IN THE SUPREME COURT OF FLORIDA

CASE NO.: 92-685

ANTHONY PERSICO and
JOANNE PERSICO,

PETITIONERS

VS.

ROBERT M. RUSSO,

RESPONDENT

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONERS' BRIEF ON THE MERITS

RESPECTFULLY SUBMITTED BY:

LEIGH C. KATZMAN, ESQ.
KATZMAN & KORR, P.A.
ATTORNEY FOR PETITIONERS
1100 SOUTH STATE ROAD SEVEN
SUITE 102
MARGATE, FLORIDA 33068
(954) 972-8228
FLORIDA BAR NO. 935808

IN THE SUPREME COURT OF FLORIDA

ANTHONY PERSICO and JOANNE PERSICO,	
PETITIONERS,	**CASE NO.: 92-685**
vs.	
	DISTRICT COURT OF APPEAL, 4TH DISTRICT - NO. 97-4216
ROBERT M. RUSSO,	
RESPONDENT.	

NOTICE TO ADOPT BRIEF

NOTICE IS HEREBY GIVEN that the Petitioners herein, ANTHONY PERSICO and JOANNE PERSICO, seek to adopt the arguments contained within RESPONDENTS' ANSWER BRIEF ON THE MERITS filed in the case of VON EIFF V. AZICRI, CASE NO.: 91-647, presently on file with the Clerk of the Supreme Court a copy of which is attached hereto and marked as Exhibit "A". The case of VON EIFF V. AZICRI is fully briefed and is presently scheduled for oral argument before this Honorable Court on May 5, 1998 at 9:00 A.M. It is the position of the Petitioners in the present case that the question certified to the Supreme Court in the instant case and that of VON EIFF V. AZICRI are identical but for one word. The word choice difference, in the opinion of Petitioners, does not cause any distinction in meaning between the questions certified by the Fourth and Third District Courts of Appeal.

Petitioners have provided to this Court a brief statement of the facts of the instant case because they differ from those as stated in the adopted brief. However, the underlying issue raised and to be considered in both cases remains virtually identical.

Petitioners believe the 4th District Court of Appeals holding that §752.01(1)(A) is unconstitutional because it infringes on a parent's fundamental right to raise children free of interference from the government, as protected by the privacy provision in the Florida Constitution Section 1, Article 23, for failure to apply the compelling state interest standard is an erroneous interpretation of the law. Accordingly, Petitioners request that this Honorable Court hold §752.01(1)(A) constitutional, reverse the 4th District Court of Appeal's ruling and affirm the Circuit Court's granting of reasonable rights of visitation between the maternal grandparents and the minor child.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Regular U.S. Mail to the addressee(s) on the attached service list this 24 day of March, 1998.

KATZMAN & KORR, P.A.
Attorney for Petitioners
1100 South State Road 7, Suite #102
Margate, Florida 33068
(954) 972-8228

BY: _____
LEIGH C. KATZMAN, ESQ.
Fla. Bar No.: 935808

SERVICE LIST

Stephan P. Lange, Esq.
LANGE & LANGE, P.A.
7 S.E. 13th Street
Fort Lauderdale, Florida 33316

Ann Alper
GUARDIAN AD LITEM
P.O. Box 14006
Ft. Lauderdale, Florida 33301

Honorable Judge Lawrence L. Korda
Broward County Courthouse
201 S.E. 6th Street
Room 801
Fort Lauderdale, Florida 33301
Attn: Melody Bias, Judicial Assistant

STATEMENT OF THE CASE AND FACTS

This appeal derives from an original action filed in the Circuit Court of the 17th Judicial Circuit in and for the State of Florida seeking the granting of Grandparental Visitation Rights of the minor child MARIA RUSSO between the Petitioners/Maternal Grandparents, ANTHONY PERSICO and JOANNE PERSICO, and the Respondent/Father, ROBERT M. RUSSO.

The action was brought pursuant to Florida Statutes §752.01 and §752.015. Prior to the marriage of CAROLYN RUSSO (Deceased Mother) and the Respondent/Father, ROBERT M. RUSSO, CAROLYN RUSSO was diagnosed with Hodgkins Disease, and due to the terminal condition of her illness, subsequently died on July 26, 1995. Notwithstanding her affliction CAROLYN RUSSO became pregnant shortly after her marriage to ROBERT M. RUSSO and contrary to the physicians direction to abort the child, CAROLYN RUSSO carried the child to term and gave birth to MARIA RUSSO on July 25, 1993.

At all times since the child's birth the Petitioners/Maternal Grandparents of the Minor Child, ANTHONY PERSICO and JOANNE PERSICO, assisted their daughter in the day to day care of, and on many occasions solely cared for, the Minor Child MARIA RUSSO. As a consequence of the continuous and constant contact between the Minor Child and the Petitioners/Maternal Grandparents, from the time of her birth, a strong bond as well as a warm and affectionate loving relationship had developed between them.

