IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 94,843

DIANE SAUL and DAVID SAUL
Appellants,

v.
DOMINICK BRUNETTI
Appellee.

# INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT
Fourth District Appeal No. 98-00256

Jeanne C. Brady, Esq.
Appellants' counsel
Florida Bar No. 0997749

Frank R. Brady, Esq.
Florida Bar No. 0588024

Brady & Brady, P.A.
370 Camino Gardens Blvd.
Suite 200C
Boca Raton, FL 33432
Phone: (561) 338-9256

Steven M. Pesso, Esq.
Appellants' co-counsel
Florida Bar no. 0880140
370 Camino Gardens Blvd
Suites 336 & 337
Boca Raton, FL 33432
Phone: (561) 395-4046

**IN THE SUPREME COURT OF FLORIDA**

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| **DIANE SAUL and DAVID SAUL,** ) | Appeal Case no. 94,843 |
| ) | |
| **Appellants,** ) | 4th DCA case no. 98-00256 |
| **v.** ) | LT case no. CD 96-7845 FY |
| ) | |
| **DOMINICK BRUNETTI** ) | |
| ) | |
| **Appellee** ) | |

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## CERTIFICATE OF INTERESTED PERSONS

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|---|---|
| Diane Saul<br>David Saul | petitioners - trial court<br>appellees - Fourth District<br>appellants - Supreme Court |
| Dominick Brunetti | respondent - trial court<br>appellant - Fourth District<br>appellee - Supreme Court |
| Tyler Brent Brunetti<br>f/k/a Tyler Brent Saul | minor grandchild |
| Judge Catherine M. Brunson | trial jude |
| Judge Larry A. Klein<br>Judge William C. Owen<br>Judge George A. Shahood | appellate panel - 4th District |
| Jeanne C. Brady, Esq.<br>Frank R. Brady, Esq.<br>Steven M. Pesso, Esq. | appellants' counsel<br>appellants' co-counsel<br>appellants' co-counsel |
| Bennett Cohen, Esq.<br>Kenneth Renick, Esq. | appellee's counsel<br>appellee's co-counsel |
| Stacy Mullins, Esq. | former counsel for appellee |

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## PRELIMINARY STATEMENT

References to the record are prefaced by the letter "R" and are made to the page number assigned in the Index to Record on Appeal. References to the transcripts are prefaced by the letter "T" followed by the page number of the transcript.

Appellants/maternal grandparents, Diane Saul and David Saul, are referred to as "Appellants", "Mr. and Mr Saul", "the Sauls", "Maternal Grandparents" or individually as "Mrs. Saul" and "Mr. Saul". The Sauls' deceased daughter, Beth Saul, is referred to as "Beth". Beth's son, the Sauls' grandson, is referred to as "Tyler". Dominick Brunetti, the Appellee/unwed father, is referred to as "Nick" or "Appellee". Tyler's paternal grandparents are referred to as "Mr. and Mrs. Brunetti" or the "Brunettis" or individually as "Mr. Brunetti" and "Mrs. Brunetti".

## STATEMENT OF TYPESETTING

This Initial Brief is typed with times new roman, 14 point font in WordPerfect™ 5.1 for windows format.

## JURISDICTIONAL STATEMENT

This Court has mandatory jurisdiction because the Fourth District Court of Appeals declared a state statute, § 752.01(1)(d), Florida Statutes invalid. Art. V § 3(b)(1), Fla. Const.; Rule 9.030(a)(1)(A)(ii), Fla.R.App.P.; ***Dept. of Bus. Reg., v. Classic Mile Inc.***, 541 So. 2d 1155 (Fla. 1989).

This Court also has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V. § 3(b)(3),

Fla. Const. (1980); Fla. R. App.P, 9.030(a)(2)(A)(iv).

## STATEMENT OF THE CASE AND FACTS

***Nature of the Case:***

This case involves a now four year old grandchild born out of wedlock (R 449), who was the subject of paternity, child support and guardianship actions (R 450; T 212-13, 274, 524, 670).

