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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,647

PHILIP GOODE VON EIFF and CHERYL GOODE VON EIFF,

Petitioners,

vs.

LEONOR AZICRI and ROBERTO AZICRI,

Respondents.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

INITIAL BRIEF OF PETITIONERS' ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioners, PHILIP GOODE VON EIFF and CHERYL GOODE VON EIFF, will be individually referred to as "PHILIP" and "CHERYL" and will be collectively referred to as the "Petitioners" or the "Parents." The minor child, KELLY GOODE VON EIFF, will be referred to as "KELLY." The Respondents, LEONOR AZICRI and ROBERTO AZICRI, will be collectively referred to as the "Respondents" or the "Grandparents." LUISA VON EIFF will be referred to as "LUISA".

The symbols "R" and "T" will be used to refer to portions of the record on appeal and transcripts of the lower court's proceedings, respectively. The symbol "A" will be used to designate the Appendix to Petitioners' Brief, which is comprised of the decision of the Third District Court of Appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioners, PHILIP GOODE VON EIFF and CHERYL GOODE VON EIFF, are the parents of KELLY GOODE VON EIFF. PHILIP is KELLY's biological father. Following her marriage to PHILIP, CHERYL legally adopted KELLY on October 5, 1994. KELLY's natural mother, LUISA, died from cancer in December of 1993 when KELLY was two years old. The Respondents, LEONOR AZICRI and ROBERTO AZICRI, are LUISA's parents and KELLY's maternal grandparents (R. 1-4, 15-22).

On December 15, 1994, the AZICRIS filed a Petition seeking grandparent visitation pursuant to §752.01(1)(a), Fla. Stat. (1993). (R. 1). PHILIP and CHERYL responded by asserting, *inter alia*, that the nature and extent of visitation sought by the grandparents was not, in their opinion, in KELLY's best interests and directly challenged the constitutionality of Florida's Grandparent Visitation Statute. (R. 15-22).

It is undisputed that PHILIP and CHERYL were unified, at all times, in their opposition to the unsupervised visitation sought by the AZICRIS.[1] (Tr. July 15, 1996, p. 83, 95, 96, 101, 104; August 21, 1996, p. 180-181, 183, 186-187). They feared that the AZICRIS' lack of respect for their parental judgment coupled with the hostility shown toward both of them would negatively impact on their child. (Tr. of July 15, 1996, p. 104; August 21, 1996, p. 183, 186).

On November 13, 1996, the lower court entered its Final Order finding, *inter alia*, that the Petitioners were loving, nurturing and fit as parents of the minor child. (R. 344-46). Without any

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[1] During the pendency of the lower court proceeding and due, in part, to the anxiety of this litigation, PHILIP and CHERYL separated and remained separated up to the point when the lower court rendered its order. Despite their separation, the GOODE VON EIFFS remained and remain united in their opposition to KELLY'S unsupervised visitation with the grandparents. Goode Von Eiff v. Azicri, 22 Fla. L. Weekly D2176 (Fla. 3d DCA 1997).

showing of harm to KELLY absent such visitation, the trial court granted the grandparents' petition and awarded visitation that (a) excluded the parents after only eight (8) weeks from the inception of the visitation schedule without any input from a mental health professional; (b) allowed the grandparents to enjoy overnight visitation excluding the parents; and (c) afforded the grandparents the unilateral right to decide with whom the minor child may associate during such visitation without regard to the parents' wishes. The Final Judgment also contained provisions mandating the parents to prepare Friday night dinners for the grandparents to facilitate visitation and compelled additional visitation on certain Jewish holidays. (R. 344-46).

On November 25, 1996, the parents filed a Notice of Appeal to the Third District Court of Appeal. (R. 337-340). On September 17, 1997, the Third District Court of Appeal issued its Opinion affirming that part of the lower tribunal's Order permitting visitation by the grandparents under §752.01(1)(a), Florida Statutes, but reversed and remanded the case to the lower tribunal to reconsider the extent and scope of what constitutes reasonable visitation under the circumstances in this case. In arriving at its determination, the Third District upheld the constitutionality of §752.01(1)(a) and concluded that the demonstrable harm requirement[2] only applied to the limited class of families consisting of two natural parents. Due to the important and sensitive family law issues involved, the Third District certified the following question to the Florida Supreme Court as one of great public importance:

> May the State constitutionally allow reasonable grandparent visitation where one or both parents of the child are deceased and visitation is

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[2] See Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996)(where this Court held section 752.01(1)(a) unconstitutionally infringed on the privacy rights of the parents because it failed to require a showing of harm to the child who was living in an intact family having two living parents).

determined to be in the best interests of the child?[3]

Goode Von Eiff v. Azicri, 22 Fla. L. Weekly D2176 (Fla. 3rd DCA September 17, 1997).[4]

In stark conflict to the Third District's opinion, approximately one week after the Goode Von Eiff decision was issued, the Fifth District Court of Appeal held, in a case consisting of similar facts to the case at bar, that §752.01(1)(a) was unconstitutional. Fitts v. Poe, 22 Fla. L. Weekly D2265 (Fla. 5th DCA September 26, 1997).

Thereafter, on October 15, 1997, the parents timely filed their Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court, pursuant to Rules 9.030(a)(2)(A)(iv) and (v), Fla. R. App. P., to review the certified question and the express and direct conflict between Goode Von Eiff and Fitts on the same issue of law.

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[3] In her scholarly dissenting opinion, Judge Melvia Green suggested a rephrased certified question that more accurately reflects the dispositive issue for this Court's ultimate decision:

> Are Sections 752.01(1)(a)-(d), Florida Statutes (1995), facially unconstitutional because they constitute 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?

[4] Judge Green also concluded that the Grandparent Visitation Statute is facially unconstitutional under Article I, Section 23 of the Florida Constitution as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

I.

Florida's grandparent visitation statute, §752.01(1)(a), 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 action must serve a compelling interest through the least intrusive means. The compelling state interest must involve the prevention of harm to the child. Since §752.01(1) (a) 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. Accordingly, the Final Judgment must be reversed because this statute is facially unconstitutional under Article I, Section 23 of the Florida Constitution.

Florida Statute §752.01(1)(a) 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)(a) allows the State to intrude upon the parents' rights to raise their children without any demonstration of harm, it unconstitutionally violates the Fourteenth Amendment.

Section 752.01(1)(a) is further constitutionally flawed on grounds that it violates one's right to equal protection under the Fourteenth Amendment. The Petitioners argue that there should be no distinction concerning the granting or denial of grandparent visitation rights between an intact marriage where one parent objects to visitation to a case where one parent has died and the surviving parent, either individually or together with a new adoptive parent, objects to visitation. In view of this Court's finding of §752.01(1)(e) unconstitutional, the statute now insinuates that a widowed, divorced, remarried or unmarried parent is less fit than a married parent to raise his or her own child. Accordingly, the Statute is facially unconstitutional and should be struck down for treating similarly situated parents differently.

The relationship between an adoptive parent and child is no less sacred than a relationship between the natural parent and child, and that relationship is entitled to the same protection. In view of this Court's recent holding in Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996), there are no grounds by which grandparent visitation is lawfully authorized in a case where the child has a natural parent and an adoptive parent since, by definition, that family unit constitutes an intact family, upon which grandparents, since Beagle, have no legal right for visitation with the grandchildren. Certainly, the importance this Court attached to the sanctity of the family unit in Beagle should apply equally to the case of PHILIP, the natural father, and CHERYL, the adoptive mother, who are entitled to the same constitutional protection of their parental rights. Neither §752.01(1)(a) or §752.01(1)(e) addresses the situation of an intact family consisting of a natural parent and an adoptive parent. Since adoptive parents are entitled to the same constitutional protection of parenting decisions as natural parents, this Court must extend its holding in Beagle to the factual scenario described herein on the basis that, for all legal purposes and proceedings, KELLY is no longer the child of a deceased parent.

ARGUMENTS

I.

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

The Petitioners argue that §752.01(1)(a) of the Grandparent Visitation Statute should be held unconstitutional as violating their right to privacy as guaranteed under Article I, Section 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. A parent has the right to raise a child free from governmental interferences as long as the parent is fit and the child is not in danger of substantial harm. Further, a parent has the right to define the family as he or she pleases, and not according to the State's conception of what constitutes a "proper" family. The recognition of this right certainly justifies a presumption that a child's mother[5] and father together will act in a child's best interests. As such, section 752.01(1)(a) interferes with Petitioners' parental rights regarding the custody, care and management of their child by allowing a court to award grandparent visitation over their objections.

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[5] The legal ramification of KELLY's adoption by her stepmother is that for all legal purposes and proceedings, KELLY is no longer the child of a deceased parent. Goode Von Eiff v. Azicri, 22 Fla. L. Weekly D2176 (Fla. 3rd DCA September 17, 1997). See §63.172, Fla. Stat. (1996) Korbin v. Ginsberg, 232 So.2d 417, 418 (Fla. 4th DCA 1970) ("A judgment or decree of adoption establishes the relationship of parent and child to the same extent as though the child had been born to such parent in lawful wedlock."); Lee v. Kepler, 197 So. 2d 570, 573 (Fla. 3rd DCA 1967) ("The result of the adoption by the stepmother was to place the adopted child as far as possible in the same position as the natural child to all intents and purposes.").

A. Florida's Grandparent Visitation Statute

The present grandparent visitation statute, §752.01(1), grants any grandparent the right to seek visitation when it is in the best interests of the child if:

(a) One or both parents of the child are deceased;

(b) The marriage of the parents of the child has been dissolved;

(c) A parent of the child has deserted the child;

(d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s.742.091; or

(e) 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.[6]

Fla. Stat. §752.01(1) (a)-(e) (1993).

While the Petitioners appreciate the laudable legislative motives for the enactment of §752.01 in its present form, the statute, however, is nevertheless facially unconstitutional. Since §752.01(1)(a) requires no showing of demonstrable harm to a child prior to the imposition of forced grandparent visitation, it violates the parents' rights under Article I, Section 23 of the Florida Constitution as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

B. Section 752.01(1)(a), 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,

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[6] This Court held subsection (e) unconstitutional. Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996).

"[e]very natural person has the right to be left alone and free from governmental intrusion into his private life. . . ." This Court, in Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 546-548 (Fla. 1985), has held that this "right of privacy is a fundamental right" which "is much broader in scope then that of the Federal Constitution", and provided a concise background of the significance of the right of privacy of Floridians.