Some time in December of 1995, the Respondent/Father, ROBERT M. RUSSO decided to discontinue all contact between the minor child MARIA RUSSO and the Petitioners/Maternal Grandparents of the Minor Child, ANTHONY PERSICO and JOANNE PERSICO.

The Respondent/Father, ROBERT M. RUSSO also decided to discontinue any contact between the minor child and all other lineage of her deceased mother including her great grandmother, two aunts and first cousin of the same age, who, prior to CAROLYN RUSSO'S death were practically raised as siblings.

Litigation ensued and some months after the case was at issue, allegations of sexual abuse were made by the Respondent/Father, ROBERT M. RUSSO that the Petitioners/Maternal Grandfather of the Minor Child, ANTHONY PERSICO had molested his daughter CAROLYN RUSSO during the time that she was alive and that he had also molested his granddaughter MARIA RUSSO on several occasions. A Guardian Ad Litem was requested and subsequently appointed by the Court. The Judge ordered that temporary supervised visitation between the Petitioners/Maternal Grandparents, ANTHONY PERSICO and JOANNE PERSICO and the minor child, MARIA RUSSO should occur. Such supervised visitation did occur on a semi-regular basis with some exceptions.

At the Final Hearing there was testimony from the Guardian Ad Litem who stated that her findings were that visitation between the Petitioners/Maternal Grandparents of the Minor Child, ANTHONY PERSICO and JOANNE PERSICO, and the minor child MARIA RUSSO, would be in the best interest of the minor child. The Trial Court Judge found no competent evidence that any abuse occurred and entered an order granting reasonable rights of visitation to the Petitioners/Maternal Grandparents, ANTHONY PERSICO and JOANNE PERSICO. The Respondent/Father, ROBERT M. RUSSO subsequently failed to provide the minor child for visitation as agreed to by the parties and further ordered by the Trial Court and due to his continued contempt of the Trial Court's Final Order was held in contempt and incarcerated.

The Respondent/Father, ROBERT M. RUSSO, through counsel appealed the Trial Court's Final Order and obtained a writ of habeas corpus ordering his immediate release from incarceration. The basis of the Respondent/Father, ROBERT M. RUSSO'S appeal was limited to the constitutionality of Florida Statutes §752.01(1)(A). The 4th DCA, upon consideration of briefs filed subsequently, ruled that the statute section is an unconstitutional infringement on the right to privacy and that the Trial Court's ruling should be reversed. However, the Fourth District Court certified the following question:

> MAY THE STATE CONSTITUTIONALLY REQUIRE REASONABLE GRANDPARENT VISITATION WHERE ONE OF THE PARENTS OF A CHILD IS DECEASED AND VISITATION IS DETERMINED TO BE IN THE BEST INTEREST OF THE MINOR CHILD?

The sole question on appeal at this time before this Honorable Court is the Constitutionality of §752.01(1)(A).

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.

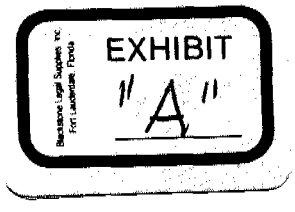
ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENTS' ANSWER BRIEF ON THE MERITS

BRENDA B. SHAPIRO, ESQUIRE
44 West Flagler Street
Courthouse Tower, Suite 720
Miami, Florida 33130
(305) 577-3861
Florida Bar Number: 880401

and

ALLISON DOLINER HOCKMAN, ESQ.
325 Almeria Avenue
Coral Gables, Florida 33134
Telephone: (305) 446-7800
Florida Bar Number: 312673
ATTORNEYS FOR RESPONDENT



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Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

TABLE OF CITATIONS

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

STATUTES:

Allison Dolinor Hockman, Esq.* • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9355

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9355

OTHER AUTHORITIES:

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

STATEMENT OF THE CASE AND FACTS

This appeal stems from the November 13, 1996, Final Judgment wherein the trial court awarded the Respondents/Grandparents, LEONOR and ROBERTO AZICRI,[1] visitation with their granddaughter, KELLY LEA GOODE VON EIFF, the minor child of their deceased daughter, LUISA VON EIFF, under §752.01(1)(a), *Fla. Stat.* (1993). R. 344-346) [2] The Third District Court affirmed the granting of the visitation, upholding the constitutionality of §752.01(1)(a), *Fla. Stat.* (1993), but reversed the schedule of visitation imposed by the Trial Court. (R. 347-381)