Since birth the grandchild ("Tyler") lived with and was provided with *primary care* by his *maternal grandparents* ("Appellants" or "the Sauls") and mother (R 449, 451). Tyler then lost his mother, Beth Saul ("Beth"), in a car crash, and went to live with his paternal grandparents, who provide a home and support for Tyler's twenty six year old unwed father, Dominick Brunetti ("Appellee" or "Nick"), and assist Appellee with Tyler's care and support (T 634).

Within days after Tyler's transition to the home of his paternal grandparents, the Sauls did not know whether or when Nick would allow Tyler to visit with the Sauls. Nick refused a regular visitation schedule, overnight visits, and shortened the time allowed for visits (T 78, 79, 88, 94, 101-102, 109-112 178, 282-283, 650). Just weeks after Tyler's transition from his maternal grandparents' home to paternal grandparents' home, the Sauls sought visitation with Tyler based on Tyler's out of wedlock status, the father's earlier desertion of the mother and child, and the mother's death (T 672; R 108-132, 133-348). The trial court granted the Sauls' petition for visitation (R 449-452).

Nick appealed the visitation order, contending that visitation between the Sauls and Tyler violated his own right to privacy. Relying on this Court's decision in ***Von Eiff v. Azicri***, 720 So. 2d 510 (Fla. 1998), the Fourth District reversed, holding that both § 752.01(1)(a) (death one or both parents) & § 752.01(1)(d) (grandchild born out of wedlock) are unconstitutional, and that despite paternity litigation between this grandchild's parents in 1995, § 61.13(2)(b)2.c, which provides for grandparent

visitation in paternity, is not available to the Sauls.

The Fourth District stayed its appellate mandate, and this review follows.

***Statement of the facts:***

Twenty one year old Beth Saul was never married, lived with her parents (the Sauls) and had a normal and very loving relationship with them (T 21-23, 42, 71, 73, 101, 106, 195, 301, 473, 652). Having dated Appellee for several years, Beth became pregnant with Tyler, who was born out of wedlock in October of 1994 (T 126).

Beth wanted to marry and have a traditional family (T 300). Nick had no plans to marry Beth (T 196, 235). Rather, Nick requested Beth to abort the pregnancy against Beth's wishes (T 106, 128-129, 463, 464). A part time student and Costco employee, Nick lived with his parents, Dante Brunetti and Barbara Brunetti ("Mr. and Mrs. Brunetti" or "the Brunettis"). Nick concealed Beth's pregnancy from his parents (T 71, 73, 42, 220, 235, 246, 256, 624). Beth and Mrs. Saul finally informed Mr. and Mrs. Brunetti about Beth's pregnancy when Beth was five months pregnant (T 41, 42, 73, 257, 624). Thereafter, Beth was instructed not to come to the Brunetti home at certain times so that other Brunetti family members would not learn of Beth's pregnancy (T 256, 405-406, 436, 625).

During Beth's pregnancy, and for the better part of Tyler's first year, Beth received *no* support from Nick (T 22-23, 34-37, 106). During Beth's pregnancy, and after Tyler's birth, Beth's parents provided emotional and financial support, a home, food, clothing, health insurance, and medical care to both Beth and Tyler (T 31, 36, 197 104, 105, 106, 165, R 354-413). Beth and Mrs. Saul went to obstetrical appointments and lamaze classes together. Mrs. Saul was Beth's lamaze coach for Tyler's birth (T 37, 157). Mr. Saul and Beth's half sister, Michelle, also attended Tyler's birth (T 37, 157). Beth named Tyler after Mr. Sauls' mother, and her deceased half brother (T 37-38, 130). Beth wanted Tyler to have the Saul name, and she placed

the Saul name on Tyler's birth certificate and social security card (T 35-37, 169; R 352-353). Beth and Tyler were both dependents of the Sauls on the Saul's federal tax returns (T 107).

