IN THE SUPREME COURT OF FLORIDA

CHARLENE RICHARDSON,

Appellant,

v. CASE NO.: 94,810

ADRIENNE E. RICHARDSON,

Appellee.
_____/

APPELLANT'S CORRECTED INITIAL BRIEF ON THE MERITS

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA AND FROM THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

TRIAL COURT FACTUAL FINDINGS:

Appellant respectfully submits that the best source of information which would otherwise be presented in a Statement of the Case and Facts is the 49 page Order of the court ("Order on Petitions to Modify"), which is the Order on appeal, found at Tab 2 of the Appendix.

APPELLANT'S STATEMENT OF THE CASE AND FACTS:

1. Appellant will cite to pages of the trial court's Order, to exhibits which were admitted and have been forwarded by the Clerk, and to pages of the (partial) trial transcript prepared at the request of Appellant.

2. The Order being appealed transferred the primary physical residence of Ashleigh Richardson from her mother to her paternal grandparents. Ashleigh was seven years old when the pleadings were filed and when this case was heard in September 1997 (Order, p. 2).

3. The court found that the child had spent the significant portion of her life living at the grandparents' home. The court received into evidence (Order, p. 29) a document from when the child was two months old, where the mother gave the grandparents a special power of attorney (subsequently renewed), which permitted the grandparents to authorize and consent to medical care and treatment for Ashleigh.

4. The child spent four to five days of every week with the grandparents beginning at age 25 months for a 16 month period ending May 1993 (Order, p. 3).

5. The child next lived with her grandparents from January 1994 until April 1994 (Order, p. 31).

6. Ashleigh's parents divorced in a Chapter 61 action, with the Final Judgment being entered on April 4, 1994 (Order, p. 4) and which contained a provision forbidding, by agreement of the parties, either party from removing the child from more than 100 miles from Pensacola, Florida (Order, p. 5).

7. Ashleigh next lived with her grandparents from November 1994 until December 1996 (Order, p. 31).

8. The mother had signed a written agreement on June 30, 1995 allowing the child to live with the grandparents "until six months after the mother obtains her four year degree" (Order, pp. 29-30).

9. The event which temporarily interrupted the grandparents' care of the child was the mother's "abrupt departure" (Order, p. 46) to North Carolina on December 14, 1996 (Order, p. 45).

10. When the mother refused to return the child to Florida, the father filed an action seeking to have the child returned. This was filed 19 days after the mother took the child to North Carolina (Order, p. 6). The Petition recited that the child had been living with the paternal grandparents (Appellant) (Order, p. 6).

11. The grandparents were actively involved in this action filed by the father (see transcript, 1/21/97 hearing), but were not of record until five weeks later when they filed their Motion to Intervene (Order, p. 9).

12. In anticipation of the final hearing, the court entered its Order Appointing Guardian Ad Litem and ordered psychological evaluations of the principal parties (Order, p. 9).

13. The Guardian Ad Litem investigated the case. Her transcribed trial testimony has been made a part of this record by the Appellant and will be summarized elsewhere in this section.

14. The psychologist met with all of the parties, including the child, during a one week period in the summer several weeks prior to the September 1997 hearing (see Exhibits of psychologist's written report and deposition introduced into evidence).

15. The psychologist's evaluations and reports are quoted extensively by the trial court in the Order on appeal (he testified by way of a deposition, which was presented to the Court; the deposition had been taken five days prior to the hearing).

16. The psychologist found that the child was bonded to her mother (Order, p. 40); that he had "concern with the mom's unpredictable, compulsive, inconsistent behavior" (Order, p. 40); and indicated his belief that the mother had "the ability to be a good parent" (Order, p. 40); and then summarized his opinions by stating:

> Although the primary bond is clearly with mom, the primary connection with a place and residence is at the grandparents. There is no doubt that that has been the most consistent place she has known in her life and her sense of a safety connection there.

17. Immediately prior to trial but <u>after</u> the psychologist's deposition, the grandparents obtained, for the first time, a number of documents and information relating to criminal charges and HRS

investigations, which were previously unknown to them (Demaria trial testimony pp. 6-15 found at Tab 3 of the Appendix).

18. Dr. Demaria was then recalled to testify live on the final day of the hearing and admitted that this newly disclosed information regarding the mother would have substantially affected his opinions if it had been provided to him (see pp. 6-15 of Demaria trial testimony found at Tab 3 of the Appendix).