> The concept of privacy or right to be left alone is deeply rooted in our heritage and it 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:
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> > 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).
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> 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, relationships and child rearing, and education.

Id. (emphasis added). Historically, both Florida Courts and the United States Supreme Court have long recognized the fundamental nature as well as the constitutionally protected rights of parents in the care, custody and management of their children without State interference, except under the most

compelling circumstances.[7] However, with the enactment of Article I of 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.

The right of privacy has been implicitly recognized as extending to decisions involving family relationships and raising children. In Re: T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989). Numerous cases in this state have recognized the fundamental nature of the right of parents to raise their children unfettered by governmental interference, except for the most compelling reasons. In the Interest of D.B., 385 So. 2d 83, 90 (Fla. 1980)(acknowledging the existence of "fundamental constitutionally protected interest in preserving the family unit and raising one's children"); State v. Reeves, 97 So.

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[7] Judge Webster noted in his concurring opinion in Beagle:

> 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.

Beagle v. Beagle, 654 So. 2d 1260, 1266 (Fla. 1st DCA 1995).

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), aff'd. 379 So. 2d 346 (Fla. 1979)(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"); Foster v. Sharpe, 114 So. 2d 373, 376 (Fla. 3d DCA 1959) (asserting that, "[t]he right of the parents to the custody, care and upbringing of their children is one of the most basic rights of our civilization"). See also, Padgett v. Dep't of Health and Rehabilitative Services, 577 So. 2d 565, 570 (Fla. 1991)(acknowledging "longstanding and fundamental liberty interests of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism"); In re Dubreuil, 629 So. 2d 819 (Fla. 1993)(where this Court recognized that a constitutionally protected interest exists in preserving the family unit and in raising one's children).

Given the broad rights that the State recognizes in parents, it seems an unassailable proposition that a parent who has neither abused, neglected, or abandoned a child but rather has been found to be loving, nurturing and fit, must then have a reasonable expectation that the state will not interfere with his or her decision to limit a grandparent's access to the child. Moreover, the absence of such intrusions into parental decisions, as shown in the cases cited above, provides stronger support in favor of the reasonableness of the expectation of privacy parents have from court-ordered grandparent visitation. It is, thus, axiomatic that since the parents' authority to raise their children is a basic, fundamental right, it cannot be usurped or impinged upon by the government except when

doing so serves a compelling state interest and accomplishes its goals with the least intrusive means. Winfield, supra; see Moore v. City of East Cleveland, 431 U.S. 113, 155 (1977).

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. In re Dureuil, 629 So. 2d 819 (Fla. 1993); In the Interest of E.H., 609 So. 2d 1289 (Fla. 1992); Padgett, supra. 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. Absent such a demonstration of substantial harm, as in the instant case, the parents' constitutional authority would be usurped in violation of Article I, Section 23 of the Florida Constitution.

As section 752.01 lacks any such requirement, for example, that the parents' decision not to allow the grandparents to visit with the child would substantially harm the child, the statute is unconstitutional in violation of Florida's right to privacy. Although relationships with grandparents can be an enriching and important part of many children's lives, grandparents do not traditionally have the responsibilities and vested interest in the children's development sufficient to make the formation of such relationships a "compelling State interest."[8] Therefore, when a showing of actual or threatened harm is lacking, the State is not justified in acting to promote what it perceives to be in

[8] In light of the consistent recognition the Florida Supreme 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 v. State, 632 So. 2d 623 (Fla. 1994).

the child's best interests while effectively usurping the parents' constitutional authority in violation of Article I, Section 23 of the Florida Constitution. [9]

Based on this Court's analysis and holding in Beagle, Petitioners maintain that §752.01(1)(a) is flawed for the same reason and that the court-ordered visitation between the AZICRIS and KELLY in the instant case over the unified objection of KELLY's loving parents does not pass muster under the compelling interest test to justify the abridgement of the fundamental right of a parent to raise his or her child without government interference.

The Florida grandparent visitation statute is practically identical to the Georgia Grandparent Visitation Statute, which was recently held unconstitutional by the Supreme Court of Georgia on the basis that it violated the constitutionally protected interest of parents to raise their children without undue state interference. Brooks v. Parkerson, 454 S.E. 2d 769 (Ga. 1995). The Supreme Court of Georgia, mindful of the rule that legislative enactments are presumptively constitutional, found the Georgia statute "unconstitutional under both state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized." Id. at 774. The Brooks opinion states in pertinent part:

> The statute in question falls short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation be ordered. [T]he state may, in limited instances, interfere with parental decision-making to protect the health or welfare of children, if there is insufficient evidence that supports the proposition that grandparents' visitation with their grandchildren

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[9] In Brooks v. Parkerson, 454 S.E. 2d 769, 773 (Ga. 1995), where the Supreme Court of Georgia properly held that the grandparent visitation statute failed to require a showing of harm to the child prior to ordering visitation, and thus unconstitutional, the Court appropriately rejected the irrelevant argument that it might be "better" or "desirable" for a child to maintain contact with the grandparent, since the constitution requires the focus to be whether the parents' decision is harmful to the child. Id.

> always promotes the children's health or welfare. . . . While there are, to be sure, many instances where the grandparent-grandchild bond is beneficial to the child, we have found . . . . little evidence that this is most often the case. It has also been noted even if such a bond exists and would benefit the child if maintained, the impact of a lawsuit to enforce maintenance of the bond over the parents' objection can only have a deleterious effect on the child . . . . [W]e recognize that there are many grandparents who have a deep and significant bond with their grandchildren . . . . [h]owever, even assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child. It is irrelevant . . . that it might, in many instances, be "better" or "desirable" for a child to maintain contact with a grandparent.

Id. at 773-774 (emphasis added).

Similarly, 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. In reaching this holding, the Court reasoned that

> 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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> The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.

Id. at 580-581. 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 case is directly analogous and persuasive to this case.

This Court has similarly held the Florida grandparent visitation statute unconstitutional, as it applied in the limited situation of an intact family where the child was living with both natural parents.[10] Relying on the reasoning provided by Brooks and Hawk, this Court held that, in the absence of an explicit requirement of harm or detriment, the State has not demonstrated a compelling interest to impose grandparent visitation upon an intact family after at least one parent has objected to such visitation and, therefore, the challenged section[11] is facially flawed and unconstitutional. Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996). Under the authority of Beagle and extensive case law regarding the fundamental liberty interests that parents have in the care, custody and management of their children,[12] this Court should apply the same reasoning and declare section 752.01(1)(a), Florida Statutes, unconstitutional under the more explicit privacy provision of the Florida Constitution.[13] Winfield v. Division of Pari Mutuel Wagering, 477 So. 2d 544, 547-48 (Fla. 1985). Otherwise, the statute, in contravention of the Florida and the United States Constitutions, and a long line of United

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[10] Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996)(where this Court limited its holding to the scope of the certified question presented to it).

[11] §752.01(1)(e), Fla. Stat. (1993).

[12] See supra.

[13] Florida is one of only five states which has an explicit right of privacy provision in its constitution. (i.e. Alaska, California, Hawaii and Montana). Florida is also the only state with explicit right of privacy provision to have dealt with constitutional challenges to the grandparent statute. As such, neither those states with explicit privacy provisions nor those states having no explicit privacy provisions and finding comparable grandparent statutes constitutional can carry any weight in this Court's determination here. See Goode Von Eiff v. Azicri 22 Fla. L. Weekly D2176, 2179 (Fla. 3d DCA 1997)(dissenting opinion).

States Supreme Court precedent,[14] will have the substantial and injurious effect of depriving parents of their fundamental rights to raise children.

C. Section 752.01(1)(a), Fla. Stat., Violates the Petitioners' Right of Privacy Under the Fourteenth Amendment to the United States Constitution.

The United States Supreme 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). The United States Supreme Court in Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed.2d 1042 (1923), stated that parents have the right to raise their children as they see fit, free from unreasonable governmental intrusion as one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Many other United States Supreme Court cases affirmed this same premise. Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed.2d 1070 (1925)(addressing the unreasonable interference with the liberty of parents to direct the upbringing of their children); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed.2d 645 (1944)("the custody, care and nurture of the child reside first in the parents . . . it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter"); Ginsberg v. State of New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 20 L.Ed.2d (1968)("the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our

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[14] See infra.

society"); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)(the integrity of the family unit has found protection under the Due Process Clause of the Fourteenth Amendment . . . the Equal Protection Clause of the Fourteenth Amendment . . ., and under the [privacy aspects of the] Ninth Amendment); Santosky v. Kramer, 455 U.S. 743, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)(recognizing the historical right to freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); Roberts v. U.S. Jaycees, 468 U.S. 609, 618-620, 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).[15] Accordingly, parental rights are protected under the Federal Constitution as both liberty rights and as privacy rights.

Section 752.01(1)(a), Fla. Stat. (1993), violates both of these protected rights under the United States Constitution. The effect of the Florida grandparent visitation statute is to interfere with parental rights to make decisions regarding the custody, care and management of their children, and it likewise intrudes upon their privacy in making such decisions.

There must be a countervailing interest to permit such interference. 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, 234 (1972)("if it appears that parental decision will jeopardize the health or safety of the child, or have

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[15] In Roberts v. U.S. Jaycees, the Court explained that another facet of the right to privacy expressly protected by the First Amendment and implicitly by the Due Process Clause of the Fourteenth Amendment are those considerations "that attend" the creation and sustenance of a family [including] . . . the raising and education of children . . . and cohabitation with one's relatives. Roberts, 468 U.S. at 619-20. It is clear that determining with whom the child should not associate is necessary to direct the development of the child. In the instant case, the Petitioners have asserted their right of associational privacy recognized by the United States Supreme Court. See Moore v. City of East Cleveland, 431 U.S. 494 (1977).

a potential for significant social burdens," the power of the parent may be curtailed). Thus, the states, which have the reserved power to regulate family life, have legitimate interests which, in certain circumstances such as those showing harm to the child, may override parental rights. Wisconsin v. Yoder, supra.

While the constitutional rights of parents to raise their children as they choose, although recognized as fundamental, is not absolute, neither is the States' power to regulate for the perceived good of its citizens absolute. As stated repeatedly by the Supreme Court, when the States' actions burden the fundamental rights of citizens, a heightened degree of judicial review is required. Roe v. Wade, 410 U.S. 113, 155 (1973). The standard of review, sometimes called "strict scrutiny", requires that for state action to be justified, the action must serve a compelling state interest. Yoder. In summary of the United States Supreme Court cases mentioned above, state interference is justifiable only where the state acts in its police power to protect the child's health or welfare and where parental decisions would result in harm to the child.