Until Beth's death about two years after Tyler arrived, the Sauls provided primary support and care for Beth and for Tyler (R 449-452). The Sauls, Beth and Tyler were a family unit. The Sauls assisted Beth with all aspects of caring for Tyler (T 31, 36, 104-106, 165, 147, 197; R 354-413). The Sauls took Beth and Tyler with them on vacations (T 38), and together they moved twice to larger homes so that Beth and Tyler could have more room and privacy (T 72-73). The Sauls enjoy a close relationship with Tyler, their only grandchild (T 25, 45, 160).

During the pregnancy, Nick provided *no* support, accompanied Beth to one ultrasound (T 36), and sat in the corner during the delivery (T 160, 22-23, 34-37, 106). When Tyler was about eight months old, Nick was sued for paternity and child support. Nick was ordered to pay Beth $144.00 per month in child support, with the court retaining jurisdiction of the matter (T 191). An income deduction order also issued under chapter 61. Thereafter, Nick paid court ordered child support arrearages that had accumulated since Tyler's birth (T 22-23, 34-37, 106, 191, 205, 274).

For three or four months after Tyler was born, Nick did not see Tyler with any regularity (T 61, 82, 91). Thereafter, Beth took Tyler to the Brunetti home, often when Nick was not there, gradually building up to overnight visits about twice a week just prior to her death (T 91, 381, 383, 425, 434 636). Tyler's relationship with his grandparents was important to Beth. Beth even regularly took Tyler to visit his paternal great grandfather in a nursing home (T 637).

According to the Brunettis, they loved Beth, who they characterized to be like a member of their family (T 250, 255, 380). The Brunettis paid Beth to clean their house (T 632-633). Mrs. Brunetti went shopping with Beth (T 250, 632).

Beth was contemplating marriage to another gentleman named Jim Flack just days before she was killed in the September, 1996 automobile accident (T 630, 42). Tyler was a surviving passenger in the violent accident (T 43-44), that occurred on Beth's drive home from her twenty-first birthday dinner with the Sauls and Beth's maternal grandparents.

Tyler and Beth left the birthday celebration in one car (T 42, 44) and the Sauls left several minutes later in a different car. When the Sauls arrived home, Beth and Tyler were not there, and a message on their telephone answering service from the police summoned them to the hospital. At the hospital, the Sauls learned that Beth was killed in a car accident in Tyler's presence. The Sauls held Tyler during his emergency medical care, and returned home with Tyler (T 43-44).

After Beth's death, Nick stayed at the Sauls' home for one or two nights to help comfort Tyler (T 47, 49). The day of Beth's funeral, Nick informed the Sauls that he needed to bond with Tyler (T 46), and he wanted to take Tyler to live at the Brunetti home, where they now live with Nick's parents (T 45, 48, 49, 109). Although concerned about Tyler's sudden transition to the Brunetti home, the Sauls supported Nick's decision (T 48, 100, 180, 260).

Mrs. Brunetti admitted that when Tyler came to live with them, Tyler was in a state of shock (T 508). The Brunettis enforced a routine, and Tyler calmed down (T 508). After Beth's death, Nick showed some parental responsibility for Tyler (T 90), with the help and financial support of the Brunettis (T 425).

After Beth died, Nick allowed Tyler to visit the Sauls about once a week for a few hours but refused a regular visitation schedule, overnight visits, and shortened the time allowed for visits (T 78, 79, 88, 94, 101-102, 109-112 178, 282-283, 650). Often, the Sauls did not know whether or when Nick would allow visits. Worried about Tyler's emotional well being, and fearing that Tyler will suffer a second loss

should visitation cease (T 88, 110-112), the Sauls moved for temporary visitation just weeks after the transition ( T 81, 88, 111- 112, 116, 162).

Judge Brunson awarded temporary weekly Saturday visits, with the third week of each month being an overnight visit[1] (T 162, 29; R 53-54).