19. Among the newly discovered historical items which were presented to the psychologist at trial (after being established by evidence before the trial court, see the Findings of Fact of the Order) were the following:

(a) that the mother had a pattern of five "violent, abusive relationships with adult men" (Order, pp. 15-16, 22 & 45);

(b) that one of these men had stabbed another man in the head roughly 20 feet from where the minor child, Ashleigh, was sleeping (Order, p. 17);

(c) that the above incident had been concealed from the father, the grandparents and the psychologist by the mother;

(d) that this same violent individual had been allowed to serve as temporary caretaker for the child (Order, p. 19); and

(e) that the mother herself had been involved in episodic behavior involving violence and excessive consumption of alcohol, outside the above relationships (Order, pp. 23-24).

20. At the conclusion of Dr. Demaria's trial testimony, the trial court asked his opinion about the child's attachment to the grandparents and what effect the mother's attempt at terminating

that attachment would have on the child (p. 27 of Dr. Demaria's testimony found at Tab 3 of the Appendix). The psychologist responded that the seven years in Florida with the grandparents outweighed the eight months in North Carolina (pending final hearing) (see p. 30 of Dr. DeMaria's testimony, Tab 3, Appendix). He also testified that the child had an unusually strong bond with the grandparents (p. 27 of Dr. Demaria's testimony, Tab 3, Appendix) and that the disruption or breach of that relationship "does affect a child" (p. 28 of Dr. Demaria's testimony, Tab 3, Appendix).

21. The court found factually:

> When the mother left for work on the date of the stabbing incident, she knew Ashleigh was asleep on the couch; her roommate and her roommate's boyfriend were drinking alcoholic beverages with Hubert Morris, Jr., in the kitchen; Morris was severely impaired and had a very bad temper; and trouble likely would ensue when Morris attempted to leave her home and her roommate attempted to prevent him from operating his vehicle.

(Order, p. 18).

22. The HRS caseworker visited the home immediately after the stabbing incident, and her report states "police tape was everywhere and it looked frightening to this worker . . . imagine what the child must have thought" (Order, p. 21).

23. The boyfriend who committed the stabbing was named Hubert Morris, Jr. The next gentleman in the mother's life was Joe Lee Dixon (Order, p. 21). The court found

> the mother knew or should have known Joe Dixon's criminal history. Nevertheless, she permitted him to stay in her residence while the child was present. . . . She testified that she did not consider Mr. Dixon her

"boyfriend", although she did become pregnant with his child.

24. The Court also found that the mother had violated the terms of the Final Judgment of Dissolution and the Marital Settlement Agreement by removing the child more than 100 miles from Pensacola, Florida (Order, p. 9).

25. The trial court specifically found that to allow the child to reside with the mother would be dangerous (at pp. 44-45):

> The mother's residences have been epitomized by violent, abusive relationships with adult men who have engaged in a variety of criminal activities. Additionally, the mother has herself been involved in violent, uncontrollable outbursts, possibly related to alcohol abuse. <u>The continued exposure of Ashleigh to these destructive relationships and dangerous circumstances creates an unacceptably high risk of endangerment to the child.</u> (Emphasis supplied.)

(at p. 45):

> The mother has exposed the child to numerous individuals and circumstances which promote immorality and lawlessness.

(at p. 45):

> The mother's medical and mental health history and condition does not directly place the child at risk, but when coupled with significant stress and/or alcohol, it endangers the child.

26. The Court-appointed Guardian Ad Litem, Amy Cordray, testified live (see trial transcript). She had 30 years of experience as a teacher, owner/director of a day care center, was certified by the Child Development Association, had received continuing education from the local Junior College through studies with family development and had cared for over 1,000 children (trial transcript, p. 5).

27. The Guardian testified to repeated visits to the mother's home (transcript, pp. 9-10) as well as to many unsuccessful attempts to contact the mother during her investigation (transcript, p. 16). The Guardian testified to complete cooperation by the grandparents (transcript, p. 16).

28. The Guardian testified that during her investigation "the child was always there [at the grandparents] (transcript, p. 16).

29. The Guardian testified that she believed the child had been "tossed around in a sea of confusion" and that the "safe harbor for this child" was the home of the grandparents (transcript, p. 11).

30. The Guardian noted an occasion when the mother sent the child to stay at the grandparents because "she felt the child was in danger" (transcript, p. 18).