During the tragic autumn of 1993 and LUISA's terminal fight with metatastic melanoma, the AZICRIS and their son-in-law, PHILIP VON EIFF pursued every possible avenue to stave off the inevitable, PHILIP seeking solutions in medical science, the AZICRIS seeking solace in prayed-for miracles. (T. 37) CHERYL GOODE was the social worker assigned to the case at the time of LUISA's admission to Mt. Sinai Hospital until LUISA's death in December of 1993. (R. 1-4) In February 1994, CHERYL moved in with PHILIP and the minor child, KELLY (R. 1-4) PHILIP and CHERYL married in July of that year, and in October, without the AZICRI's knowledge, CHERYL adopted KELLY. (R. 1-4)

---

[1]Respondents, LEONOR AND ROBERTO AZICRI, will be hereinafter referred to as AZICRI, Grandparents or RESPONDENTS. PHILIP and CHERYL GOODE VON EIFF will be hereinafter referred to as VON EIFF, natural father and adoptive stepmother or PETITIONERS.

[2]The Record on Appeal will be designated as (R.) with appropriate pagination; (T.) will designate the transcript of the hearings held on June 6, 1996, p. 1-34; July 15, p. 1-167; August 21, 1996, p. 168-263, comprising of Volumes III and IV; and September 13, 1996 p. 1-13, comprising of Volume V, respectively.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-3356

Prior to LUISA's death, the AZICRIS frequently saw KELLY and got along well with PHILIP. During the first two years of KELLY's life, the AZICRIS cared for her four days a week as PHILIP and LUISA both worked full-time. Visitation between KELLY and her grandparents was seriously truncated after LUISA's death and ceased after KELLY's adoption. (R. 1-4) In Response, the AZICRIS filed their petition to secure visitation rights pursuant to §752.01(1)(a), *Fla. Stat.* (1993). CHERYL and PHILIP answered the Petition, arguing that visitation was not in KELLY's best interest and that the grandparent visitation statute was unconstitutional as such visitation impinges upon the parental right to privacy (R. 1-4, 15-22, 295) As the constitutional challenge to the statute was the PETITIONERS motivation, mediation, pursuant to §752.015, *Fla. Stat.* (1993), resulted in an impasse. (R. 66) Trial was set and Pre-Trial Catalogues filed. (R. 71-76, 88-91) The VON EIFFS sought disqualification of the Trial Judge and an Order of Recusal was entered. (R. 145)

By agreement, Dr. David Rothenberg, KELLY's treating therapist, supervised one visit between KELLY and the Grandparents. (R. 188) Seeking to prevent further visitation, the VON EIFFS asked that all proceedings be abated until the Florida Supreme Court could hear argument in *Beagle v. Beagle*, 654 So.2d 1260 (Fla. 1st DCA 1995). The Court denied the Motion to Abate and ordered visitation at the Family Services Unit of the Circuit Court. (R. 219-220, 221) The VON EIFFS filed an Interlocutory Appeal of the Court's visitation order and a Motion to Stay Pending Appeal. (R. 232-235) The Third District Court reversed the visitation order, instructing the Trial Court to hold an evidentiary hearing to determine the child's best interest.

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Although the Home Study Investigation, ordered by the Court, was filed in August, 1995, the evidentiary hearings were held in July and August of 1996, almost two (2) years after the AZICRI's Petition had been filed. (T. 1-263) On November 13, 1996, the Order was entered, granting the AZICRIS visitation with KELLY as the Home Study investigator, June Lewis, LCSW, and KELLY's threating therapist, Dr. Rothenberg, agreed that visitation was in KELLY's best interest. (R. 67-68, 165-187, 344-346; T. 226, 241) The Trial Court's Order allowed the Grandparents to have parental supervised Friday night dinners with KELLY for eight weeks, and thereafter, at the option of the AZICRIS, to have KELLY without parental supervision. (R. 344-346) The Order additionally allowed KELLY to spend the night on alternating weekends and religious holidays with the AZICRIS. (R. 344-346) The VON EIFFS filed their appeal of the visitation order and a Motion to Stay Pending Appeal, which motion was granted and affirmed by the Third District and subsequently vacated.[3] (R. 337-340,335-336)

On September 17, 1997 the Third District Court issued its opinion affirming the Trial Court's decision to allow the maternal grandparents visitation, and upholding the constitutionality of §752.01(1)(a), *Fla. Stat.* (1993). *Von Eiff v. Azicri*, 22 Fla.L.Weekly (Fla. 3d DCA September 17, 1997). (R. 347-381) The Court found that the specific schedule of visitation, i.e., eight (8) consecutive weeks of supervised Friday night dinners, unsupervised visitation thereafter, religious holidays and alternating weekend sleep-overs,

[3]Subsequent to the entry of the Final Judgment in the Trial Court, the VON EIFFS filed a petition for Dissolution of Marriage which was resolved in uncontested proceedings. A Final Judgment of Dissolution was entered January 13, 1997 and CHERYL, the adoptive stepmother, now has custody of KELLY.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

was overly broad and remanded for a determination of reasonable visitation. (R. 347-362)