At the hearing for permanent visitation, the Sauls' witnesses observed Tyler to be a bright, loving, well behaved child who enjoys a very good relationship with the Sauls (T 148-150, 152-155, 158-160, 162-165). When visiting the Sauls, Tyler is able to see his other family members, including Beth's surviving half sister, Michelle Gomez, and his uncle Joaquim Gomez (T 29, 151, 160-161, 165). Tyler also enjoys seeing his playmates, neighbors, and other close family friends who have known Tyler (and knew Beth) since birth (T 26, 29, 37, 38, 154-156). When visiting with the Sauls, Tyler enjoys playing with the Sauls, his dogs, the ducks, swimming, blowing bubbles, going to the beach and nature center, and doing all the things three year olds love to do (T 29). The Sauls display pictures of Nick, Beth, and the Brunettis in Tyler's bedroom, and the Sauls say nice things to Tyler about Nick (T 28, 38, 39, 73, 107, 108).

The Sauls were observed by multiple witnesses to be loving, nurturing, and caring grandparents (T 150-156, 160, 165). Michelle Gomez, Tyler's maternal aunt, testified that Tyler was extremely close to the Sauls (T 160), and that Tyler would be "devastated" without regular visitation with the Sauls and Michelle (T 162). Sometimes Tyler cries when he leaves the Sauls (T 161). The Sauls are concerned that Tyler will suffer harm if he looses his visits with them (T 88-89). The Sauls also worry about unknown long range detrimental effects on Tyler (T 101).

According to Nick and his parents, Tyler has acted withdrawn, cried and

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[1]The Fourth District denied Appellee's petition for a writ of certiorari, which challenged the denial of his motion to dismiss the Sauls' petition for grandparent visitation. Fourth District Appeal No. 97-00954.

suffered digestive ailments when he returns to the Brunettis following visits with the Sauls (T 243, 244, 391). Admitting Tyler is doing well and blossoming after Beth's death, the Brunettis conversely testified they were "terrified" about visits, and even remarked that the Sauls had never done a positive thing for Beth or for Tyler (T 211, 421, 426, 612, 622, 623, 634, 635).

Appellee's father, Mr. Brunetti, admitted that he does not like the Sauls, and he believes the visitation case is selfish (T 417, 420). Nick believes the case is a ruse (T 176). Appellee's mother, Mrs. Brunetti, never liked the Sauls, and described them as "evil" (T 623, 627). Nick described the Sauls as "subversive" to everybody around them (T 176-177, 623, 642, 647). Mrs. Brunetti even testified that Beth did not love her parents (T 622, 637). Mrs. Brunetti also complained that on the day the Sauls received Beth's ashes from the mortuary, she and Mr. Brunetti had dressed up for diner at the Saul home, but were not served any dinner (T 522).

The Sauls were appointed by the Probate Court to administer their daughter's estate (T 148). Mrs. Brunetti and Nick were upset that the probate court appointed the Sauls as co-personal representatives (T 183-185, 215). Attorney Ronald David, Esq. was appointed as a guardian ad litem to represent Tyler's interests, over Nick's objection (T 148-149). Nick sought plenary guardianship of Tyler.

As personal representatives of Beth's estate, the Sauls were concerned about the protection and investment of proceeds from the wrongful death suit, and Mrs. Saul counter-petitioned for guardianship of Tyler's property (T 67, 92-93, 133-134, 135). When asked whether that should surprise him given he had not taken financial responsibility for Tyler during the first two years of his life, Nick contended that the Sauls acted behind his back (T 185, 215-216). Mrs. Brunetti believed that the court files contained nasty lies, and claimed that the Sauls only wanted to control Tyler's money (T 523). In the next breath, Mrs. Brunetti admitted seeking thirty dollars from

Beth's estate, which Mr. Brunetti contended he had given to Beth and was in her wallet when she was killed (T 626, 523-524). Mrs. Brunetti also demanded the estate to return the clothes that Beth wore during the fatal accident (T 626). Nick's guardianship of Tyler's property was ordered under the strict supervision of the trial court (T 136). Settlements recovering for Beth's wrongful death were all approved by the probate court, and agreed to by all parties (T 92, 148, 212, 213, 274, 524, 670).