31. Having watched the trial proceedings and from her review of the documents, the Guardian Ad Litem testified that

> what comes out is a lot of violent people and a lot of violent actions in these. I think she's [Ashleigh's] seen more violence in words and actions in her seven years than I've seen in 57 years.

32. The mother was cross-examined extensively regarding the deterioration in the child's school performance since the move to North Carolina in December 1996 (see trial transcript of Adrienne Richardson). The mother conceded that the child, in Florida, had been a student making As and Bs (transcript, p. 58). The mother admitted that the child missed eight days of school out of a 49 day period in North Carolina (transcript, p. 57). The mother admitted

that, since the child had gone to North Carolina, she had made no As (transcript, p. 58), 14 Cs (transcript, p. 59) and "a handful of Bs" (transcript, p. 59).

33. The North Carolina report card, which had been introduced by the mother, indicated that the child received poor marks in her ability to use time wisely and in her ability to listen to and follow instructions (transcript, p. 62). The child received the lowest (worst possible) marks under the categories of "cooperation with peers", "cooperation with adults" and "her practice of self control" (transcript, p. 62).

34. The child, according to the report card, was coming to school unprepared and was not completing her homework (transcript, p. 62).

35. The court received evidence regarding the mother's history of mental illness, treatments and drug and alcohol use (Order, pp. 16, 19, 24, 27 & 45).

36. Regarding the quality of the upbringing and care the child received while living with her grandparents, the following facts were found to be established by the court:

(a) the mother had designated the grandparents as custodians in the event of her death or incapacity (Order, p. 30);

(b) the grandparents were the ones who saw to the child's health needs (Order, p. 32);

(c) the grandparents saw to the child's education, including preschool (Order, p. 31);

(d) the grandparents provided for the child's extracurricular development, including swimming, soccer, gymnastics, ballet, "a variety of church activities and programs" and "special events at school" (Order, p. 31);

(e) witnesses for the grandparents testified that while in the grandparents' care, the child was "well-behaved, extremely polite, and gives respects to her grandparents" (Order, p. 33);

(f) the court found the grandparents had the

> proven history of providing the child with all her material needs, clothing, medical care, educational support, and a variety of other opportunities for the child to grow and develop into a healthy adult.

(Order, p. 44);

(g) the court further found "unquestionably the grandparents have provided the greatest moral influence over Ashleigh during her relatively brief existence" (Order, p. 45);

(h) the court found that the grandparents had involved the child

> in an assortment of activities and environs in which the child could be trained and educated in right and wrong . . . On the contrary, the mother has exposed the child to numerous individuals and circumstances which promote immorality and lawlessness.

(Order, p. 45); and

(i) The court evaluated the evidence regarding the child's Florida education and found that

> the evidence was uncontroverted that in all the child's Florida schooling, she was well-adjusted, well-behaved, well-prepared, and worked well with the teachers and other

> students, completing assignments promptly and having no problem with tardiness.

37. The court learned from teachers, the grandparents and other witnesses that while the mother still lived in Florida, she was made aware of all of the child's schooling and scheduled activities. Notwithstanding this awareness, the mother was never seen by the child's second grade teacher, attended only two soccer games over two full seasons, missed two of the child's birthdays, missed the child's choir performances and missed the child's gymnastics award day (Order, pp. 32-33).

38. The mother appealed the trial court's ruling. The District Court opinion did not discuss the violence the child had been exposed to, the actual extent of the child's residence with the grandparents, the evidence of the mother's instability, alcohol abuse, violent behavior and mental illness, nor the trial court's findings of "an unacceptably high risk of endangerment to the child".

39. The District Court reversed the trial court ruling on a finding that § 61.13(7), Fla.Stat. (1995), is facially unconstitutional in permitting evaluation of "the grandparents' custody request solely upon a best interest standard".

SUMMARY OF ARGUMENT

(1) The District Court of Appeal opinion is in error. § 61.13(7), Fla.Stat. (1995), is not facially unconstitutional, even under a Beagle/Von Eiff[1] analysis, since it contains safeguards and standards (omitted from Chapter 752) so that the "governmental intrusion" only comes into play in those limited circumstances where the child is already living with the grandparents in a stable relationship. Further, none of the "intact family" or "loving, nurturing and fit parents" factors in Beagle and Von Eiff are present, in light of the trial court's factual findings regarding the Appellee.