The Third District Court also certified the following question of:

> MAY THE STATE CONSTITUTIONALLY ALLOW REASONABLE GRANDPARENT VISITATION WHERE ONE OR BOTH PARENTS OF A CHILD ARE DECEASED AND THE VISITATION IS DETERMINED TO BE IN THE BEST INTEREST OF THE CHILD? (R. 362)

Subsequently, the Fifth District Court of Appeal issued *Fitts v. Poe*, 22 Fla. L. Weekly, 2265 (Fla. 5th DCA Sept. 26, 1997) which found §752.01(1)(a) unconstitutional. PETITIONERS filed their Notice to Invoke Discretionary Jurisdiction on October 15, 1997. On the Court's own motion, briefs on jurisdiction were postponed and Briefs on the merits were requested.

Allison Deliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9355

POINTS ON APPEAL

WHETHER §752.01(1)(a), *FLA. STAT.* (1993) IS CONSTITUTIONAL WHERE THE STATE ALLOWS REASONABLE GRANDPARENT VISITATION WHEN ONE OR BOTH PARENTS OF A CHILD ARE DECEASED AND THE VISITATION IS DETERMINED TO BE IN THE BEST INTEREST OF THE CHILD?

WHETHER THE THIRD DISTRICT COURT'S OPINION AFFIRMING THE TRIAL COURT'S AWARD OF VISITATION WAS CORRECT WHERE THE CHILD HAD A SIGNIFICANT RELATIONSHIP WITH THE GRANDPARENTS PRIOR TO HER MOTHER'S DEATH, AND IT WAS FOUND THAT IT WAS IN THE CHILD'S BEST INTEREST TO MAINTAIN THE INTER-GENERATIONAL BOND?

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

SUMMARY OF THE ARGUMENT

The grandparent visitation statute, §752.01(1)(a), *Fla. Stat.* (1993), is constitutional and must be upheld. Florida has a compelling interest in preserving the familial bond between grandparents and their grandchildren, especially where one or both parents are deceased. The State has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interest of the individual. Chapter 752 focuses on children's welfare regardless of the status of parents. The statute contains the requisite safeguards to preserve the privacy rights of the parents with the statutory rights of the grandparents and the constitutional rights of the minor child.

The Third District, affirming the Trial Court's decision to grant visitation to the grandparents, was correct where there was substantial competent evidence that it was in KELLY's best interest that visitation with the AZICRIS continue. The minor child, KELLY, and the AZICRIS had a significant relationship prior to KELLY's mother's death and expert testimony supported the continuation of their visitations. Only through continued contact with the AZICRIS, can KELLY's statutorily protected link to her past be preserved.

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

ARGUMENT

I. THE THIRD DISTRICT WAS CORRECT IN HOLDING §752.01(1)(a), *FLA. STAT.* (1993) CONSTITUTIONAL AS A STATE MAY 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.

A. FLORIDA'S GRANDPARENTS VISITATION STATUTE.

Grandparents play a special role in the life of a child. If a grandparent is physically, mentally and morally fit, a grandchild will almost always benefit from contact with his or her grandparents. The benefit received from a relationship with grandparents has been documented in psychological studies, finding that children who have close relationships with their grandparents are more comfortable with the elderly and often more emotionally secure than other children.[4] Recognizing that special circumstances exist where the relationship between grandparent and grandchild is important, prior to statutory enactment, courts carved out an exception to the common-law right of parents to raise their children.[5] The earliest statutes addressing grandparents' rights deal with the situation here, where a parent died and the living spouse denied the grandparents' visitation. Currently all fifty states have statutes addressing this issue of visitation rights.[6]

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[4] See Rebecca Brown, *Grandparent Visitation and the Intact Family*, 16 S. ILL.U.L.J. 133 (1991); See Christine Davik-Galbraith *"Grandma, Grandpa, Where Are You?"*, 3 Elder L.J. 143 (1995).

[5] Edward M. Burns, *Grandparents Visitation Rights: Is It Time for The Pendulum to Fall?*, 25 Fam. L.Q. 59, 61 (1991); *Hawkins v. Hawkins*, 430 N.E. 2d 652 (Ill. App.Ct. 1981)(Court justified imposing grandparent visitation in the absence of statutory authority where a grandparent's daily contact with the child following the death of the child's parent.)

