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

RESPONDENTS ANSWER TO PETITIONERS' BRIEF ON THE MERITS

RESPECTFULLY SUBMITTED BY:

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IN THE SUPREME COURT OF FLORIDA

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

STATEMENT OF THE CASE AND FACTS

Pursuant to Florida Statute §752.01(a) maternal grandparents Anthony and Joanne Persico seek visitation rights of the four year old Maria Russo. Robert Russo, the remarried widower father, whose wife tragically died of cancer at the age of twenty five , one day after her daughter's second birthday, seeks to prevent contact between his daughter and the maternal grandparents.

There were no allegations or proof that the Respondent, Robert Russo, an emergency medical technician (EMT), was anything other than a normal father, trying the best to raise his child, Maria, during what at best could be termed as an extremely difficult time in their lives.

No other facts are relevant to a constitutional analysis, however, since the Petitioners have set forth superfluous facts that the father disputes or that are exaggerations or mischaracterizations of the truth, the Respondent, father, feels compelled to restate those facts to place them in their correct perspective.

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Robert Russo and Carolyn Persico met each other while working as Emergency Medical Technicians for the same company. They fell in love, and shortly thereafter Carolyn who was 22 years old was diagnosed with Hodgkin's Disease. Nevertheless the couple married and Carolyn became pregnant with Maria. During an initial consultation with one physician he advised Carolyn to abort the baby, so the Russos sought the additional opinions of two separate doctors, both of whom advised that not only would it not be harmful to Carolyn to be pregnant but it could slow down the progression of the cancer during her pregnancy. (One doctor was an oncologist and one a perinatalogist.) This is known in medical slang as a "honeymoon period," where due to all of the changes in her body caused by the pregnancy the cancer would either slow down or stop. Carolyn Russo's cancer did slow down during her pregnancy and a healthy child Maria, was born. In fact, the Russos were advised by those two physicians that Carolyn should try to become pregnant again because this could further slow the progression of the Hodgkin's Disease, however, Carolyn was unable to become pregnant again.

During their struggle with Carolyn's cancer, after Maria's birth, when the Russos would go out of town for two week cancer treatments, Maria spent most of the time with Rosemarie and Edward Russo, Robert's parents. She also stayed with the Persicos for several weeks during this time, however, after the death of

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Carolyn on July 26, 1995, the Persicos had contact with Maria mainly on weekends. There was no daily contact.

The father permitted contact between the Persicos and his daughter until December 1995 when he decided to discontinue the contact. His decision to discontinue contact with the Persico family was based upon his own belief that further contact was not in his child's best interest, due to numerous reasons, including his wife's shocking death bed revelation to him that she had been abused by her father, when she was thirteen. Other reasons included the fact that the Persicos, who smoke and drink alcohol in front of Maria Russo would not curtail this activity in the presence of the child and Joanne Persico would often handle the child with a lit cigarette hanging from her lips. They would also allow the two year old Maria to taste Vodka from their drink glasses. Even though the Respondent father on numerous occasions asked Joanne Persico and her two other daughters to quit smoking in his daughter's presence they refused to do so, and so Petitioner made the difficult decision that it would be in his daughter's best interest not to continue to have contact with and perhaps, in her formative years, be permanently and negatively influenced by the Persico's. Additionally, there was testimony that one of the aunts that the Petitioner alludes to in his *Statement of Case and Facts*, is an admitted lesbian, a lifestyle that, although Mr. Russo does not condemn the aunt for it, he also does not want his daughter exposed to it, especially at this early formative time in her life.

Despite the testimony of Robert Russo and his parents, the Guardian Ad Litem found that it would be in the child's best interest to have grandparental visitation and the Court granted an extensive visitation schedule to the Persicos.

Respondent refused to provide his daughter for visitation, believing he was acting in the child's best interests, and was subsequently incarcerated for contempt.

The 4th DCA granted a *Writ Of Habeas Corpus* and Stayed the Final Order of visitation. The Trial Judge refused to release the father until he filed a *Motion to Comply* with the 4th DCA. The trial Judge then on the release Order, Sua Ponte reinstated his *Final Order of Visitation* and Respondent was forced to file another *Motion To Comply* in the 4th DCA which was granted, again Staying all grandparental visitation.

Respondent father was Ordered by the 4th DCA to file a brief on the applicability of Beagle v Beagle 678 So.2d 1271 (Fla. 1996) to this case, which was filed in the form of a suggestion to certify the issue of the constitutionality of Florida Statute §752.01(1)(a) as it applies to the situation where one of the parents is deceased, to the Florida Supreme Court. The 4th DCA rendered its opinion that the statute is an unconstitutional invasion of the right to privacy under the Florida Constitution as amended by the voters in 1980. Russo v Persico, 706 So.2d 933 (4th DCA 1998). The Fourth District thereby agreed with the Fifth District

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decision in Fitts v Poe 699 So.2d 348 (5th DCA 1997) and 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 DETEREMINED TO BE IN THE BEST INTEREST OF THE MINOR CHILD?**

SUMMARY OF THE ARGUMENT

The Forth and Fifth District Courts were correct in holding Florida Statute §752.01(1)(a) unconstitutional. There is no compelling state interest to force grandparental visitation upon a surviving spouse and parent where there is neither existing pending litigation that involves the welfare of the minor child such as a divorce, paternity, nor dependency and where there is no evidence of harm to the child.

The Statute tramples on the privacy rights of a surviving parent who has already suffered from the grief of losing his or her beloved spouse by allowing the grandparents of the minor child to force themselves into the life of the widow or widower for what in some cases may be ulterior motives totally unrelated to the best interests of the child.