The Sauls are certain that Tyler's regular court ordered visitation helps assure Tyler's emotional constancy and well being after Beth's death (T 59, 60). The Sauls are positive about Tyler's progress after Beth's death, and give Nick and the Brunettis, credit too (T 60, 63, 63, 74).

The Sauls cooperate with Nick, and abide by all of his child care instructions wherever possible (T 39, 40, 99). Without exception, the Sauls change the dates of Tyler's visits, and take Tyler to any activity whenever Nick requests them to (T 79, 97-98, 178, 179).

Psychologist, Dr. Heller, provided grief counseling to the Sauls after Beth's death. Dr. Heller described the Sauls' cooperative spirit, and their respect for Appellee in all phases of his fatherhood (T 296, 297, 305). Dr. Heller explained that Tyler is very attached to the Sauls because they were Tyler's surrogate parents since birth (T 285). Dr. Heller also explained that Tyler's contact and bond with the Sauls *saved* Tyler from emotional turmoil (T 305), and *prevented* Tyler's devastation from Beth's death (T 288, 290, 291, 463). Dr. Heller also explained that taking the Sauls' visits away from Tyler would be *harmful, detrimental, and cruel* to Tyler causing Tyler to suffer a second *detrimental loss*, and loss of his sense of security (T 285, 289, 293, 295, 335, 336, 337, 460, 461, 468). Dr. Heller testified that Tyler's temporal development made weekly and overnight visits important, and that it would be detrimental if visits stopped, because they form a part of Tyler's security (T 292, 295,

456, 457).

Dr. Heller also testified that Nick should not attempt to set up an alienation, and stated that if it was true that Tyler cried after visiting the Sauls, it is his response to losing his attachment to the Sauls, and the threat that his attachment may be gone forever (T 298, 347, 348). As Tyler settled into weekly visits, Dr. Heller recommended continuation of weekly visits, additional phone visits, and additional overnight visits (T 306).

Dr. Alexander, Appellee's expert psychologist, testified that a grandchild's loss of contact with a grandparent *that the child had lived with would be an undeniable loss that would probably be* ***harmful*** (T 587). Dr. Alexander confirmed that *the loss of contact could cause a second loss that is almost as traumatic as the loss of a mother* (T 575, 593) (emphasis supplied). Dr. Alexander agreed it is beneficial for a grandchild to maintain grandparent contact after a parent's death (T 576, 579). Dr. Alexander did not know whether the grandparent visitation statute was good or bad absent precedent in mental health research (T 99), but he unequivocally acknowledged that a *loss of the grandparent relationship can cause depression, impairment of development into adolescence, and an upsetting disruption to the child that can be harmful* (T 586, 587).

Notably, Dr. Alexander testified that the *best interest of the child is more important* than a father's right to raise that child (T 583).

***The trial court's ruling***:

The trial court found Tyler born out of wedlock, that the Sauls and Beth provided Tyler's primary care, and that Nick had paid support as ordered in the paternity action. The court also noted its concern that *visitation would not continue without court order* due to the "disdain" that Nick and his parents had for the Sauls (R 449-452). The court awarded visits every other Saturday plus seven additional

overnight visits per year (R 449-452).

***The Fourth District's ruling:***

Nick appealed to the Fourth District, contending that his right to privacy was facially violated by the visitation statute. There was no challenge of the trial court's findings of fact that visitation is clearly in Tyler's best interests. Relying on this Court's recent decision in ***Von Eiff v. Azicri***, 720 So. 2d 510 (Fla. 1998), the Fourth District ruled both § 752.01(1)(a) (death of parent(s)) & § 752.01(1)(d) (out-of-wedlock) unconstitutional. ***Brunetti v. Saul***, 724 So. 2d 142 (Fla. 4th DCA 1998) (***reh'g den.*** Jan. 26, 1999, ***rev. pending***). The Fourth District also recognized that paternity litigation waives privacy, that paternity and dissolution are on the same footing for purposes of grandparent visitation, and that when dissolution of the parents' marriage is followed by death of one parent, the court retains continuing jurisdiction to determine the best interest of children. The Fourth District nevertheless ruled that there is no basis for visitation, as § 61.13(2)(b)2.c is not available to the Sauls.