Lastly, the mother's delegating child-rearing to the grandparents constitutes an abandonment of the mother's privacy right, and the trial court's specific findings of the likelihood of demonstrable harm to the child establish a strong enough compelling State interest under prior decisions of this Court to warrant the "intrusion".

(2) If the Supreme Court disagrees with the above and agrees with that portion of the District Court opinion which finds that use of the "best interests" standard is unconstitutional, the remainder of the Statute subsection is salvageable. Constitutional Statute construction precedent established by this Court requires

[1]Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996); Von Eiff v. Azricri, 23 Fla.L.Weekly S583 (Fla. November 12, 1998).

that the Statute subsection be salvaged if possible, and a Schmitt[2] "limiting construction" should be applied to the inoffensive portions of the Statute.

(3) This particular case requires only a narrow ruling on these specific facts. Prior case law conclusively establishes a "harm to the child" exception as sufficient to establish the necessary compelling State interest to override any privacy argument.

(4) This trial court's factual findings conclusively established the likely harm to the child and the unfitness of the mother as a custodian.

(5) Accordingly, the trial court ruling should be upheld, either upon a finding that the Statute Subsection is constitutional as is, or, in the alternative, is constitutional after striking the unconstitutional phrase (or phrases) and as applied to the particular facts of this specific case.

[2]Schmitt v. State, 590 So.2d 404 (Fla. 1991).

ARGUMENT

(1) § 61.13(7), Fla.Stat. (1995), is not facially unconstitutional, since it contains safeguards and standards (omitted from Chapter 752) where the child is already living with the grandparents in a stable relationship.

The mother's delegating child-rearing to the grandparents constitutes an abandonment of her privacy right. The trial court's findings of likelihood of harm to the child establish a compelling State interest.

(1) (A) DISTINCTION BETWEEN STATUTES

First, we must draw a distinction (as the Legislature has done) between the grandparent visitation Statute addressed in Von Eiff v. Azricri, 23 Fla.L.Weekly S583 (Fla. November 12, 1998), and Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996), and the custody section of Chapter 61, Fla.Stat. (1995), which the District Court has struck down in the instant case.

This Court has previously made such distinctions, for example with this language from Beagle:

> We limit our holding to only those situations in which a child is living with both natural parents, at least one natural parent objects to grandparental visitation, and no relevant matters are pending in the court system.

[At p. 1272.]

§ 61.13(7) contains two specific, stringent threshold requirements that must be satisfied before a grandparent can seek to invoke the use of the Statute. First, the child must be actually residing with the grandparents. Secondly, there must be an existing "stable relationship" with those grandparents.

Comparing this situation to a grandparent seeking visitation is like comparing apples to oranges. In the visitation scenario,

the grandparent is by definition outside the "family" home (whether it is intact or not intact, whether it involves widowed parents, remarried parents, or otherwise).

By definition, grandparents who seek to use Chapter 752 are in some fashion or another "intruding" into this family. By contrast, any grandparent who seeks to invoke § 61.13(7), by definition already has the child inside their home. To further the analogy, if these two significant factual predicates exist, it is the parent (here the mother) who is "invading" the intact home of the child and the grandparents. This is a very important distinction, and one appropriate for the Legislature to have recognized.

It is precisely for a case such as this (Richardson) case that § 61.13(7), Fla.Stat. (1995) was enacted. Those children who have had the long-time stability of a life with loving, supportive grandparents acting in the parental role, do indeed require the protection of the State when a parent seeks to disrupt that "stable relationship".

This concept of recognizing that the circumstances of a child change drastically when that child's mother has unofficially forfeited the opportunity to have the child live with her is not a new concept. The child's landscape and life are changed by such an action, and the impact of that action has been recognized by the courts even in other contexts. For example, in a termination of parental rights case (In the Interest of L.R.R., 455 So.2d 598

(Fla. 5th DCA 1984)), the mother had shown limited interest in the children during the time they were in another's custody. The opinion pointed out that:

> As to Russell's [the mother] apparent renewed interest in the children since the filing of the petition for permanent commitment, we agree with the Second District's observation in In the Interest of R.V.F., 437 So.2d 713, 714 (Fla. 2d DCA 1983), that "this cannot make up for the lengthy omission of support and communication which preceded the filing of the Petition". [Footnote 4 at p. 600.]