Absent allegations or findings of harm to KELLY, the governmental intrusion upon the parents' fundamental rights is a violation of the Fourteenth Amendment to the United States Constitution.[16]

D. Section 752.01(1)(a), Fla. Stat., Violates the Petitioners' Right to Equal Protection Under the Fourteenth Amendment to the United States Constitution

Following this Court's Beagle decision, the Fifth District Court of Appeal issued its opinion

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[16] The laudable purpose of the statute must have been aimed at fostering all of the beneficial aspects which attend healthy grandparent/grandchild contact. Ironically, in this case, the application of the statute by the trial court results in significantly abridging the parents' inviolate joint decision-making power over the welfare of the minor child and is **destructive** to the family unit.

in Ward v. Dibble, 683 So. 2d 666 (Fla. 5th DCA 1996), wherein it stated that there is no presumption that grandparents are entitled to visitation. The statute does not provide that a grandparent is entitled to visitation based solely on his or her status as a grandparent. While grandparent visitation in that case was reversed due to insufficient evidence showing visitation was in the children's best interests, the Fifth District capitalized on the opportunity to remark about the constitutionality of the statute subsequent to Beagle:

> From the standpoint of a parent's fundamental right to raise his or her children, Beagle, . . . the distinction between an intact marriage where one parent objects to visitation and a case where one parent has died and the surviving parent objects to visitation is hard to discern. The First District Court argued in Beagle that they should be treated the same. Judge Webster, who concurred in Beagle, evidently saw no distinction either, concluding that the Beagle panel was bound by the court's earlier decision in Sketo. Judge Webster argued, however, that Sketo itself had been incorrectly decided and that §752.01 unconstitutionally intrudes upon a parent's fundamental right to raise his or her child without governmental interference.

Id.

On this point, Petitioners argue that there should be no distinction concerning the granting or denial of grandparent visitation rights between an intact marriage where one parent objects to visitation and a case where one parent has died and the surviving parent objects to visitation. The more recent opinion of Fitts v. Poe further supports Petitioners' equal protection argument where the Fifth District found paragraph (1)(a)[17] of the statute unconstitutional because it was unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent. Fitts v. Poe, 22 Fla. L. Weekly D2265 (Fla. 5th DCA, September 26, 1997).

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[17] Providing grandparents the right to petition the court for visitation if one or both the parents of the child are deceased.

In limiting the Beagle holding to subsection (1)(e), this Court left the statute suggesting that that a widowed, divorced, remarried or unmarried paren is less fit than a married parent to raise his or her own child. Based on the statute's apparent disparate treatment of different classes of parents, each of whom has a fundamental right to raise his children without interference from the State as guaranteed by both Article I, Section 23 of the Florida Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the statute is facially unconstitutional.

E. Adoptive Parents Are Entitled To Same Legal Protection As Natural Parents Under Beagle

CHERYL'S rights as an adoptive parent to make parenting decisions are not inferior to the rights of a natural parent.[18] Both Petitioners, PHILIP, the natural father, and CHERYL, the adoptive mother, are entitled to the same constitutional protection of their parental rights. In view of this Court's recent holding in Beagle, Petitioners submit there are no grounds in the Florida Grandparent Visitation Statute by which grandparent visitation is lawfully authorized in a case where a child has two living parents, a natural parent and an adoptive parent.[19] Beagle v. Beagle, 678 So. 2d 1271

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[18] Note the trial court's reference to CHERYL as a step-parent: "My ruling would be, the grandparents should receive visitation. The Court finds that the natural father and step-mother's reasons for denying visitation are petty and unreasonable." (Tr. of September 13, 1996, page (3)(emphasis added).

[19] Significantly, the legislature did not limit "parents" in subsection (a) to mean only natural parents as it did in subsection (e). Florida Statute §752.01(1) states as follows:

The Court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:

(a) One or both parents of the child are deceased;

(Fla. 1996) As such, the Final Judgment ordering grandparent visitation in this case, or in any other case involving a minor child parented by a natural parent and an adoptive parent, has no basis in law.[20]

Although unique to Florida, state supreme courts in other jurisdictions have had occasion to review factually similar cases construing adoption and grandparent statutes identical to Florida's, and are, therefore, instructive.

In Simmons v. Simmons, 900 S.W. 2d 682 (Tenn. 1995), the Supreme Court of Tennessee upheld and found superior the rights of the natural mother and adoptive father who refused to allow visitation privileges to the paternal grandparents concerning their five (5) year old child. The Court's ruling was founded in part upon a determination that "[t]he relations which exist between parent and child are sacred ones" and that the constitutional right to privacy fully protects the "rights of parents to care for their children without unwarranted state intervention." Hawk v. Hawk, 855 S.W. 2d 573, 578 (Tenn. 1993). Although the grandparents in Simmons insisted that the constitutional protection

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(b) The marriage of the parents of the child has been dissolved;
(c) A parent of the child has deserted the child;
(d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091; or
(e) 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.

[20] When the lower court entered its ruling on the record, it recognized a gap in the statute in cases involving adoptive parents. (Tr. September 13, 1996, p. 6). The transcript graphically illustrates the difficulty the lower court had with ruling in this case of an adoptive parent and the Court's reasoning that cases involving adoptive parents are very likely not contemplated by the statute.

is limited to married, natural parents who have maintained continuous custody of their children and whose fitness as parents has not been challenged, the Court held otherwise based upon the parents' constitutional right to privacy with respect to making parenting decisions . Simmons. So too, does Florida have a similar right of privacy.

Both in Simmons and the case at bar, the grandparents argued that the right of an adoptive parent to make parenting decisions is inferior to the right of a natural parent. In rejecting this premise, the Tennessee Supreme Court held "that position is contrary to the stated law and policy of this State, as well as human experience." Simmons, 900 S.W. 2d at 684. It is significant that the Tennessee Adoption Statute is identical to Florida's Adoption Statute, Florida Statute §63.172(c). The Supreme Court of Tennessee held that the relationship between an adoptive parent and child is no less sacred than the relationship between the natural parent and child, and that the relationship is entitled to the same legal protection. Finding no evidence that the child was in danger of substantial harm to justify court intervention, the Court found in favor of the parents' constitutional rights to develop their own personal and family values free from intrusion by the State and reversed the grandparent visitation order. Id.

Similarly, CHERYL'S status here is tantamount to that of a natural parent and she is entitled to the same constitutional protection in parenting decisions as natural parents. There is no legal basis to explain why the unified objection of the parents in this case should take a backseat to the desires of the grandparents. See §63.172(c), Florida Statute (1996); Korbin v. Ginsberg, 232 So. 2d 417, 418 (Fla. 4th DCA 1970)("a judgment or decree of adoption establishes the relationship of parent and child to the same extent as though the child had been born to such parent in lawful wedlock."). The

legal ramification of KELLY's adoption by her stepmother is that for all legal purposes and proceedings, KELLY is no longer the child of a deceased parent. Instead, she is and remains the child of two living parents. Based on this Court's pronouncement in Beagle, the AZICRIS cannot, therefore, overcome the GOODE VON EIFF'S objection to their request for visitation.

The Supreme Court of Nevada considered a grandparent visitation statute identical to Florida's and in the divorce context in Steward v. Steward, 890 P. 2d 777 (Nev. 1995). In Steward, the paternal grandparents petitioned for the visitation of the grandchild, and the grandchild's mother and father, who were divorced, each filed opposition to the petition. Both natural parents were united in opposing the paternal grandparents exercising any contact with the minor child despite the fact that the grandparents took in the father and the minor child after the divorce and assumed significant responsibility in raising that minor child. In recognizing that the legislature did not intend to permit grandparents the right to judicially compelled visitation over the objection of both parents, (as in Beagle), the Nevada Supreme Court interpreted its Grandparent Visitation Statute as establishing a presumption against court-ordered grandparental visitation when divorced parents, with full legal rights to the children, agree that it is not in the child's best interest to see the grandparents. The Nevada Supreme Court reasoned:

> Interpreting the statute otherwise would have the absurd result of permitting the State to intrude solely because the parties are divorced, regardless of the fact that both parents are in agreement as to what was in the best interests of their child, and regardless of the fact that both parents have full legal rights to the child and have never abdicated their parental responsibility. Additionally, any other interpretation would undermine the natural parents' liberty interest in the care, custody and management of their children. (citations omitted).

Steward v. Steward, 890 P. 2d 777, 782 (Nev. 1995).

Applying the analysis and reasoning of Steward and Simmons, cases decided in states having similar adoption and grandparent visitation statutes to that of Florida's, the Florida Grandparent Visitation Statute must require a demonstration of clear and convincing evidence that harm will occur to the child unless visitation occurs. The record below is devoid of any such evidence and neither does the statute, in its present form, require a showing of harm to the child. Accordingly, Florida's grandparent visitation statute must be held unconstitutional on the basis of the disparate treatment of similarly situated parents.

CONCLUSION

In sum, the Florida Grandparent Visitation Statute is in contravention of the Federal Constitution, the Florida Constitution and a long line of United States Supreme Court and Florida Supreme Court precedent, and it has the substantial and injurious effect of depriving parents, such as the GOODE VON EIFFS, of their fundamental rights to raise their children. Since §752.01(1)(a) permits the State to interfere with the parents' constitutional privacy rights without a demonstration of harm to the child, it is unconstitutional. Accordingly, this Court should strike §752.01(1)(a) on the basis that it is unconstitutional, reverse the opinion of the Third District Court of Appeal and Final Judgment on constitutional grounds and resolve the conflict between the district courts of appeal by affirming the holding in the Fifth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioners' on the Merits was served upon Brenda B. Shapiro, Esq., counsel for Respondents, 44 West Flagler Street, Courthouse Tower, Suite 750, Miami, Florida 33130 and Allison Doliner Hockman, Esq., co-counsel for Respondents, 325 Almeria Avenue, Coral Gables, Florida 33134 was mailed this 18 day of December, 1997.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,647

PHILIP GOODE VON EIFF and
CHERYL GOODE VON EIFF,

Petitioners,

vs.

LEONOR AZICRI and
ROBERTO AZICRI,

Respondents.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

APPENDIX

ROBERT S. GEIGER, ESQUIRE
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(Before COPE, GERSTEN and SHEVIN, JJ.)