[6] All fifty states have codified similar statutes designed to preserve the rights of grandparents to visit with their grandchildren. ALA. CODE §30-3-4 (Michie 1989 & Supp. 1994); ALASKA STAT. §25.24.150 (Michie 1991); ARIZ. REV. STAT. ANN. §25-337.01(West Supp. 1994); ARK. CODE ANN. §9-13-103 (Michie 1993); CAL. FAM. CODE §3102 (West 1994); COLO. REV. STAT. §19-1-117 (West 1990); DEL. CODE ANN. tit. 10, §1031 (Michie Supp. 1994); FLA. STAT. ANN 752.01 (West Supp. 1995); GA. CODE ANN. §19-7-3 (Michie Supp. 1994); HAW. REV. STAT. ANN. §571-46.3 9(Michie Supp. 1994); 750 ILL. COMP. STAT. §5/607 (Michie Supp. 1994); IND. CODE ANN. §31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. §598.35 (West Supp. 1994); LA REV. STAT. ANN. §9:344 (West Supp. 1995); ME. REV.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Florida's Grandparent Visitation Statutes, Chapter 752, allows a grandparent to petition for reasonable rights of visitation where the child's parent(s) have objected to visitation, and where their parents have died, divorced, abandoned, or established paternity.[7] The present section of the grandparent visitation statute, Chapter 752, being challenged is:

§752.01(1)(a) which provides that 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.

STAT. ANN. tit. 19, §1003 (West Supp. 1994); MASS. GEN LAWS. ANN. ch. 119, §39D (Law. Co-op. 1994); MICH. COMP. LAWS. ANN. §722.27b (West 1993); MINN. STAT. ANN. §257.022 (West 1992); MISS. CODE ANN. §93-16-3 (Law. Co-op. 1994); MO. ANN. STAT. §452/402 (West Supp. 1994); NEB. REV. STAT. §43-1802 (1993); NEV. REV. STAT. ANN. §125A.330 (Michie 1993); N.H. REV. STAT. ANN. §458:17-d (Butterworth 1992); N.J. REV. STAT. ANN. §9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. §40-9-2 (Michie 1994); OHIO REV. CODE ANN. §3109.051(Anderson Supp. 1994); 23 PA. CONS. STAT. ANN. §5311 (West 1991); R.I. GEN. LAWS §15-5-24.1 (Michie Supp. 1994); S.D. CODIFIED LAWS ANN. 24-5-54 (1993); TEX. FAM. CODE ANN. §14.03 (West 1986 & Supp. 1995); VT. STAT. ANN. tit. 15, §1012 (Butterworth 1989); W.VA. CODE §48-2B-4 (Michie Supp. 1994); WIS. STAT. ANN. §880.155 (West 1991); WYO. STAT. §20-7-101 (Michie 1994).

[7]§752.01 (1) (e), *Fla. Stat.* (1993): Authority to petition for visitation in the situation where the minor is living in his or her biological intact family home, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents, has been held unconstitutional. *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

Other states with this wide-open visitation rights have also found the provision to be unconstitutional solely under circumstances involving an intact family. *See Brooks v. Parkerson*, 454 S.W.2d 769 (Ga.), cert. denied, _____ U.S. _____, 116 S.Ct. 377 (1995); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Williams v Williams*, 485 S.E.2d 651 (Va. App. 1997). Legal commentators have openly criticized his provision as potentially disruptive of the right of parental supervision over children. *See. e.g.*, Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interest of the Child*, 15 Mem. S.U.L.Rev. 635, 652-3 (1984-5); Bean, *Grandparent Visitation: Can the Parent Refuse?* 24 U.Louisville J.Fam.L. 393 (1985-6); Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 Fam.L.Q. 59, 61 79-80 (Spring 1991); Schoonnaker, Narwold, Hatch & Goldthwaite, *Constitutional Issues Raised by Third-Party Access to Children*, 25 Fam.L.Q. 95 (Spring 1991); Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 Colum.L.Rev. 118 (1986).

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

In 1978, the Florida Legislature enacted §68.08 *Fla. Stat.* (Supp. 1978), the forerunner of the present challenged section. The statute gives courts who are competent to decide child custody matters, jurisdiction to award grandparent visitation rights with the minor child upon the death or desertion of the parent if it is in the best interest of the child. In 1984, the visitation provision was placed in Chapter 752, entitled "Grandparental Visitation Rights" and numbered as it stands. In 1990, the Legislature added the requirement of mediation and six factors before a visitation award can be granted. [8] The Court must determine the standard of "best interest of the minor child" by addressing the willingness of the grandparents to encourage a relationship between the child and the parent; the length and depth of the prior relationship between the child and the grandparent; the preference of the child, if mature enough to express same; the mental and physical health of the child and the grandparents; and such other factors that are necessary in the particular circumstances, demanding a case by case analysis. More important, prior to any court intervention, grandparents and parents are mandated to mediate the dispute, giving the parents full opportunity to voice their own interests. Chapter 752 was amended in 1993, but the challenged provision remained intact.