This 1984 decision of the Fifth District (which quoted similar language from the Second District) was in place long before the Legislature (in 1993) enacted Subsection 7 relating to grandparent custody (Laws 1993 c.93-236, § 1).

The Legislature was entitled to rely on the logic and ruling of these Appellate decisions. By doing so, they determined that the fact of a child living in a stable relationship away from the parent is a serious and significant factor in determining that parent's future parental rights. The District Court in L.R.R. had upheld a termination of the mother's parental rights based on this and other grounds.

The children's classic Horton Hatches An Egg by Dr. Suess (1940, Theodore Geisel, Random House Books for Young Children) tells the story of a mother bird who lays an egg and then decides to go on an extended vacation while the hapless elephant she has duped sits on the egg for incubation through the cold winter months and the rainy summer monsoons. When Mayzee (the mother bird) returns to claim the egg at the time of hatching (after all the

work is done), all are surprised to see that the hatchling, while under Horton, has grown an elephant's trunk, ears, body and tail, just like Horton, the sitting elephant. More importantly, the hatchling has established stability and a continuity of relationship by being in the care of the "alternate" care-giver during this critical time in her life. (See Dr. Demaria trial testimony at p. 27, Tab 3, Appendix, "These first three to five years in life are crucial".) To paraphrase Dr. Suess, a child needs the solid continuity of a grandparent who is "faithful, one hundred percent!" and not just when the biological parent elects to come back on the scene.

The Legislature was acting well within its power when it recognized this important distinction.

(1) (B) ABANDONMENT OF PRIVACY RIGHT

We also respectfully submit that the Statute as applied, and under the particular facts of this case, does not invoke the privacy rights ("the fundamental right to raise a child") of a parent. Why? Because the mother here (Adrienne Richardson) had clearly waived her "fundamental right to raise her child" by surrendering it to the grandparents. (See Spence v. Stewart, 705 So.2d 996 (Fla. 4th DCA 1998), next page.)

This notion that an individual may waive or abandon the privacy rights has been adopted by this Court:

> Determining whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.

City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995), quoting Stall v. State, 570 So.2d 257, 260 (Fla. 1990).

We respectfully submit that, in this case, the mother's "objective manifestation of that expectation" (under Stall and City of North Miami) was clearly that she was delegating those parental decisions to the grandparents. She delegated these responsibilities both in fact, by having the child live full-time in the grandparents' home, and by written expression of intent (the various documents which were signed by her and introduced into evidence and described by the trial court in its opinion). We do not suggest that any of those signed agreements or contracts or authorizations constituted (without trial court ratification) full legal changes in custody. However, they each constitute actual evidence of "objective manifestations of [a waiver of] that expectation" of privacy in parenting decisions.

A recent Fourth District opinion (Spence v. Stewart, cited earlier), involving grandparent visitation, addressed this abandonment issue and drew a clear distinction with the Beagle opinion. Spence held that since the two parents of the child disagreed regarding the appropriateness of visitation with the grandmother, and had submitted this issue to the trial court for disposition, they had "already abandoned their right of familial privacy by bringing their dispute before the court" and that, as a result, "the court's further consideration of whether grandparental visitation is in the best interest of the child is not violative of the right of privacy".

Hence, in the instant cause, applying the Spence holding, the mother had abandoned her privacy right by: (1) allowing the child to grow up with the grandparents, and (2) by submitting the issue to the court for resolution, by violating the restriction against moving the child more than 100 miles away. The other of the two parents (the father) participated in the lower court proceedings, all the way through the trial, and then "took the position that the grandparents should be designated the primary residential custodians of Ashleigh" (see Order on Petitions to Modify, p. 10, Tab 2, Appendix).

The logic and reasoning of Spence has been adopted by the First District in Williams v. Spears, 719 So.2d 1236 (Fla. 1st DCA 1998). There the Appellate Court found that the Statute was not facially unconstitutional, but was unconstitutional as applied, since both parents agreed that the petitioning grandmother should not have visitation. This was an action under Chapter 752, Fla.Stat. (1995).

This was the same result in Tennessee under the Hawk opinion cited in Beagle and Von Eiff (Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993).) That court found the grandparent Statute unconstitutional as applied (to two married, fit parents), not on its face. That opinion repeatedly emphasized that evidence of harm would have changed the ruling.

