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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

PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ARGUMENT

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

The Respondents/Grandparents erroneously maintain that §752.01(1)(a), Florida Statutes, is constitutional despite the subsection's complete absence of any requirement that there be a showing of substantial harm to the child. Significantly, Respondents' version of the STATEMENT OF THE CASE AND FACTS is wholly bereft of any finding by the trial court that the lack of grandparental visitation translated to demonstrable harm to the minor child. Instead, Respondents point to the Third District Court of Appeal's scholarly discussion concerning the impact upon a minor child as a result of the death of a parent. (Respondents' Answer Brief at page 13, fn. 11).[1] Perhaps if the statutory scheme required a showing of harm to the child, the lower court would have engaged in this critical determination. Unfortunately, the statute neither contains this vital requirement nor did the trial court make such a determination.

The Supreme Court has held that a person's right to conduct his family life as he chooses rises to the level of a "fundamental right". U.S. Constitutional Amendments 5 and 14. The First Amendment of the United States Constitution does not explicitly mention the freedom of association, however, this right is implied from the rights of speech, press, assembly and petition.

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[1] Regarding the death of a parent the Third District Court of Appeal opined, "In these situations a child needs stability that grandparents can provide." Von Eiff v. Azicri, 22 Fla.L.Weekly at 2177.

Consequently, a state may interfere with this right only upon two showings: that interference is necessary for the fulfillment of a compelling state or public interest and that the compelling state interest cannot be achieved by less restrictive or intrusive means. See NAACP v. Alabama, 357 U.S. 449 (1958). The facts of the instant case do not warrant state interference as no compelling interest exists. The only feasible compelling interest would be harm or potential harm to the child, KELLY. However, there was no testimony related to harm or potential harm to KELLY. The Petitioners have a constitutionally recognized fundamental right to raise KELLY as they choose, and no compelling state interest is identified to justify this statute when a strict scrutiny test is applied. Accordingly, this Court should defer to the Parents', Von Eiffs', rights to make decisions and recognize that government is not "equipped nor intended to dictate social interaction among families". Michael v. Herzler, 900 P.2d 1144 (Wyo. 1995).

Further, a parent has the right to define "family" as he or she pleases. Moore v. City of East Cleveland, 431 U.S. 494 (1977). This right to define "family" includes the right to determine with whom a minor child associates with and is not limited to the right to exclude relatives, including grandparents.

Respondents repeatedly cite authority which apply the incorrect standard of rational review to support their arguments. See Bailey v. Menzie, 542 N.E.2d 1015 (Ind. Ct. App. 1989); Campbell v. Campbell, 896 P.2d 635 (Utah Ct. App. 1995); King v.King, 828 S.W.2d 630 (Ky. 1992), cert. denied, 506 U.S. 901 (1992). This lesser standard is inappropriate as it does not apply when fundamental interests such as the liberty at stake is the issue.

Respondents correctly assert in their Answer Brief that a State has the "prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interest of the individual". (Respondents' Answer Brief at Page 6). However, as argued supra, Respondents cannot maintain that the lower court record evidenced any harm or potential harm to KELLY by virtue of not visiting with the Azicris. Harm prevention is the only possible compelling state interest that may justify state interference and satisfy the strict scrutiny test. Without the required harm or potential harm finding Florida Statute §752.01(1)(a) cannot pass constitutional muster. Absent a finding of harm this Court, like the Beagle Court, should follow its sister courts of Georgia and Tennessee. Beagle v. Beagle, 654 So.2d 1260 (Fla. 1st DCA 1995), 678 So.2d 1291 (Fla. 1996); Simmons v. Simmons, 900 S.W. 682 (Tenn. 1995); Hawk v. Hawk, 855 S.W. 2d 573 (Tenn. 1993); Brooks v. Parkerson, 454 S.E. 2d 769 (Ga. 1995).

Respondents argue that this court should apply a best interests standard when determining whether to award grandparental visitation. However, to do so would improperly elevate the status of a grandparent to the legal status of a "parent" thereby violating the parent's right to privacy. Spradling v. Harris, 778 P.2d 365 (Kansas 1989). The best interests of the child standard is properly reserved for circumstances of custody or visitation disputes between two parents. In re Guardianship of D.A. McW, 460 So.2d 368 (Fla. 1984). The more stringent standard of substantial harm or detriment to the child is properly applied to custody/visitation disputes between parents and third parties, such as grandparents. Simmons v. Simmons, 900 S.W. 2d 682 (Tennessee 1995); Steward v. Steward, 890 P.2d 777 (Nevada 1995); Hawk v. Hawk, 855 S.W. 2d 573 (Tennessee 1993); Brooks v. Parkerson, 454 S.E. 2d 769 (1995). The

Third District Court of Appeal did not require the Respondents to show harm, incorrectly reasoning that a finding of harm was only necessary where two "natural" parents existed. The Court failed to recognize that adoptive parents are entitled to the same legal rights and protections as "natural" parents. Beagle v. Beagle, supra.[2] Therefore, a showing of harm is required and the Respondents have failed to meet their burden of proof by failing to demonstrate any, much less than "substantial", harm or potential harm to KELLY. Respondents argue that Beagle does not apply as the Petitioners do not constitute an "intact" family. In fact, the Petitioners were married at the initiation of these proceedings as well as at the time of the Third District Court's ruling. Although the Petitioners are no longer married, they are united in their opposition to legally mandated grandparental visitation.