(PER CURIAM.) Rafael Alvarez appeals a sentencing order imposed on multiple convictions. We affirm the portion of the sentence that stacks the three-year mandatory minimums imposed on counts two and three. *State v. Christian*, 692 So. 2d 889 (Fla. 1997); *State v. Thomas*, 487 So. 2d 1043 (Fla. 1986). However, that portion of the written sentence that orders the mandatory minimum sentences in counts two, three and five to run consecutively does not conform to the court's oral pronouncements. At the sentencing hearing, the trial court stated: "Counts 3 and 5 run concurrent to each other, but consecutive to Count 2 for a total of six years minimum mandatory." Accordingly, we vacate that portion of the sentence, remand the cause to the trial court and direct the court to enter a sentencing order in conformance with that pronouncement.

Affirmed in part, vacated in part, and remanded.

* * *

Child custody—Visitation—Grandparents—Statute providing for reasonable grandparent visitation rights where one or both parents of child are deceased and where such visitation is found to be in child's best interests is constitutional—Statute is narrowly tailored to promote state's compelling interest in protecting children after parent has died by preserving grandparent visitation that is in child's best interests and contains inherent safeguards which protect fundamental rights of parents—Finding that visitation by paternal grandparents was in best interests of child supported by competent substantial evidence, including evidence that child's mother had died, her father had remarried and was in process of divorcing child's adoptive mother, child's father no longer lived in child's home, and child was being cared for by her adoptive mother—Order was overly broad in that it allowed grandparents to mandate child's religious development by permitting extended visitation every other Friday evening for Sabbath dinner in addition to numerous specific religious holidays—Court has additional reservations concerning whether frequent dinners and visits are warranted where trial court found parents to be fit and testimony revealed that frequent visits would be destructive to child's normal pattern of living—Question certified: May state constitutionally allow reasonable grandparent visitation where one or both parents of child are deceased and visitation is determined to be in best interests of child

PHILIP GOODE VON EIFF and CHERYL GOODE VON EIFF, Appellants, v. LEONOR AZICRI and ROBERTO AZICRI, Appellees. 3rd District. Case No. 96-3273. L.T. Case No. 94-27837. Opinion filed September 17, 1997. An Appeal form the Circuit Court for Dade County, Bernard S. Shapiro, Judge. Counsel: Geiger, Kasdin, Heller, Kuperstein, Chames & Weil, and Robert Geiger and Johnathan A. Heller, for appellants. Brenda B. Shapiro and Robin B. LeBlanc, for appellees.

(Before SCHWARTZ, C.J., and GERSTEN, and GREEN, JJ.)

(GERSTEN, Judge.) Appellants, Philip and Cheryl Von Eiff, contend that the trial court abused its discretion by granting visitation to appellees, Leonor and Roberto Azicri ("grandparents"), the maternal grandparents of Philip's biological daughter. The appellants additionally claim that the visitation order is too broad, not in the best interests of the child, and that the underlying grandparent visitation statute is unconstitutional. We find the relevant statutory provision is constitutional and in the best interests of the child, but reverse and remand the order to reconsider the extent and frequency of visitation.

I

Kelly Von Eiff was born to Phillip and Luisa Von Eiff on March 14, 1991. Kelly's natural mother, Luisa, died of cancer in December of 1993. Two months later, Cheryl Goode moved in with Philip and Kelly. Cheryl eventually married Philip, hereafter collectively referred to as "parents", and adopted Kelly in October of 1994. Currently, Cheryl and Philip are in the process of a divorce and Kelly is living with her adoptive mother Cheryl.

Prior to Luisa's death, the grandparents frequently saw Kelly and got along well with Philip. However, this relationship deteriorated after Cheryl moved in with Philip. The grandparents' visits with Kelly were reduced, and ceased altogether after the adoption. In response, the grandparents filed a petition to compel visitation under section 752.01(1)(a), Florida Statutes (1995).

Section 752.01(1)(a) provides for reasonable grandparent visitation rights where one or both parents of a child are deceased, and where such visitation is found to be in the child's best interests. Philip and Cheryl opposed the petition arguing that visitation was not in Kelly's best interests, and that the statute unconstitutionally infringed on their parental rights.

After an unsuccessful mediation, the parties went to trial. Trial testimony revealed, and the trial court found, that limited grandparent visitation would be in Kelly's best interests. The trial court's order allowed the grandparents to have parentally supervised Friday night dinners with Kelly for eight weeks. Additionally, after the eight week introduction, Kelly would spend the night on alternating weekends with the grandparents, with parental supervision at the option of the grandparents. Lastly, the order also provided that Kelly would spend religious holidays with her grandparents.

II

We first address the constitutionality of section 752.01(1)(a). Simply, the state has a compelling interest in protecting children after a parent has died by preserving grandparent visitation that is in the child's best interests. Because section 752.01(1)(a) is narrowly tailored toward promoting this compelling interest, we find the provision constitutional.

Florida's grandparent visitation statute, section 752.01(1), Florida Statutes (1995), provides:

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

We stress that this case solely involves section (1)(a) of the statute where one or both of the parents are deceased. Under these circumstances, a court may award reasonable visitation rights to a grandparent only if visitation is in the best interests of the child. Factors utilized by the court in making such a determination include: the willingness of the grandparents to foster a close relationship between the child and the parents, the length and quality of any prior relationship between the grandparents and the child, the preferences of the child, and the mental and physical health of the grandparents and the child.[1]

In examining the constitutionality of section 752.01(1)(a), we recognize the potential conflict between grandparent visitation rights and a parent's constitutional privacy rights in directing the upbringing and education of their children without undue government interference. *See Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). However, this rule of parental privilege is not absolute, and yields where the state shows compelling reasons to promote the best interests of the child. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Padgett v. Dep't of Health and Rehabilitative*

Services, 577 So. 2d 565 (Fla. 1991); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985). For example, case law has established the state's compelling interest in protecting children from actual harm and the threat of harm. *See Jones v. State*, 640 So. 2d 1084 (Fla. 1994). The state also has a compelling interest in protecting children from emotional harm. *See Nelson v. Nelson*, 433 So. 2d 1015 (Fla. 3d DCA 1983). Accordingly, the state can require that parents enroll their children in school, that they adequately feed them, clothe them, inoculate them, use child restraints in vehicles, and house them during curfews. *See Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

While we recognize the vital importance of the parental right to make childrearing decisions, well-established precedent clearly provides that the rights and concerns of the child must ultimately control.[2] *See State ex rel. Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957). The critical question then becomes: can it be in a child's best interests to permit grandparent visitation when one or both of the parents is deceased?

The Florida Supreme Court addressed grandparent visitation in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). The Court held that another section, section 752.01(1)(e) of the statute, unconstitutionally infringed on the privacy rights of the parents because it failed to require a showing of harm to the child who was living in an intact family.

Yet the Florida Supreme Court carefully limited its unconstitutionality finding to the "intact family" section of the statute. The Court emphasized that the "inadequacy of the best interests test in this limited circumstance does not change or modify existing principles regarding the use of that test in other family law concepts." *Beagle*, 678 So. 2d at 1272. The Court repeatedly emphasized that its decision requiring a showing of harm in the context of an intact family did not change any other application of the best interests test.[3] *Beagle*, 678 So. 2d at 1277. Hence, it is manifest that the Court did not intend for the demonstrable harm requirement to extend to situations, such as the provision at issue here, which do not involve an intact family.[4]

This makes sense because the purpose behind requiring demonstrable harm no longer applies in the absence of an intact family situation. Courts are rightfully reluctant to interfere with the sheltered structure of an intact family because of the parent's fundamental right to raise their children. Thus logically the only cases holding provisions of visitation statutes unconstitutional deal solely with intact families.[5] *See Beagle*, 678 So. 2d at 1271; *Brooks*, 454 S.E.2d at 769; *Hawk*, 855 S.W.2d at 573; *Williams*, 485 S.E.2d at 651.

However, under circumstances where families have been disrupted by death or divorce, the intact family is already compromised and the focus of the analysis shifts to the best interests of the child. *See McAlister v. Shaver*, 633 So. 2d 494 (Fla. 5th DCA 1994) (discontinuity of parents' relationship allows the court to determine visitation or custody based solely on the child's best interests). In these situations, the state is historically empowered to protect the interests of those injured by the disruption.[6] *See McRae v. McRae*, 52 So. 2d 908 (Fla. 1951) (courts in dissolution proceedings have the inherent power to protect children and to do all things necessary for the administration of justice). To require an explicit finding of demonstrable harm under such circumstances would be superfluous.

The constitutionality of section 752.01(1)(a) must therefore be determined based upon a "best interests" analysis. While this is a determination that must be made on a case by case basis, we recognize the important interest in a child's relationship with his or her grandparents. Exposure to grandparents generally provides tremendous benefits to the health and welfare of children.[7] *See Ramey v. Thomas*, 483 So. 2d 747, 748 (Fla. 5th DCA 1986) (child's welfare is promoted in most cases by having grandparents, rather than by not having them).

Children benefit by exposure to an essential link with the past that provides them with a sense of family identity. *See* Christine David-Galbraith, *Grandma, Grandpa, Where Are You?*, 3 Elder L.J. 143 (1995). Children also benefit because their grandparents can provide an objective eye on events at home (i.e., calling attention to abuse) and offer a place of sanctuary. Additionally, research reveals that children in these relationships gain a respect for the elderly, are more secure, and are less likely to commit suicide or use drugs. *Id.* at 143.

At no time are the fruits of this relationship more beneficial then when a child's world is turned upside down by the death of a parent. Death centers a child in an emotional maelstrom threatening emotional development.[8] In these situations, a child needs the stability that grandparents can provide.[9]

Moreover, children can become innocent pawns in power struggles by their loved ones when a family is disrupted. *See Cochran v. Cochran*, 263 So. 2d 292 (Fla. 2d DCA 1972). Allowing a parent without restraint to interfere with beneficial visitation in circumstances of death may exacerbate emotional trauma precisely when the child is most vulnerable. *See Preston v. Mercieri*, 133 N.H. 36, 573 A.2d 128 (1990) (abrupt termination of a meaningful relationship between the child and his grandparents would be cruel and inhumane after a parent has died).