Appellant feels that the two-prong factual predicate required by the Statute ("actually residing" and "in a stable relationship") are more than sufficient to establish the compelling State interest

in protecting a child, against a parental claim of government intrusion in violation of the Florida Constitution. That is, we suggest the Statute is valid as written and should stand intact, especially under the severe facts of this case relating to likely harm of the child (see Section (4) at p. 28). However, if the Court ends up finding the best interests standard should no longer apply in any form when parental rights are being litigated, we still believe the Subsection can stand.

This approach is consistent with Florida law regarding interpreting Statutes, where possible, to uphold their constitutionality and, secondly, to strike only those limited portions of a Statute as are necessary, where the balance of the Statute can be "salvaged".

(2) If the Supreme Court finds that use of the "best interests" standard is unconstitutional, the remainder of the Statute subsection is salvageable. Precedent established by this Court requires that the Statute subsection be salvaged if possible. A Schmitt[3] "limiting construction" should be applied to the inoffensive portions of the Statute.

Even if the Court finds that the "best interests" standard should no longer be applied when considering grandparent custody (even in a "prior stable relationship" scenario such as this one), the remainder of the Statute Subsection can remain intact. This would continue to give trial courts a vehicle to protect children under facts such as those raised in the instant cause. Striking the "best interests" standard from the Subsection, it would read as follows:

> (7) In any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having the same standing as parents for evaluating custody.

If the Court finds also that the "same standing as parents" language is constitutionally infirm,[4] the Statute could still retain vitality as illustrated below:

> (7) In any case where the child is actually residing with a grandparent in a stable relationship, whether the court has awarded custody to the grandparent or not, the court may recognize the grandparents as having standing for evaluating custody arrangements.

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[3]Schmitt v. State, 590 So.2d 404 (Fla. 1991).

[4]This Court, in interpreting § 61.13(7), Fla.Stat. (1995), might elect to go a step further than the District Court and find that the grandparents should not necessarily and automatically achieve the "same standing as parents" just because of the stable relationship.

We recognize fully that it is improper and inappropriate for the Court to write or re-write Legislation. The above is offered solely as a graphic illustration of how the Statute can be interpreted, and continue to have constitutional validity, even if certain portions are deemed to be unconstitutional. The heart of the Statute could remain intact, to continue to give the trial courts the necessary discretion in this type of case.

The "best interests" standard would no longer apply to this case. However, this Court's extensive prior rulings would provide the necessary standard by limiting grandparent custody awards to cases involving past or imminent harm to a child.

Such a practical interpretation of the Statute, preserving a trial court's discretion in these limited Chapter 61 actions, is appropriate under existing Florida case law relating to constitutional review of Statutes. For example, in the Padgett v. Department of Health and Rehabilitative Services, 577 So.2d 565 (Fla. 1991) decision, there was no specific language in the Statute (as drafted) which would have allowed the trial court to use a previous termination of parental rights with regard to one child, as a factor in considering whether the parental rights should be terminated as to another child. However, the trial court (and the Supreme Court on review) invoked a logical and common sense analysis of the other portions of the Statute (including, for example, a Subsection relating to abuse of other children) in order

to support the trial court's finding of termination. The Supreme Court stated the issue for their determination in Padgett as follows:

> The real question posed here is whether this prior termination of parental rights in other children can serve as grounds for permanently severing the Padgetts' rights in the present child. To answer this question, we must determine first whether Statutory or other authority exists to sustain such a practice, and second whether the practice violates constitutional principles. [Emphasis supplied.]

[At p. 568.]

A recent example where the Appellate Court struck only a phrase from a Statute, and the remainder of the section survived constitutional scrutiny, occurred in L.B. v. State, 681 So.2d 1179 (Fla. 2d DCA 1996):

> Having determined that the term "common pocketknife" is void for vagueness, we do not condemn the entire definition in § 790.001(13). As is noted in Mitchell[5], we are obliged to preserve as much of the Statute as is permissibly consistent with both the Legislative intent and constitutional strictures . . .
>
> Our assessment of this matter was unanticipated by L.B. She has urged this court to fashion a common-sense, legal test by which a judge could determine whether a specific knife is a "common pocketknife". L.B.'s suggested approach, however, is an invitation for this court to exceed the proper scope of its review authority -- an invitation we emphatically decline. If a pocketknife exception is to have any meaningful definition, such definition must be provided by the Legislature . . . until that body gives its attention to this matter, the determination of whether a pocketknife is or is not a weapon within the meaning of the Statute may be determined by established precedent. [Emphasis added.]