Respondents contend that they are "physically, mentally and morally fit". (Respondents Answer Brief at Page 7). Respondents further argue that the court must consider the willingness of grandparents to foster a parent-child relationship as well as the child's preference. (Respondents' Answer Brief at Page 9). However, even if the Respondents' fitness is conceded, this is not relevant as the facts of the instant case do not provide a situation of a custody or visitation dispute between two parents.

Respondents also maintain that grandchildren "almost always benefit from contact with his or her grandparents". (Respondents' Answer Brief at Page 7). Again, this utopian concept of "family" is not the legally mandated standard. Nor does the Respondents' argument that the doctrine of parens patriae justify infringement of parental rights. Without a showing of harm, the

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[2] See Judge Melvia Green's dissent, Von Eiff v. Azicri, 22 Fla.L.Weekly at 2178.

child's welfare is assured by the proper and reasonable exercise of the parents' discretion. The fact that grandparent contact could be "beneficial" or may result in greater "stability" following the death of a parent, does not equate with the notion of "substantial harm".

Respondents argue that a parent's death gives the court jurisdiction and the death of a parent is conclusive evidence of "potential harm" and that once a "substantial risk of harm has been demonstrated the best interest of the child standard is sufficient". (Respondents Answer Brief at Page 15). Neither proposition is correct, which explains Respondents' omission of any authority for these arguments. To hold otherwise would be to treat a widowed parent differently than a married parent, a clear violation of equal protection and due process. See generally, Fitts v. Poe, 22 Fla.L.Weekly D2265 (5th DCA September 26, 1997).

Respondents also argue that LUISA's death gives rise to the potential for substantive harm to KELLY. The mere possibility of potential harm some time in the near future is not sufficient to meet the Respondent's burden of proof. Many events in children's lives give rise to the potential for substantial harm. Yet, these events often do not result in actual substantial harm nor do they justify state intervention with constitutionally protected rights. Again, if this was demonstrable, the grandparents failed to carry the burden at the trial level.

II. THE FIFTH DISTRICT COURT OF APPEAL IN FITTS v. POE, 22 Fla.L.Weekly D2265 (5th DCA September 26, 1997) HAS FOUND FLORIDA STATUTE §752.01(1)(a) UNCONSTITUTIONAL AND TWO SISTER STATES HAVE FOUND STATUTES SIMILAR TO §752.01(1)(a) UNCONSTITUTIONAL

Recently, upon facts similar to the case at bar, the Fifth District Court of Appeal has held Florida Statute §752.01(1)(a) unconstitutional. The Court so held 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 (5th DCA September 26, 1997).

Likewise, Georgia and Tennessee have also held similar statutes unconstitutional as they violate parents' state and federally protected constitutional fundamental rights. See Brooks v. Parkerson, supra and Hawk v. Hawk, supra.

Respondents argue that other states have found the best interest of the child standard proper and the statute constitutional, notwithstanding state constitutions' privacy right provisions. See Sanchez v. Parker, 1995 WL 489, 146 (Del. Fam. Ct. 1995); Ridenour v. Ridenour, 901 P.2d 770 (N.M.Ct.App.) cert. denied, 898 P.2d 120 (1995); Campbell v. Campbell, supra; Michael v. Herzler, supra; Herndon v. Tuhey, supra; Spradling v. Harris, supra; Lehrer v. Davis, 571 A.2d 691 (Conn. 1990); Bailey v. Menzie, supra. However, these cases apply a lesser standard of scrutiny, a rational basis test. An application of this rational basis test rarely results in a finding of unconstitutionality. Because this matter involves the fundamental right of parenting free from government intrusion, a "strict scrutiny" standard is required.

CONCLUSION

Based upon the foregoing, §752.01(1)(a) Florida Statutes (1993) should be held unconstitutional as violating Article I, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. Alternatively, the action should be dismissed upon a finding that the grandparents were entitled to no relief under §752.01(1)(a), where the minor child continuously lived with her married parents during the lower court proceedings. Respondents urge this Court to adopt, as its majority opinion, Judge Melvia Green's well reasoned dissent in Von Eiff v. Azicri, 22 Fla.L.Weekly at 2178.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners 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 __ day of March, 1998.

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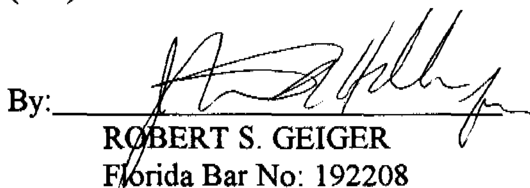

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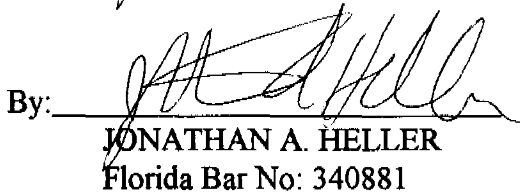

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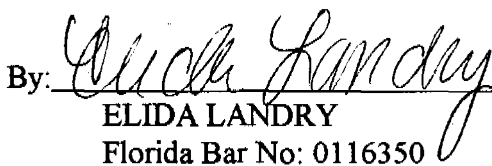

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