This case provides the perfect example of a child placed in emotional jeopardy. Here, Kelly's natural mother died, and her father is divorcing her adoptive mother. Kelly, who now lives with her adoptive mother, is completely cut off from the beneficial, loving relationship she knew with her grandparents. A relationship her natural mother encouraged. Unlike united opposition in an intact family, this is not a case where the state is called upon to impose visitation over parental objections. Rather, this is a case where the state acts to insure the continuity of visitation already encouraged by a deceased parent.[10]

In *Sketo v. Brown*, 559 So. 2d 381 (Fla. 1st DCA 1990), the First District faced a factually similar situation. There, the father died and the paternal grandparents sought visitation rights after the relationship with the mother deteriorated. The mother contested visitation on the grounds that this interfered with her right to raise her children as she saw fit, and that the state lacked a compelling interest to require her to submit to visitation. The court held that section 752.01(1)(a) was facially constitutional because it met a sufficiently compelling state interest in protecting the welfare of children.[11]

We agree with *Sketo*. A court cannot blindly adhere to the right of privacy when this would be detrimental to a child's best interests. *See In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. 4th DCA 1983), *approved*, 460 So. 2d 368 (Fla. 1984) (grandparent visitation allowed where abrupt termination would be detrimental to a child's welfare). The state has a compelling interest, not in mandating how parents should raise their children, but to insure that a child's needs are not overlooked in these difficult circumstances. By preserving beneficial grandparent visitation rights after a parent has died, section 752.01(1)(a) promotes the state's compelling interest in the welfare of children.

Moreover, section 752.01(1)(a) is narrowly tailored and contains inherent safeguards which protect the fundamental rights of parents. First, parents have the opportunity and the right to object to visitation and apply it to their particular circumstances. Second, the statute pertains only to grandparents. Third, the statute allows for mediation of the dispute, prior to judicial review. Fourth, since there is no presumption that grandparents are entitled to visitation, the burden rests with the grandparents to show how visitation is in the child's best interests. Additionally, the statute itemizes specific factors for the court to assess the best interests of the child and whether visitation is appropriate. Finally, and perhaps most importantly, any visitation imposed by the statute is judicially modifiable. *See Ward v. Dibble*, 683 So. 2d 666 (Fla. 5th DCA 1996); *Sketo*, 559 So. 2d at 381. The trial

court has the authority to reduce or even completely deny visitation. *See Brago v. Brago*, 604 So. 2d at 866.

In conclusion, section 752.01(1)(a) which allows limited visitation to grandparents after a parent has died, promotes a compelling state interest in protecting the emotional well being of children, while simultaneously safeguarding the fundamental rights of parents. Accordingly, we find this section constitutional under Article I, section 23 of the Florida Constitution.[12]

III

Having determined that section 752.01(1)(a) is constitutional, we next address whether grandparent visitation is in the best interests of Kelly. In Kelly's short life her mother died, her father remarried, and is now in the process of getting a divorce from her adoptive mother. Kelly's father no longer lives in her home and she is now being cared for by her adoptive mother. From Kelly's perspective the world is constantly turning upside down.

Testimony at trial revealed that, because people close to Kelly have constantly disappeared from her life, she needs the stability that her grandparents would provide. Additional evidence also showed that Kelly has a loving relationship with her grandparents and that severing this relationship would be detrimental to her. *See Dixon v. Melton*, 565 So. 2d 1378 (Fla. 1st DCA 1990) (visitation allowed where grandchild suffered from the frustration of grandparent visitation by the mother). Our review of the record reveals competent, substantial evidence supporting the trial court's finding that visitation with her grandparents is in Kelly's best interests. *See Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975).

However, while we agree with that part of the trial court's order finding visitation proper, we find under these circumstances that the order was overly broad. Of particular concern are the provisions allowing the grandparents to mandate Kelly's religious development. The visitation order allows the grandparents extended visitation every other Friday evening for Sabbath dinner, in addition to numerous specific religious holidays. There is a wide gulf between simple visitation and religious tutelage. One of the most basic rights in determining the care and upbringing of a child is the teaching of moral standards and religious beliefs. *See Bellotti v. Baird*, 443 U.S. at 622, 99 S.Ct. at 3035, 61 L.Ed.2d at 797. The trial court abused its discretion by intruding too far into the parent's domain and should not have superseded the parents' objections as to how and what specific type of religious upbringing Kelly should have.

Additionally, we express severe reservations concerning whether the frequent dinners and visits are warranted when the lower court found the parents to be fit. Here, testimony revealed that frequent visits would be destructive to Kelly's normal pattern of living. Consequently, under these circumstances we find that the broad scope of the visitation order runs contrary to Kelly's best interests, and must be reversed. *See Sketo*, 559 So. 2d at 381 (extensive visitation unreasonable and not in minor child's best interest); *Fisher v. Fisher*, 390 So. 2d 142 (Fla. 3d DCA 1980) (visitation to grandparents upheld but order facilitating visitation by forbidding parent to remove children from Broward County reversed).

IV

In conclusion, finding that section 752.01(1)(a) does satisfy the requirements of the Florida Constitution, we affirm that part of the order permitting visitation by the grandparents because visitation is in Kelly's best interests. However, we reverse and remand to the trial court to reconsider the extent and scope of what constitutes reasonable visitation under these circumstances. *See Ward v. Dibble*, 683 So. 2d at 666; *Sketo*, 559 So. 2d at 381.

Because of the important and sensitive family law issues involved, we certify the following question to the Florida Supreme Court as one of great public importance:

MAY THE STATE CONSTITUTIONALLY ALLOW REASONABLE GRANDPARENT VISITATION WHERE ONE OR BOTH PARENTS OF A CHILD ARE DECEASED AND VISITATION IS DETERMINED TO BE IN THE BEST INTERESTS OF THE CHILD?

Affirmed in part; reversed in part and remanded; question certified. (SCHWARTZ, C.J., concurs.)

(GREEN, J., dissenting.) I respectfully dissent. I believe that the order under review should be reversed *in toto* and this case dismissed upon the grounds that the appellees/grandparents were entitled to no relief under section 752.01(1)(a), Florida Statutes (1993) where throughout the course of the proceedings below, the minor child continuously had two living married parents, her natural father, and adopted stepmother. Alternatively, I believe that the order must be reversed because this statute is facially unconstitutional under Article I, Section 23 of the Florida Constitution as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I

The majority has characterized this case as "[u]nlike united opposition in an intact family, this is not a case where the state is being called upon to impose visitation over parental objections." Majority op. at 10-11. Rather, the majority states, "this is a case where the state acts to insure the continuity of visitation already encouraged by a deceased parent." Majority op. at 11. With all due respect, this overly simplistic assessment does not comport with the true factual scenario presented in this case. Indeed, the majority's myopic view of Kelly's legal familial situation during the course of this proceeding has unfortunately skewed its analysis of this case.

When the grandparents commenced this proceeding on December 15, 1994 for unsupervised visitation rights, Kelly was indeed living in an intact family with two parents; her natural father and adopted stepmother. Both of her parents were united in their opposition to Kelly's unsupervised visitation with the grandparents. At some point during the proceedings below, Kelly's parents separated[13] and remained separated up to the point when the lower court rendered its order. Despite their separation, Kelly's parents remained and remain united in their opposition to Kelly's unsupervised visitation with the grandparents. The lower court awarded, among other things, Kelly's unsupervised visitation with the grandparents over her parents' objections pursuant to section 752.01(1)(a)[14]. That section reads:

> The Court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> (a) One or both parents of the child are deceased;

From the plain language of this statute, no grandparents can be conferred visitation rights under this subsection where a child has two living parents. Significantly, the legislature did not limit "parents" in this subsection to mean only natural parents as it did in section 752.01(1)(e).[15]

The majority states (indeed stresses) no less than three times that this case solely involved grandparental visitation in the context of one deceased parent. *See* Majority op. at 4, 6, and 11. Such an astonishing statement ignores and denies the existence of Kelly's adopted mother with whom Kelly now actually resides. Although not expressly stated, the clear implication of the majority's characterization of this case is that the rights and childrearing decisions of Kelly's adoptive mother either do not exist or, if they do exist, are subservient to the previous decisions made by Kelly's deceased natural mother. This, of course, is wholly at odds with the longstanding law and sound policy of this state that adopted parents be accorded the same legal rights and constitutional protections in parenting decisions as natural parents. *See* § 63.172(c), Fla. Stat. (1996); *Korbin v. Ginsberg*, 232 So. 2d 417, 418 (Fla. 4th DCA 1970) ("A judgment or decree of adoption establishes the relationship of parent and child to the same extent as though the child had been born to such parent in lawful

wedlock."); *Lee v. Kepler*, 197 So. 2d 570, 573 (Fla. 3d DCA 1967) ("The result of the adoption by the stepmother 'was to place the adopted child as far as possible in the same position as the natural child to all intents and purposes.'"); *see also Simmons v. Simmons*, 900 S.W. 2d 682, 684 (Tenn. 1995) ("The relationship between an adoptive parent and child is no less sacred than the relationship between a natural parent and child and that relationship is entitled to the same legal protection.").

The legal ramification of Kelly's adoption by her stepmother is that for all legal purposes and proceedings, Kelly is no longer the child of a deceased parent. *See* § 63.172(1)(b) (1996) (adoption "terminates all legal relationships between the adopted person and the adopted person's relatives, . . . so that the adopted person thereafter is a stranger to his or her former relatives for all purposes."). Instead, she is and remains the child of two living parents. Consequently, the grandparents could not be awarded visitation rights pursuant to section 752.01(1)(a)[16] and the lower court erred in so doing under the factual scenario presented in this case.

II

Although I believe that this case can and should be disposed of solely on the grounds that the grandparents were entitled to no relief under section 752.01(1)(a), where the minor child in this case has two living parents, I write further to illustrate why this statute in its entirety is nevertheless facially unconstitutional. In my view, because section 752.01, Florida Statutes (1995) requires no showing of demonstrable harm to a child prior to the imposition of forced grandparental visitation, it is facially unconstitutional under Article I, Section 23 of the Florida Constitution as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

At the outset, I point out that I fully concur with the sentiment expressed by our state supreme court in *Beagle*, that it is not appropriate for the judiciary to comment on the general wisdom or desirability of maintaining inter-generational relationships in a constitutional analysis. *See Beagle*, 678 So. 2d at 1277; *see also Brooks*, 454 S.E. 2d at 773-74 (the question of whether it might be "better" or "desirable" for a child to maintain contact with a grandparent is irrelevant to constitutional analysis). Consequently, I shall refrain from interjecting any opinion as to the need for maintaining the grandparent/grandchild relationship into this constitutional analysis.