[At p. 1181.]

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[5]State v. Mitchell, 652 So.2d 473 (Fla. 2d DCA 1995)

L.B. and Mitchell cited to the Supreme Court case of Cramp v. Board of Public Instruction of Orange Co., 137 So.2d 828 (Fla. 1962).

In Cramp, the Florida Supreme Court was faced with a decision from the United States Supreme Court which had found a portion of the loyalty oath prescribed by (then) § 876.05, Fla.Stat., unconstitutional. The Florida Supreme Court elected to strike only the offensive language and held:

> It will be apparent that we have judicially eliminated the particular language found to be objectionable by the Supreme Court. The balance of the oath remains intact. Other related provisions of the Statute are not adversely affected.

This approach has survived as an appropriate Appellate course of action through and into the current decade. In Schmitt v. State, 590 So.2d 404 (Fla. 1991), addressing the issue of "severability", the court held:

> The question remaining is whether the constitutional defects noted above require us to strike all of § 827.071 or whether we may adopt a limiting construction. We believe the latter course is in order.

[At p. 414.]

The Schmitt opinion then went on to discuss thoroughly the four part test to be utilized in deciding whether a portion of a section of Statute can be stricken, and the remainder be upheld (citing to a prior Supreme Court opinion Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990)), with the following language:

> When a part of a Statute is declared unconstitutional, the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the

> Legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

[At p. 415.]

The Appellate Courts are required "whenever possible" to uphold the constitutionality of Florida Statutes enacted by the Legislature. This well-established principle was re-stated in Doe v. Mortham, 708 So.2d 929 (Fla. 1998), which, in turn, quoted directly from State v. Stalder, 630 So.2d 1072 (Fla. 1994):

> We note that in assessing a Statute's constitutionality, this court is bound "to resolve all doubts as to the validity of [the] Statute in favor of its constitutionality, provided the Statute may be given a fair construction that is consistent with the federal and State constitutions, as well as with the Legislative intent.

Further:

> [w]henever possible, a Statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place narrowing constructions on acts of Congress, this court may, under the proper circumstances, do the same with a State Statute when to do so does not effectively re-write the enactment.

[At p. 934, footnote 12.]

Appellant would also argue against any suggestion that there must always be an absolute, highly explicit and fully detailed Subsection of all possible fine points of a Statute before a child may be protected or that Statute enforced. We are attempting here to rebut the argument that, if the "best interests" standard is stricken from the Statute, then the Statute has no standard and

cannot be utilized by any grandparent. We respectfully reject such an argument. Case law and common sense applications clearly establish appropriate standards for review under these circumstances.

(3) This particular case requires only a narrow ruling on these specific facts which might not apply to a different § 61.13(7) case involving no danger of harm to a child. Prior case law conclusively establishes a "harm to the child" exception as sufficient to establish the necessary compelling State interest to override any privacy argument.

This Court can resolve the issue in this case with a narrow ruling which holds that § 61.13(7), Fla.Stat. (1995), and case law interpreting Art. I, § 23, Fla. Const., combine to reach the following case-specific result:

> The Statute is constitutional as applied when, as here, the Statutory predicate of "a stable residence with the grandparents" is accompanied by facts sufficient to show actual or imminent harm to the child.

Such a narrow ruling would be consistent with all of the prior rulings emphasizing the "harm to a child" exception.

A passage of the Padgett decision bears repeating.

> While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly that the right is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.

[At p. 570.]

Von Eiff and Beagle both recognized the clear line of cases where the State has an appropriate compelling interest in "protecting its citizens -- especially its youth -- against the clear threat of abuse, neglect and death" (citing to Padgett).

We note that the qualifier "in the absence of a demonstrated harm to the child" appears in Beagle, in one form or another, 15 different times!

This continued reliance on a well-founded exception continues in the Von Eiff case where the qualifier is used (in one form or another) 11 times.

These two opinions quote extensively from Appellate decisions from Tennessee and Georgia, and each of those two jurisdictions also recognized the same "demonstrable harm" exception we urge on the Court in the instant cause.