The Statute creates the nightmare of litigation for a one parent family already decimated by the death of one of the parents. It exposes that family unit to the intrusion of court-ordered mediators, guardians, medical doctors, psychologists

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and psychiatrists, and others, and burdens a struggling parent with the costs and legal fees attendant with defending such litigation, just because the parent has exercised his or her right to raise their minor child the way they deem fit and proper. The State, under such circumstances, should not be allowed to step in claiming to be better able to make such private decisions for the parent. This is an invasion of the parents right to privacy under the Florida Constitution, Article 1, Sec 23.

ARGUMENT

The Fourth District Courts of Appeal was correct in holding Florida Statute §752.01(1)(a), Fla. Stat. (1993) unconstitutional where one parent of a child is deceased and the grandparents seek to force the unwilling surviving parent to submit the minor child to visitation with the grandparent(s) upon a showing of "best interest" of the minor child.

In 1980 Florida Voters approved an amendment to the Florida Constitution that would give every Florida resident a greater right of privacy than that afforded by the U.S. Constitution. It reads:

> **"Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." (Article 1, Section 23 Florida Constitution)**

There are no qualifications to this fundamentally guaranteed right, such as a qualification that the governmental intrusion must not be "unreasonable" or "unwarranted." The right of privacy in Florida is absolute and unqualified and must be interpreted as such by the courts..

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This Court had already found that Florida Statute §752.01(1)(e) is facially unconstitutional because it constitutes impermissible State interference with parental rights protected by Article I Sec. 23 of the Florida Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Beagle v Beagle, 678 So.2d 1271 (Fla. 1996).

Since the 1980 amendment to the Florida Constitution states that "every natural person" has this fundamental right, then if, as this Court held in Beagle, supra, a family unit consisting of a mother, a father and a child or children has this right, which Florida Statute §752.01(1)(e) violates by mandating grandparental visitation, then it is not even a small step, but merely an affirmance of this right of privacy to hold that this fundamental constitutional right of privacy is also enjoyed by a widow or widower. To hold otherwise would mean that a parent who had this fundamentally guaranteed right of privacy and the right to be free from forced grandparental visitation while that parent's spouse was alive, automatically loses this fundamental constitutionally guaranteed right merely because that parent's spouse died. Such reasoning and such a result would be untenable and absurd.

In Von Eiff v. Azicri 699 So.2d 772 (3rd DCA 1997) the 3rd District appears to compare a divorce situation with that of the death of one of the parents citing McAlister v. Shaver, 663 So.2d 494 (Fla. 5th DCA 1994) for the proposition that the "discontinuity" of the parents' relationship allows the Court to determine visitation or custody based solely on the child's best interest.

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Unfortunately, the 3rd District's analysis of McAlister , supra, was rendered without benefit of the 5th District's subsequent decision in Fitts v Poe 699 So.2d (Fla. 5th DCA 1997) in which the 5th District, in citing Beagle, supra, held Florida Statute §752.01(1)(a) unconstitutional because it could not see a difference between the fundamental right of privacy of a natural parent in an intact family and that of a widowed parent.

The Third DCA's reliance upon the Fifth District's decision in McAlister, supra, was therefore apparently misplaced. Further the Third DCA cites another divorce case Cochran v Cochran, 263 So.2d 292 (Fla. 2DCA 1972) for the proposition that "Children can become innocent pawns in power struggles by their loved ones when a family is disrupted."

These types of problems are dealt with in other statutes such as Florida Statute §61.13, and do not implicate the right of privacy because there exists pending litigation such as a divorce or paternity action, or a dependency proceeding that remove those matters from a claim to the right of privacy under the Florida Constitution. Certainly children are also subject to becoming "innocent pawns" in litigation instituted by grandparents with other than the purest motives.

Furthermore, the 3rd DCA in Von Eiff, supra, pg. 777, states erroneously that one of the inherent safeguards is that the statute only pertains to grandparents. This is untrue as the statute defines a grandparent as also including great grandparents, so not only is a widowed parent subject to being engaged in

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expensive litigation with his or her own parent or those of his or her deceased spouse, but by their parents, too.

This Court said it succinctly and clearly in Beagle, supra, when it cited the Georgia Supreme Court in Brooks v Parkerson, 454 SE.2d 769.

> **"However, 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 to this constitutional analysis, that it might in many instances be "better" or "desirable" for a child to maintain contact with a grandparent."**

This purely constitutional analysis, when based upon the strong right of privacy Floridians are guaranteed by the Florida Constitution, cannot justifiably be bifurcated to treat married couples differently from widows or widowers for purposes of application of this constitutional provision.

The appellant's brief in Von Eiff, at page 15, concedes that a widowed parent has the right of privacy in raising the child. However, at the same time, Von Eiff would have this Court rule that upon the death of one parent, the Courts obtain jurisdiction because the fact of the death of one parent gives rise to the element of "potential harm" to the child.

If "potential harm" were the standard by which the constitutionality of this statute is measured then virtually any intrusion on the right of privacy could be

justified by some imagined "potential harm" This is clearly not the standard by which the constitutionality of statutes is measured in Florida.

CONCLUSION

Respondent, **ROBERT RUSSO**, respectfully requests that this Court answer the certified question by the Fourth District Court of Appeal in the negative and affirm the opinion of the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Regular U.S. Mail to the addressee(s) listed below on this 29 day of JUNE, 1998.

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