A. RIGHT OF PRIVACY UNDER FLORIDA'S CONSTITUTION

On November 4, 1980, the citizens of this state voted to amend the Florida Constitution to include article I, section 23 which provides in relevant part that "[e]very natural person has the right to be let alone and free from governmental intrusion into his [or her] private life . . . ." The far reaching impact of this amendment was poignantly observed by our supreme court:

> The citizens of Florida opted for more protection from governmental intrusion when they approved [A]rticle I, [S]ection 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.

In re T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989) (quoting *Winfield*, 477 So. 2d at 548). The right of privacy guaranteed by article I, section 23 does not confer complete immunity from governmental intrusion into the private lives of Floridians and will yield to compelling governmental interests. *See Winfield*, 477 So. 2d at 547. However, before the right of privacy attaches and the compelling state interest is applied, there must be a threshold showing of a reasonable expectation of privacy. *Id.*

In the context of the parent/child relationship, it should be pointed out that even prior to the enactment of article I, section 23, Florida courts had always zealously guarded the rights of parents to raise their children without interference:

> While according to the trial Judge a broad judicial discretion in the matter we 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. This is a rule older than the common law itself and one which had its inception when Adam and Eve gave birth to Cain in the Garden of Eden. In cases such as this one the only limitation on this rule of parental privilege is that as between the parent and the child the ultimate welfare of the child itself must be controlling. (citations omitted).

In re Guardianship of D.A., McW., 429 So. 2d 699, 702 (Fla. 4th DCA 1983) (quoting *State ex rel. Sparks v. Reeves*, 97 So. 2d 18, 20 (Fla. 1957)). Thus, the enactment of article I, section 23 merely codified these recognized rights of parents in constitutional form.[17]

Initially then, a determination must be made as to whether parents have a reasonable expectation of privacy in their decision to deny the grandparents access to their children. Although no case to date has expressly so stated, it appears to be an unassailable proposition that otherwise fit parents, such as the appellants who have neither abused, neglected, or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exclude or limit the grandparents' visitation with their child.[18] Indeed, even the majority apparently does not take exception with this basic proposition. Consequently, the critical issue in this analysis is whether absent any showing of harm to the child, the "best interest" standard is a compelling reason for the state to override any fit parent's decision to limit (or not) grandparental visitation, regardless of whether the family is intact or not. Contrary to the majority's conclusion, I do not believe that it is.

Florida is one of only five states which has an explicit right of privacy provision in its constitution. In the majority opinion, it is pointed out that most of the state courts which have considered the constitutionality of their respective grandparent statutes (i.e., Connecticut, Indiana, Kansas, Kentucky and Wyoming), have found such statutes to be constitutional. *See* Majority op. at 4 n.1. What is not pointed out in the majority opinion, however, is the fact that none of the constitutions in those states have explicit privacy provisions. Thus, because Floridians have opted for more privacy protections than the citizens in those jurisdictions, the fact that their grandparent statutes have been found constitutional simply cannot carry any weight in Florida. Moreover, of the four other states which do have express privacy provisions in their constitutions (i.e., Alaska, California, Hawaii, and Montana)[19], not one of these jurisdictions to date has found the "best interest of the child" standard to be a compelling state interest.[20]

I believe that well-established precedent clearly supports the concept that any fit parent has the absolute right to make child rearing decisions in the absence of a showing by the state that the parental decisions are harmful or detrimental to the welfare or well-being of the child. That is precisely why, as the majority points out, the state can constitutionally impose regulations requiring parents to provide the basic necessities of life to their children, to wit: school, food, clothing, inoculation, child restraint seats, and curfew hours. *See* Majority op. at 5. The state's only justifiable intrusion into these areas is to prevent harm to the child. *See Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991) (state has compelling interest in preventing the sexual exploitation of children), *cert. denied*, 503 U.S. 964 (Fla. 1992); *Padgett v. Dep't of Health and Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991) (state may terminate parental rights where substantial

risk of harm to child exists). These basic necessities of life are not merely provided in the child's "best interest" or general welfare. Indeed, without them, the child is at substantial risk of harm. A child's occasional visitation with a nonparent relative, however loving and doting, simply cannot be cast into the same category as these basic necessities of life, absent a showing of particularized physical or emotional harm.

As I understand the thrust of the majority's analysis, the state can: (1) enact any regulatory measure deemed to be in the child's best interest,[21] and (2) enforce the same over parental objections as long as the child's family is not intact. If the majority's reasoning were correct, then the state could not constitutionally enforce its curfew laws, child restraint seat laws, inoculation laws, school attendance laws, etc. against intact families who otherwise opposed the same. Contrary to the majority's position, the state's only compelling interest in these areas is that harm (whether physical or emotional) not befall the child. The state's compelling interest has nothing to do with the parent or child's family status.

Indeed, after the enactment of the privacy provision, one of the more telling decisions to recognize a parent's fundamental decision-making right, outside of the intact family context, was *In re T.W.* There, the supreme court held that a statute requiring an unmarried pregnant minor to obtain parental consent or judicial permission before terminating her pregnancy from conception to birth unconstitutionally infringed upon the minor parent's right to privacy under Article I, Section 23 of the Florida Constitution. Significantly, the court found that such a substantial intrusion into the minor parent's right of privacy was not necessary for the preservation of her maternal health or the potentiality of life in the fetus.

> We . . . adopt the end of the first trimester as the time at which the state's interest in maternal health becomes compelling under Florida law because it is clear that prior to this point no interest in maternal health could be served by significantly restricting the manner in which abortions are performed by qualified doctors, whereas after this point the matter becomes a genuine concern.

In re T.W., 551 So. 2d at 1193. The significance of this decision to the issue before us is the state supreme court's recognition of the fact that the state's only compelling interest in these minor maternal parents was in their health; not their "well-being" or "best interests" in general.

If *In re T.W.* was not enough, any lingering doubts about the state's compelling interest in this area were most assuredly dispelled in the supreme court's decision in *Beagle*. There, in response to the specific certified question of whether section 752.01(1)(e)[22] of the grandparent visitation statute was facially unconstitutional under Article I, Section 23 of the Florida Constitution or the Due Process Clause of the Fourteenth Amendment, the court held that it was, absent a showing of harm to the child. Citing to its holdings in *In re T.W.*, *Padgett*, and *Schmitt*, the court said that these cases "have made it abundantly clear that the state can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child." *Beagle*, 678 So. 2d at 1276. Accordingly, the court concluded that because the challenged paragraph did not require the state to demonstrate a harm to the child prior to an award of grandparental visitation rights, the provision infringed upon the parent's fundamental right to raise their children. *Id.* Contrary to the suggestion made by the majority, the constitutional analysis of the state's compelling interest in *Beagle* did not turn on the fact that the Beagles were an intact family.[23] There is nothing in the *Beagle* analysis to suggest that parents who are single, widowed, separated, or divorced should have less constitutionally protected privacy rights in the rearing of their children than married parents in the context of an intact family.[24]

Despite the supreme court's pronouncement in *Beagle* and its prior decisions regarding the state's compelling reasons in this arena, the majority has apparently decided to embrace and adopt the first district's holding in *Sketo* which found section 752.01(1) to be facially constitutional. The *Sketo* court determined that "the state has a sufficiently compelling interest in the welfare of children that it can provide for the continuation of relations between children and their grandparents under reasonable terms and conditions so long as that is in the children's interest." 559 So. 2d at 382. With all due respect to my colleagues in the majority, I believe that their adaptation of *Sketo* is wholly ill-advised.[25] Aside from the fact that the *Sketo* holding is wholly irreconcilable with the state supreme court decisions heretofore discussed and the federal court decisions subsequently to be discussed[26], I believe the *Sketo* (and hence the majority's) analysis is fundamentally flawed because it presupposes that a visitation dispute between a parent and a nonparent is the same as a visitation dispute between two parents. It is not. The clearest indication that these two types of disputes are not on the same level playing field can be found in the supreme court's decision in *In re Guardianship of D.A. McW v. McWhite*, 460 So. 2d 368 (Fla. 1984). There, the court found that then Judge Anstead of the fourth district had correctly articulated the test to be applied in a custody dispute between two parents and distinguished it from the test applicable to a custody dispute between a parent and a third party. "When a custody dispute is between two parents, where both are fit and have equal rights to the custody, the test involves only the determination of the best interests of the child." *Id.* at 369-70. On the other hand, "[w]hen the custody dispute is between a natural parent and a third party, . . . custody should be denied to the natural parent only when such an award will, in fact, be detrimental to the welfare of the child." *Id.* at 370. Because the *Sketo* court did not employ this correct analysis to the visitation dispute between the parent and grandparent, I echo Judge Webster's sentiments in *Beagle*, 654 So. 2d 1260 (Fla. 1st DCA 1995), that *Sketo* was wrongly decided.[27] *See Beagle*, 654 So. 2d at 1263 ("I would recede from that opinion and hold that the statute at issue here violates both, [A]rticle I, [S]ection 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution.").[28] Indeed, because the "best interests" test is the appropriate standard only when a court is confronted with a custody or visitation dispute between two parents, the *Beagle* court carefully emphasized that its holding was "not intended to change the law in other areas of family law where the best interest of the child is utilized to make a judicial determination." *Beagle*, 654 So. 2d 1276.

In summation, I am not at all unsympathetic to the laudable legislative motives for the enactment of section 752.01(1) in its present form. I simply do not believe that any of its provisions can pass constitutional muster under Article I, Section 23 of Florida's Constitution where it does not require that demonstrable harm to the child be shown prior to the imposition of forced grandparent visits. If subsection (1)(e)[29] of the statute could not pass constitutional muster under article I, section 23 without a showing of harm to the child *a fortiori*, the remaining four provisions of section 752.01(1) must necessarily fall as well because they similarly require no showing of harm to the child prior to the imposition of forced grandparent visitation.[30]

Unfortunately, I cannot join in the majority's question as certified because I do not believe it factually or adequately states the true issue that has been presented to us. In my view, the supreme court's ultimate decision in this case will necessarily be dispositive of all of the remaining provisions of section 752.01 since all of these provisions pertain to non-intact familial situations. Therefore, in the interest of judicial economy, it makes sense to me that the following question be certified to the supreme court:

> ARE SECTIONS 752.01(1)(A)-(D), FLORIDA STATUTES (1995), FACIALLY UNCONSTITUTIONAL BECAUSE THEY CONSTITUTE IMPERMISSIBLE STATE INTERFERENCE WITH PARENTAL RIGHTS PROTECTED BY EITHER ARTICLE I, SECTION 23, OF THE FLORIDA CON-

STITUTION OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

B. RIGHT OF PRIVACY UNDER THE DUE PROCESS CLAUSE

Although I believe that the constitutionality of section 752.01 can and should be determined under state law, I write still further to point out why this statute is unconstitutional under the federal constitution as well.