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[8] §752.01 (2), *Fla. Stat.* (Supp 1990) determines best interest of the minor child wherein the court should consider:

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

§752.015, *Fla. Stat.* (Supp. 1990) provides for mediation of the visitation disputes once a petition has been filed.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

B. §752.01(1)(a), *FLA. STAT.* (1993) DOES NOT VIOLATE ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION NOR THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is well established that this Court has a duty to construe §752.01(1)(a), *Fla. Stat.* (1993) as constitutional if reasonably possible and to resolve all doubts in favor of constitutionality. *In re T.W.*, 551 So.2d 1186, 1201 (Fla. 1989); *Corn v. State*, 332 So.2d 4 (Fla. 1976) It is presumed in enacting the statute, that the Legislature intended constitutionality. *In re. T.W.*, 551 So.2d at 1202.

PETITIONERS contend that §752.01(1)(a) violates Article I, Section 23 of the Florida Constitution, and the Fourteenth Amendment of the United States Constitution. [9] They argue that the 'best interest of the child' standard of review mandated by the statute is insufficient to prevent infringement upon the fundamental rights of parents to decide with whom their child shall associate. PETITIONERS want this Court to extend the holding in *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996) to prevent Grandparents from petitioning for the right of visitation without first showing substantial harm to the child, regardless of the situation or parent status. RESPONDENTS assert that the well-reasoned opinion of the Third District Court should be affirmed as it accurately articulates the law in Florida, balancing the rights of the parents, the rights of the minor child and the State's compelling interests.

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[9] Subjecting §752.01(1)(a), *Fla. Stat.* (1993) to constitutional scrutiny under the Florida Constitution, Article I, Section 23, which affords its citizens a greater protection of privacy, makes a Federal Constitution examination unnecessary. *Beagle*, 678 So.2d at 1272.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Whenever a statute intrudes on the right of privacy bestowed by the Florida Constitution, the tensions of individual rights and compelling state interests are weighed and balanced, but must be considered within a specific factual context. In examining the constitutionality of §752.01(1)(a), the majority opinion in *Von Eiff v. Azicri*, 22 Fla. L. Weekly D2176, (Fla. 3d DCA September 17, 1997), recognized the potential conflict between grandparent visitation rights and a parent's constitutional privacy right in directing the upbringing and education of their children without undue government interference. *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).[10] While the right of privacy of fit parents to raise and educate a child without government interference is protected, the right is not unbridled nor absolute. *See* *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind.Ct.App. 1989) The parental right must yield to the State where the State shows compelling reasons to promote the best interest of the child. *State ex rel. Sparks v. Reeves*, 97 So.2d 18, 20 (Fla. 1957)("The only limitation on the rule that the parent has a legal right to enjoy custody, fellowship and companionship of his offspring is that between a parent and child, the ultimate welfare of the child is controlling.")

The State's interest in protecting children encompasses protection from physical and psychological harm. *See* *Jones v. State*, 640 So.2d 1084 (Fla. 1994); *Nelson v.*

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[10]Parental rights which are protected to varying degrees by the constitution are the physical possession of a child which in the case of custodial parent, includes day-to-day care and companionship of child; right to discipline child, which includes right to inculcate parent's moral and ethical standards; right to control and manage minor child's earnings; right to control and manage minor child's property; right to be supported by adult child; right to have child bear parent's name; and right to prevent adoption of child without parent's consent. See *Black's Law Dictionary 5th Edition* (1979).

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Nelson, 433 So.2d 1015 (Fla. 3d DCA 1983). In this vein, the State has permissibly required parents to provide the basic necessities to their children, school, food, clothing, as well as, accept responsibility for compliance with state imposed inoculations, child restraints and curfew hours. *See* Bollotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

Where the intact family is disrupted by death or divorce, the state is historically empowered to protect the interests of those injured by the disruption. *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); 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). "States have a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved." *See* Burns, *Grandparent Visitation Rights: Is it Time for the Pendulum to Fall?* 25 U.Louisville J.Fam.L. 59, 61, 79-80 (1991); Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993) The documented findings of harm which occurs to a child upon the death of a parent is clearly demonstrated in the

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

Third District Court opinion of *Von Eiff v Azicri*, 22 Fla. L. Weekly at 2177[11] Thus, the death of a parent is prima facie evidence of harm to the minor child.

Recognizing the harm experienced by the child upon the death of a parent, the current statute was designed to protect the interests of children in disrupted families by preserving beneficial grandparent visitation. In striking down §752.01(1)(e), this Court in *Beagle v. Beagle*, 678 So.2d at 1272, emphasized that "the inadequacy of the best interest test in this limited circumstance [intact biological families] does not change or modify existing principles regarding the use of that test in other family law contexts". Once disruption to the intact family is shown, the analysis properly shifts to the best interest of the child. *Von Eiff v Azicri*, 22 Fla. L. Weekly at 2177 The requirement that the Court consider the six factors when determining the best interest of the child standard and the requirement of mediation prior to an award of visitation, obviates the arbitrariness of the statute. *King v. King*, 828 S.W 2d 630 (Ky. 1992), cert. denied, 506 U.S.901 (1992) *See* §752.01(2), *Fla. Stat.* (1993)

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[11] "At no time are the fruits of this relationship more beneficial than 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. In these situations, a child needs stability that grandparents can provide." *Von Eiff v. Azicri*, 22 Fla. L. Weekly at 2177 "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 Alternative When the Premise of the Nuclear Family Has Failed*, 70 Va.L.Rev. 879, 902 (1984). 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). *Von Eiff v. Azicri*, 22 Fla. L. Weekly at 2177, n.8 and 9.