We suggest that the Schmitt case cited earlier at p. 23 of this Brief is particularly appropriate for review and comparison with our case, in that the horrors to which the child is being exposed in our case are equal to or arguably surpass the horrors sought to be avoided by the Statute in Schmitt. Is the child's likely exposure to stabbings any less harmful than exposure to demonstrations of lewd behavior? Each image is equally reprehensible, and the Court ought to be able to intervene to protect a child from either scenario.

As Justice Kogan recognized in the Schmitt opinion:

> There is absolutely no question that the protection of children is a paramount interest of the State, far more weighty than other interests previously recognized as "compelling" in Florida privacy cases.

(4) This trial court's factual findings conclusively established the likely harm to the child and the unfitness of the mother as a custodian.

Put in its simplest terms, the trial court judge did not yet have the benefit of the Appellate opinion overruling him and declaring § 61.13(7), Fla.Stat. (1995), unconstitutional for the very first time.

As a result, by applying the "best interests" standard, he was doing exactly what the law required of him. The trial court noted in its opinion that it would be inappropriate in light of the Statute and the number of cases interpreting the Statute (pp. 12 and 13 of the trial court opinion) for the court to apply any other standard.

However, a plain reading of the factual findings of the trial court reveal an overabundance of facts sufficient to support findings of parental unfitness, endangerment of the child, and detriment to the child.

We will not re-list here all of the troubling details of the mother's lifestyle patterns, dangerous male companions and inappropriate behavior, but would refer the reader to the Statement of the Case and Facts and the trial court's opinion (Tab 2 at the Appendix).

We are concerned that the District Court opinion seems to have partially re-written the trial court's opinion by changing certain factual findings, and then by omitting significant dramatic facts altogether.

The District Court opinion, for example, made no reference to the child's exposure to a stabbing, drug users, the child's deteriorating school performance or to the mother's behavior patterns, including bizarre, violent actions and substance abuse.

The trial court's Order (in language ignored by the District Court) found:

> The mother's residences have been epitomized by violent, abusive relationships with adult men who have engaged in a variety of criminal activities. Additionally, the mother has herself been involved in violent, uncontrollable outbursts, possibly related to alcohol abuse. The continued exposure of Ashleigh to these destructive relationships and dangerous circumstances creates an unacceptably high risk of endangerment to the child. (Emphasis supplied.)

In summary, the District Court opinion focuses on the "best interests" standard when the trial court clearly found that the child was in danger if she was not moved from the home of the mother to the grandparents.

Another example is the District Court opinion first indicating that the "custody and primary residence of the child [was] with the Appellant" and then, almost as an afterthought: "although the child stayed with the paternal grandparents at various times during the next several years".

What the trial court had actually found (based on uncontradicted evidence) was that the child had spent the majority of her life with the grandparents, right up until the Christmas vacation where the mother decided to not return the child (thus provoking the Petitions to Modify).

Adding up the total number of months of residence with the grandparents established by the trial court Order (see Statement of Case and Facts) shows that, at a minimum, the child lived with the grandparents 45 months of her first seven years (84 months). Most important for this action, the child had lived with the grandparents for 30 of the prior 36 months, and all of the 25 months prior to the mother's taking the child to North Carolina in December of 1996.

CONCLUSION

Accordingly, the trial court ruling should be upheld, either upon a finding that the Statute Subsection is constitutional as is, or, in the alternative, is constitutional after striking the unconstitutional phrase (or phrases) and as applied to the particular facts of this specific case.

The District Court opinion should be reversed and remanded to the trial court for reinstatement of the original Order on Petitions to Modify.

If the Court elects to find the "best interests" standard unconstitutional, then the District Court opinion should be affirmed in part (as to that standard) and reversed in part based upon this Court's finding that the Statute, as redacted, is constitutional as applied to the particular and limited facts of this case. The cause should then be remanded to the trial court for entry of an Order directing the return of the child to the grandmother based upon the legal finding that the trial court's factual findings clearly established likely detriment to the child, sufficient to warrant a change in custody under the redacted Statute Subsection.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Corrected Initial Brief on the Merits has been furnished to Adrienne E. Richardson, 259 Furman Rd, #209, Boone, NC 28607, by regular U.S. Mail, on this the _____ day of March, 1999.

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IN THE SUPREME COURT OF FLORIDA

CHARLENE RICHARDSON,

Appellant,

v. CASE NO.: 94,810

ADRIENNE E. RICHARDSON,

Appellee.
_____/

APPENDIX

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA AND FROM THE FIRST DISTRICT COURT OF APPEAL

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