The notion that there is a right of privacy or certain spheres of personal liberty into which the government may not intrude without strong justification, although not expressly stated in the federal constitution, finds its genesis in the Due Process Clause of the Fourteenth Amendment.[31] *See Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). In a line of cases beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), one of the fundamental rights or liberty interests recognized as being protected under the Due Process Clause is the right of a parent to rear their children without unwarranted government interference.

Thus, in *Meyer*, the Court struck down as unconstitutional a state statute which prohibited the teaching of any language other than English to children before the ninth grade. The Court declared generally that the liberty interest guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . ." 262 U.S. at 399. Further, although the *Meyer* Court acknowledged the general power of the state to compel school attendance and to prescribe a curriculum for its educational institutions, the Court significantly held that the statute could not pass constitutional muster absent a demonstrable showing of harm to the child:

> No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.

Id. at 403.

Citing to *Meyer*, the Court subsequently said in *Pierce* that a state statute requiring all children to attend public schools "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control," absent a showing by the state that a private education was inherently harmful. *See Pierce*, 268 U.S. at 534-35.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him [or her] and direct his [or her] destiny have the right, coupled with the high duty, to recognize and prepare him [or her] for additional obligations.

Id. at 535.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court recognized that the state as parens patriae could only intrude into parental decisions when the safety of children so required. There, the aunt and legal guardian of a minor appealed her conviction for violating the state's child labor laws, which prohibited, among other things, minors from selling newspapers, magazines or periodicals on any street or public place. The child's aunt, a Jehovah's Witness had permitted her minor niece to accompany her to a public street one evening to sell religious magazines. The aunt argued that the tenets of her family's faith dictated that they distribute religious literature; thus, the state laws were violative of her rights under the First Amendment applied by the Fourteenth Amendment to the states. Her argument was buttressed, however, upon her claim of parental right as secured by the Due Process Clause of the Fourteenth Amendment. 321 U.S. at 164. In rejecting her argument, the Supreme Court acknowledged that although the "custody, care, and nurture of the child reside first in the parents," the harm from which the child labor laws were seeking to protect, namely: "the crippling effects of child employment," particularly in public places and potential harms arising from other activities in such places, was not beyond regulation as against a claim of religious liberty. 321 U.S. 158, 166, 168.

Later, however, in *Yoder*, the Court held that the First and Fourteenth Amendments precluded the state from compelling Amish parents to send their children to high school, in derogation of the parents' religious beliefs. The Court rejected the state's all-encompassing parens patriae interest in the universal compulsory high school education for all children where there was no showing of harm to Amish children in their unique lifestyle. Distinguishing this case from *Prince*, the Court noted that:

> [A]ccommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

Yoder, 406 So. 2d at 234.

The clear recurring theme in these cases is that under the Fourteenth Amendment, there must be a threshold showing of real or potential harm to a child before the state's intrusion into family life can be justified.[32] That is, absent a showing of harm or danger to the child, the state simply cannot, under the guise of promoting what it deems to be in the general welfare or best interest of a child, override parental decisions. Recently, a Virginia appeals court squarely held that the right of parents in raising their child is a fundamental right protected by the Fourteenth Amendment and that there must initially be a showing of actual harm before grandparental visitation can be ordered over the parents' objection. *See Williams v. Williams*, No. 2260-3, 1997 WL 289315 (Va. Ct. App. June 3, 1997). The state's compelling interest cannot be satisfied simply upon a "best interest" showing.[33] As one legal commentator has said:

> [T]o allow grandparents to receive visitation with their grandchildren because the court determines that the child's development will be "better because of it" is to set precedent which places in the courts the authority to direct the development of children; it gives to the state what is best reserved for the parents.[34]

Still another has aptly pointed out that:

> Even assuming that the parent makes a mistake in denying the child the right to see the grandparent, the fundamental right of parents to make decisions concerning their children must include the right to make wrong decisions. For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all.[35]

Thus, in the absence of any requirement of a showing of demonstrable harm to a child as a result of the deprivation of grandparental visitation, I believe that section 752.01(1) infringes upon fundamental rights guaranteed to parents or guardians under the Fourteenth Amendment. The state's desire for grandparental visitation simply because it deems such visitation generally to be in the "best interest of all children" simply does not pass constitutional muster as a compelling state interest under the Due Process Clause of the federal constitution.

III

For all of the foregoing reasons, I believe that section 752.01(1) in its presently written form is facially unconstitutional under both the state and federal constitutions. I believe that this case presents an excellent opportunity for our supreme court to extend its *Beagle* holding to the remaining subsections of 752.01(1) to so state.

[1]All fifty states have codified similar statutes designed to preserve the rights of grandparents to visit with their grandchildren. The majority of those state courts which have addressed this issue find these statutes constitutional. *See Lehrer v. Davis*, 571 A.2d 691, (Conn. 1990); *Sanchez v. Parker*, 1995 WL 489146 (Del. Fam. Ct. 1995); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind.Ct.App. 1989); *Spradling v. Harris*, 13 Kan.App.2d 595, 778 P.2d 365 (1989); *King v. King*, 828 S.W. 2d 630 (Ky.), *cert. denied*, 506 U.S. 941, 113 S.Ct. 378, 121 L.Ed.2d 289 (1992); *Herndon v. Tuhey*, 857 S.W. 2D 203 (Mo. 1993); *Ridenour v. Ridenour*, 901 P.2d 770 (N.M.Ct.App.), *cert. denied*, 898 P.2d 120 (1995); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995).

By contrast, only a few states find grandparent visitation unconstitutional and have done so solely under circumstances involving an intact family. *See Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, __ U.S. __, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *Hawk v. Hawk*, 855 S.W. 2D 573 (Tenn. 1993); *Williams v. Williams*, 485 S.E.2d 651 (Va. App. 1997). Interestingly, the Tennessee Supreme Court in *Hawk* noted that because parents in a disrupted family might be less inclined to allow visitation with their former in-laws, the state had a stronger argument for visitation to protect the child when the nuclear family was destroyed. *Hawk*, 855 S.W.2d at 580.

[2]No state allows unfettered discretion to parents. "Except in countries which lie in barbarism, the authority of the parent over the child is nowhere left absolutely ... without definition and regulation." *Bailey v. Menzie*, 542 N.E.2d 1015, 1019 (Ind.Ct.App. 1989), *quoting State v. Clottu*, 33 Ind. 409, 411 (Ind. 1870).

[3]The Court specifically stated: "We emphasize again that our holding in this case is not intended to change the law in other areas of family law where the best interest of the child is utilized to make a judicial determination. In issuing this decision, we have no intent to disrupt or modify the current requirements for best interest balancing in those other areas of family law proceedings." *Beagle*, 678 So. 2d at 1277.

[4]The thrust of the dissent's argument is that because *Beagle* found section (1)(e) unconstitutional as requiring a showing of harm in the context of an intact family, the remaining four provisions of the statute, even though dealing with completely different circumstances, must fall as well. Dissent at 31-32. A careful reading of *Beagle* shows quite the opposite. The Court went out of its way, on four separate occasions, to emphasize that its holding was limited to intact families. *Beagle*, 678 So. 2d at 1271. In light of this specific language, we disagree with the dissent's contention that the demonstrable harm requirement should be extended to the remaining provisions of the statute as well.

[5]While the dissent correctly observes that states holding visitation statutes constitutional do not have Florida's explicit right of privacy, we more importantly point out that all states with privacy rights have enforced grandparent visitation premised solely on the best interests of the child. *See Brown v. Brown*, 914 P.2d 206 (Alaska 1996); *In re Robert D.*, 198 Cal.Rptr. 801 (Cal. 1984); *Doe v. Doe*, 937 P.2d 949 (Haw. Ct.App. 1997); *In re Marriage of Kovash*, 858 P.2d 351 (Mont. 1993).

[6]Section 752.01(1) was designed to protect the interests of children in disrupted families by preserving beneficial visitation. As noted by this court in *Griss v. Griss*, 526 So. 2d 697 (Fla. 3d DCA 1988) (Pearson, J. concurring), *review dismissed*, 531 So. 2d 1353 (Fla. 1988), section 752.01(1) was intended to apply in situations where a family is disrupted by death or divorce, and the custodial parent spitefully prevents the children from visiting with their grandparents. The clear legislative intent behind this statute was to protect the interests of children to visit with their grandparents. *See Griss*, 526 So. 2d at 700 (*citing to Fla. H.R., Tape Recording of Proceedings* (April 23, 1984) (tape available from Florida House of Representatives) (floor debate on H.B. 487)).

[7]As noted by one court: the "tensions and conflicts that mar relations between parents and children are often absent between those very same parents and their grandchildren...visits with a grandparent are a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship." *Mimkon v. Ford*, 332 A.2d. 199, 204 (N.J. 1975).

[8]It is widely recognized that a fundamental disruption in a child's environment can significantly impair their development. "Near consensus does exist...for the principle that a child's healthy growth depends in large part upon the continuity of his personal relationships. When divorce, death of a parent, foster care, or adoption intrude on a child's family life, such continuity is inevitably interrupted...it seems reasonable...that a break in family continuity is detrimental to a child." Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need For Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 902 (1984).

[9]Grandparents can alleviate much of the emotional trauma and impact associated with the disruption of a family. In fact, "studies...show that the quality and strength of support a child receives following the death of a parent may protect the child from later psychiatric disorders. Maintaining existing ties to adults outside the nuclear family may help minimize a child's sense of grief and loss following a parent's death." Catherine M. Gillman, *One Big, Happy Family? In Search of a More Reasoned Approach to Grandparent Visitation in Minnesota*, 97 Minn. L. Rev. 1279, 1301-2 (1995).

[10]As an alternative argument, the dissent contends that section 752.01(a) is inapplicable because Kelly is now adopted. Dissent at 19. We agree that an adoptive parent generally stands in the same shoes as a natural parent. *See* § 63.172(c), Fla. Stat. (1995). That is not the point here. What triggers the application of section 752.01(a) is the death of a parent. Thus, regardless of the fact Kelly was subsequently adopted, this section was triggered when her natural mother died.