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

There is ample precedent supporting the constitutionality of the right of grandparents to petition for visitation upon the death of the child's natural parent. *Sketo v. Brown*, 559 So.2d 381 (Fla. Ist DCA 1990)(upheld the constitutionality of §752.01 (1)(a), facially but reversed the order as too extensive and unreasonable under the statue); *Von Eiff v. Azicri*, 22 Fla. L. Weekly D2176, (Fla. 3d DCA September 17, 1997) (upholding Section (1)(a) of Chapter 752, as constitutional); Other states with privacy right in their Constitution have deemed the best interest of the child standard sufficient in upholding the constitutionality of their statutes. *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*, 896 P.2d 635 (Utah Ct. App. 1995); *Michael v. Herzler*, 900 P.2d 1144 (Wyo. 1995); *Herndon v. Tuhey*, 857 S.W. 2d 203 (Mo. 1993); *Spradling v. Harris*, 13 Kan. App. 2d 595, denied, 506 U.S. 941 (1992); *Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. Ct. App. 1989)

The PETITIONERS argue the same as those in *Beagle* and want this Court to believe that the instant case falls under the disallowed provision, §752.01(1)(e). They contend that the minor child is no longer the child of a deceased mother, but the child of an intact family. Contrary to their assertion, KELLY will always be the child of a deceased mother as well as the child of an adoptive stepparent. PETITIONERS insistence that this case is governed by §752.01(1)(e)(which pertains only to married natural parents) is deliberately deceptive. They fail to cite §63.172(2), *Fla. Stat.* (1993), which expressly delineates this situation and does not terminate the legal relationship between the adopted person and his or her relatives, and specifically references

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

grandparent visitation rights under Chapter 752.[12] §63.172(2), *Fla. Stat.* (1993) See *Davis v. Dixon*, 545 So.2d 318 (Fla. 3d DCA 1989)(stranger adoptions and stepparent adoptions distinguished where legislative exemption for grandparents to have legal right of visitation with child adopted by a stepparent).

Only the Fifth District Court has determined that a widowed parent is also entitled to parental autonomy which outweighs the state's interest and *a fortiori,* declared §752.01 (1)(a) unconstitutional on equal protection grounds. *Fitts v. Poe*, 22 Fla. L. Weekly (Fla. 5th DCA September 26, 1997) That Court 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. RESPONDENTS contend that *Fitts* is wrongly decided where the right of the minor child and the factual situation was never considered. Regardless of the parents' status, the court's focus must be directed to the child's status and his or her best interest. While the widowed parent may be entitled to a right of privacy in raising the child, the court has jurisdiction through the fact of the parent's death. That fact gives rise to the element of potential harm to the child and distinguishes this situation from the sheltered structure of an intact family. Once the substantial risk of harm has been demonstrated the best interest of the child standard is sufficient .

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[12] §63.172(2), *Fla. Stat.* (1993) provides: If one or both parents of a child die without the relationship of parent and child having been previously terminated and a spouse of the living parent or a close relative of the child thereafter adopts the child, the child's right of inheritance from or through the deceased parent is unaffected by the adoption and , unless the court orders otherwise, the adoption will not terminate any grandparental rights delineated under chapter 752. for purposes of this subsection, a close relative of a child is the child's brother, sister, grandparent, aunt or uncle.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

§752.01 (1)(a), *Fla. Stat.* (1993) is constitutional as the State's compelling interest in protecting the welfare of its children outweighs the parental right of privacy where a parent's death gives rise to the potential for substantial harm to the child. Accordingly, the opinion of the Third District Court in *Von Eiff v. Azicri* should be affirmed and approved, and *Fitts v. Poe*, rejected.

