to **Ross Baer, Esquire, Sue-Ellen Kenny, Esquire and Jeanine Germarowicz, Esquire,** The Legal Aid Society of Palm Beach County, Inc., 423 Fern Street, Suite 200, West Palm Beach, Florida 33401, by mail, this 6th day of October, 1995.

ATTORNEY

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