[11]The dissent attempts to dismiss *Sketo* by contending that it is wholly irreconcilable with existing state and federal constitutional law. Dissent at 29. In doing so the dissent likens beneficial visitation to such complete deprivations of parental rights as the termination of custody, or the veto of a minor child's abortion. *See In re Guardianship of D.A. McW.*, 460 So. 2d 368 (Fla. 1984); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989). This goes too far. The denial of custody and the abortion veto are both fundamental usurpations of parental power that completely override the ability of parents to control their children. Visitation cannot be compared to such drastic usurpations of parental power. *See In re Guardianship of D.A. McW.*, 429 So. 2d 699 (Fla. 4th DCA 1983), *approved*, 460 So. 2d 368 (Fla. 1984). The parents retain complete control over their children. Moreover, whereas visitation is modifiable, abortion or the complete termination of parental rights is not. Unlike the circumstances in cases cited by the dissent, section 752.01(1)(a) does not involve the complete dismissal of parental control, but the preservation of control through the maintenance of visitation rights already granted by the deceased parent.

[12]The dissent cites a number of cases to support the contention that section 752.01(1) violates the federal constitution. Our resolution of this issue under Florida's more restrictive right of privacy makes any analysis under the federal constitution irrelevant. *See Beagle*, 678 So. 2d at 1272.

[13]Ironically and sadly, in the proceedings below, Kelly's father attributed the demise of their otherwise intact family to the emotional and financial strain of this litigation with the grandparents.

[14]The grandparents have pointed out to us in their brief that the appellants were subsequently divorced after the commencement of this appeal. This subsequent event, however, cannot appropriately be factored into our decision since it was not litigated before the lower court. *See Hillsborough County Bd. of Count Comm'r v. Public Employees Relations Comm.*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) (appellate court will not consider evidence that was not presented to lower tribunal, since function of court is to determine whether lower tribunal committed error based on issues and evidence before it); *see also Rosenberg v. Rosenberg*, 511 So. 2d 593, 593 n.3 (Fla. 3d DCA 1987) (appellate review is limited to record as made before that court at time of entry of final judgment or order complained of), *review denied*, 520 So. 2d 586 (Fla. 1988).

[15]Prior to being declared unconstitutional in *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), that subsection permitted reasonable grandparental visitation if it was in the child's best interests where:

> (e) 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. (emphasis added).

[16]Nor could the lower court's order be sustained under section 752.01(1)(b) which permits visitation if the marriage of the parents of the child has been dissolved. It is undisputed that Kelly's parents remained married throughout the course of the proceedings below.

[17]*See* Michael J. Minerva, Jr., *Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy"*, 18 Fla. St. U. L. Rev. 533, 545 (1991).

[18]*Id.*

[19]Arizona, Illinois, Louisiana, South Carolina, and Washington have included privacy protections in their search and seizure provisions. *See Beagle*, 678 So. 2d at 1275, n.9.

[20]The majority cites to decisions from these states, *Brown v. Brown*, 914 P. 2d 206 (Alaska) 1996); *In re Robert D.*, 198 Cal. Rptr. 801 (Cal. 1984); *Doe v. Doe*, 937 P. 2d 949 (Haw. Ct. App. 1997); *In re Marriage of Kovash*, 858 P. 2d 351 (Mont. 1993), which have enforced grandparent visitation premised solely upon the best interests of the child. None of these decisions, however, presented a constitutional challenge to the grandparent statute under the state's privacy provision.

[21]Interestingly enough, most people would agree that any number of things are generally in a child's best interest—attending college, having regular preventative medical or dental checkups, instilling religious and/or spiritual values at a young age, restricting the number of television viewing hours, etc. Few, if any people, however, would dare suggest that the state has the power to constitutionally enact measures to require parents to provide such things or impose such restrictions on their children. That is because while these measures, like grandparental visitation, may be deemed to be in the child's best interests, it does not necessarily follow that a child will sustain harm in the absence of them. The notion that the state could regulate and usurp those and other areas from the parents based solely upon the "best interest" test would effectively make the state and not the parent primarily responsible for childrearing.

[22]That portion of the statute provides that:

> (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> * * * *
>
> (e) 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.

[23]Indeed, if the majority was correct on this point, the supreme court would have had to recede from *In re T.W.* rather than cite to it with approval in *Beagle*.

[24]The majority makes much to do about the fact that the supreme court in *Beagle* carefully limited its unconstitutionality finding to the "intact family" section of the statute. The sole reason for the court's limited holding, however, was because the intact family provision of the statute, section 752.101(1)(e), was the only provision put at issue before the court. *See Beagle* at 1272. If the supreme court had deemed this subsection unconstitutional when applied to intact families, it would have decided *Beagle* on this basis and not engaged in the "demonstrable harm" analysis.

[25]See Judge Webster's concurring opinion in *Beagle v. Beagle*, 654 So. 2d 1260 (Fla. 1st DCA 1995), where he indicated his preference to recede from *Sketo* and hold that "the statute at issue here violates both [A]rticle I, [S]ection 23 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution." *Id.* at 1263.

[26]*Sketo* is also factually distinguishable where the minor child there did not have an adopted stepparent as in this case.

[27]Significantly, the fourth district in *In re The Guardianship of D.A., McW.*, also recognized that despite the superiority of the natural parents' rights to visitation over those of the grandparents, visitation privileges could be afforded to the grandparents if an abrupt and complete severance of the child's relationship with the grandparent would be detrimental to the child. 429 So. 2d at 704.

[28]*Sketo* has also been appropriately criticized by one legal commentator as "merely [paying] lip service to the compelling state interest test":

> It disregards the superiority of parental rights and treats the dispute as one between persons of equal rights with respect to the children. According to the *Sketo* court, any regulation asserting the welfare of children as its touchstone need only be reasonable, rather than serving a compelling state interest. If this assertion were sufficient to carry the state's burden, the Florida Supreme Court would not have struck down the parental consent law in *T.W.*, in which the state attempted to justify its law by asserting a compelling interest in the protection of immature minors.

See Minerva, *supra* note 1, at 551.

[29]That portion of the statute provides that:

> (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> * * * *
>
> (e) 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.

[30]The remaining provisions of this section permit the imposition of grandparental visits solely when it is in the best interest of the minor child if:

> (a) One or both parents of the child are deceased;
>
> (b) The marriage of the parents of the child has been dissolved;
>
> (c) A parent of the child has deserted the child; [or]
>
> (d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091. . . .

[31]*See also* Minerva, *supra* note 1, at 540.

[32]*See* Cynthia L. Greene, *Grandparents Visitation Rights: Is the Tide Turning?*, 12 J. Am. Acad. Matrim. Law 51, 57 (1994).

[33]Interestingly, it is clear from the *Sketo* decision that these federal cases were cited to that court. Based upon its holding, I can only conclude that the *Sketo* court misapprehended the significance of these federal decisions.

[34]Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 J. Fam. L. 393, 441, n.30 (1985-86).

[35]Greene, *supra* note 11, at 59.

* * *

Criminal law—Aggravated stalking—Battery—Where prior inconsistent statements of victim and her son were the only substantive evidence of guilt, convictions cannot be sustained

BRYANT WILLIAMS, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-544. L.T. Case No. 96-22036. Opinion filed September 17, 1997. An Appeal from the Circuit Court for Dade County, Victoria Platzer, Judge. Counsel: Leonard J. Cooperman, for appellant. Robert A. Butterworth, Attorney General and Paulette Taylor, Assistant Attorney General, for appellee.

(Before JORGENSON and SORONDO, JJ., and BARKDULL, Senior Judge.)

(SORONDO, J.) Bryant Williams appeals the trial court's judgment of conviction and sentence for the crimes of burglary with assault (3 counts), aggravated stalking and simple battery (2 counts).

Officer Lillian Hunter responded to a call and contacted Linda Davis and her son, Osami. When she arrived she observed that Davis had a large lump on her forehead and an injury to her breast. She was also very agitated and rambling. At that time Davis told the officer that her boyfriend, Williams, had entered her apartment and struck her on the forehead. She further stated that she had a domestic violence injunction against Williams and that earlier that day she had another fight with Williams during which he bit her breast.

As has become lamentably common in cases of domestic violence, Davis' testimony before the jury was diametrically contrary to her undoubtedly more candid original statements to the police. She denied any wrongdoing by Williams, described his actions during the incidents in question as playful in nature or portrayed herself as the aggressor. Her son, Osami, also testified favorably for Williams and contrary to the statements he had made on a 911 tape during which he pleaded for police assistance because Williams was coming in through the apartment window.

The state impeached both witnesses with their prior statements to the police. At the conclusion of the trial the only evidence the state had introduced establishing the defendant's guilt was the prior inconsistent statements of Davis and Osami. In *Moore v. State*, 485 So. 2d 1279 (Fla. 1986), the Supreme Court of Florida addressed the following question, certified as one of great public importance (as reworded by the Court):

> Is a prior inconsistent statement sufficient evidence to sustain a conviction when the prior inconsistent statement is the only substantive evidence of guilt?

Id. at 1281. The Court answered the question in the negative and went on to say that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." *Id. See also Joyce v. State*, 664 So. 2d 45 (Fla. 3d DCA 1995); *Santiago v. State*, 652 So. 2d 485 (Fla. 5th DCA 1995). In the absence of any substantive evidence of guilt beyond the prior inconsistent statements of the victim and her son, we are, regrettably, compelled to reverse and remand with instructions to discharge the defendant.

Reversed and remanded.

* * *

Criminal law—Probation revocation—Probation properly revoked based on grand theft and failure to participate in TASC program—Provision of order finding failure to pay costs as additional ground for revocation inconsistent with oral pronouncement that state did not prove defendant's ability to pay costs

YADIRA JIMENEZ, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 97-241. L.T. Case No. 95-9283. Opinion filed September 17, 1997. An Appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge. Counsel: Bennett H. Brummer, Public Defender, and Rosa C. Figarola, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Joni Braunstein, Assistant Attorney General, for appellee.

(Before COPE, LEVY and SHEVIN, JJ.)

(PER CURIAM.) We affirm the order revoking defendant's probation based on commission of grand theft and failure to participate in the TASC program. However, as the state properly concedes, the order is inconsistent with the trial court's oral pronouncement that the state did not prove defendant's ability to pay costs. *Cushion v. State*, 637 So. 2d 2 (Fla. 3d DCA 1994). Accordingly, we remand this cause to the trial court with instructions to strike from the order defendant's failure to pay costs as an additional ground for revocation. This modification does not require the presence of the defendant.

Affirmed in part, reversed in part, and remanded.

* * *