Allison Dollner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

II. THE THIRD DISTRICT COURT'S OPINION AFFIRMING THE TRIAL COURT'S AWARD OF VISITATION WAS CORRECT WHERE THE CHILD HAD A SIGNIFICANT RELATIONSHIP WITH THE GRANDPARENTS PRIOR TO HER MOTHER'S DEATH, AND IT WAS FOUND THAT IT WAS IN THE CHILD'S BEST INTEREST TO MAINTAIN THE INTER-GENERATIONAL BOND

In this case, the trial court relied upon competent and substantial evidence to award the AZICRIS visitation with KELLY. The most compelling testimony came from KELLY's treating therapist and VON EIFFS' expert, Dr. David Rothenberg, Ph.D. Dr. Rothenberg stated it would be in KELLY's best interest to have visitation with the grandparents. (T. 226) The doctor discounted the alleged deathbed confrontation between PHILIP and the AZICRIS believing the stress of LUISA's death created understandable tension and should not impinge upon the relationship between the grandparents and the child. (T. 226) The doctor also opined that supervised visitation would be initially effective with a gradual shift to the grandparents' home without supervision. (T. 241) The Trial Court also considered the testimony of June Lewis, Licensed Clinical Social Worker, who conducted the home study and also interviewed teachers, the parties, the minor child, and people with knowledge of the parties. Ms. Lewis recommended that the grandparents have visitation with KELLY, beginning with supervised visits. (T. 132) She stated there was a bonding between the grandparents and KELLY which should be continued and that it was in the best interest of the child to maintain this continuity. (T. 136)

In affirming the trial court, the Third District Count poignantly describes the facts of this case:

Allison Dolinor Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

> "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. *Von Eiff v. Azicri*, 22 Fla. L. W. at 2177."

It should be noted that during the first two and one-half (2 1/2) years of KELLY's life, she spent four days each week in the AZICRIs' care while both her parents worked. (R. 1-4) Before the age of four, KELLY had to endure the loss of her natural mother, the loss of her half-brother (who went to live with his biological father the same month LUISA died), the imposed loss of her grandparents, and the separation from her natural father upon his divorce from CHERYL. (T. Vol.IV, P. 31)

Grandparent visitation remedies KELLY'S harm making the intrusion of the court ordered visitation constitutionally permissible. *Griss vs. Griss*, 526 So.2d 697, 700 (Fla. 3d DCA), review dismissed, 531 So.2d 1353 (Fla. 1988); *Miller v. Miller*, 329 PA.Super 248, 478 A.2d 451 (1984)(the court presumed that when a child loses a natural parent at an early age, grandparent-grandchild relationships become even more special as the grandparents help fill the void created by the loss of a parent.); *Brago v. Brago*, 604 So.2d 866 (Fla. 3d DCA 1992)(Chapter 752 embodies a legislative finding that grandparents visitation, when in the best interest of the child is also in the public interest."); *Beard v. Hamilton*, 512 So.2d 1088 (Fla. 2d DCA 1987) (grandparents' petition reinstated where grandparents had relationship with child of deceased daughter and

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

RESPONDENTS manipulated court system successfully precluding grandparents from having visitation with the grandchild).

The evidence that the best interest of KELLY would be to have continued visitation with her maternal grandparents was scrutinized by both the Trial Court and the Third District Court of Appeal. Both Courts emphatically found that this child, who suffered the loss of her mother through death, and separation from her father through divorce, needed the continuity of visitations with her maternal grandparents. *Von Eiff v. Azicri*, 22 Fla.L.Weekly at 1278; *Griss v. Griss*, 256 So.2d 697 (Fla. 3d DCA) rev. dismissed, 531 So.2d 1353 (Fla. 1988) Both courts were satisfied with the competent substantial evidence presented to support the AZICRI'S Petition and to fulfil the requirements of the 'best interest of the child' test. The certified question posed by the Third District Court should be answered in the affirmative. *See Dinkle v Dinkel*, 322 So.2d 22 (Fla. 1975); *Fisher v. Fisher*, 390 So.2d 142 (Fla. 3d DCA 1980).

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

CONCLUSION

RESPONDENTS, LEONOR and ROBERTO AZICRI, respectfully request that this Court answer the certified question by the Third District Court of Appeal in the affirmative and affirm the opinion of both the Third District Court and the trial court awarding visitation to the grandparents, AZICRIs.

Respectfully submitted,

By: Allison Doliner Hockman Esq
ALLISON DOLINER HOCKMAN, ESQ.

Allison Doliner Hockman, Esq. • 325 Almeria Avenue • Coral Gables, Florida 33134 • Phone: (305) 446-7800 • Fax: (305) 567-9356

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20 day of January, 1998 to: **Robert S. Geiger, Esquire**, at GEIGER, KASDIN, HELLER, KUPERSTEIN, CHAMES & WEIL, P.A., 1428 Brickell Avenue, 6th Floor, Miami, Florida 33131.

Brenda B. Shapiro, Esquire
44 West Flagler Street
Courthouse Tower, Suite 720
Miami, Florida 33130
(305) 577-3861
Fla. Bar No.: 880401

-and-

Law Office of Allison Doliner Hockman
Attorney for Petitioners
325 Almeria Avenue
Coral Gables, Florida 33134
(305) 446-7800
Fla. Bar No.: 312673

By: Allison Doliner Hockman
ALLISON DOLINER HOCKMAN, ESQ.