The Fourth District stayed its appellate mandate. Review of right at this Court follows.

## SUMMARY OF THE ARGUMENT

The Fourth District held: (1) grandparent visitation pursuant to § 61.13(2)(b)2.c, Florida Statutes is unavailable to the Sauls notwithstanding that a paternity case was commenced in 1995, and (2) grandparent visitation pursuant to § 752.01(1)(d) (providing for visitation with out of wedlock grandchildren) is unconstitutional, leaving no basis for any grandparent visitation for the Sauls. Both holdings constitute error.

Unlike any scenario this Court has encountered when assessing grandparent

visitation under chapter 752,[2] this case involves an extended grandparental residential relationship with the Appellant/grandparents acting in a primary caretaker role. This unwed father/Appellee failed to appreciate the gravity and responsibilities attendant to parenthood, thereby causing Beth and Tyler to live together with the Sauls in a nuclear family, where Tyler developed over two years a very strong bond with his maternal grandparents, who were surrogate parents to him. Now that Tyler's mother is deceased, the Appellee asserts his own privacy as a shield to prevent Tyler's visitation with the Sauls.

There is a great difference between the facts of this case and those of ***Von Eiff***, which involved an intact family, no relevant court proceedings during the marriage and a death of one parent, followed by remarriage of the surviving parent and step-parent adoption. In ***Von Eiff***, the surviving parent and adoptive step-parent were entitled to *"continued"* privacy after the unfortunate death of the spouse. In sharp contrast to the facts in both ***Beagle*** and ***Von Eiff***, the father of this out of wedlock child seeks to deliberately sever a grandparental bond to the detriment of Tyler -- even though it was his own failure to appreciate the magnitude of his parental role that gave rise to that bond in the first instance. Nick's own expert testified that loss of the grandparental relationship could be as harmful and traumatic to Tyler as the loss of his mother (T 575, 586-7, 593). It is a different proposition entirely to prevent grandparent visitation after a death of one parent, as this Court did in ***Von Eiff,*** than to permit a parent who has repeatedly waived familial privacy to intentionally precipitate an emotional damage to a child that is as traumatic as the loss of a parent.

Unlike ***Beagle*** or ***Von Eiff,*** here, there was only discontinuity in Tyler's

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[2]***Beagle v. Beagle***, 678 So. 2d 1271 (Fla. 1996) (married couple with no relevant court proceeding); ***Von Eiff***, 720 So. 2d at 510 (widower and adoptive step-mother united in opposition to visitation).

parents' relationship. There was never an intact family, or a live-in relationship between Tyler's parents (T 21-23, 42, 71, 101, 106, 195, 301, 473, 652). There was extended maternal grandparent residency (***Id.***). Tyler, Beth and the Sauls were a family unit, and the Sauls were Tyler's primary care takers (***Id.***, T 31, 36, 102, 115, 165, 197; R 354-413). The Sauls provided for Beth and for Tyler. It is undisputed that Nick provided *no* support during Beth's pregnancy (T 22-23, 31-37, 106). Nick wanted the child aborted over Beth's wishes (T 106, 128-29, 463-4). Nick concealed the pregnancy (T 71, 73, 42, 220, 235, 246, 256, 624). Beth was banished from the Brunetti home at times so that others would not learn of her pregnancy (T 256, 405-6, 436, 625). The Sauls helped Beth through the pregnancy, and Mrs. Saul even coached during Tyler's birth, with the rest of the Saul family in attendance. After Tyler's birth, and during Tyler's infancy, Nick evinced very marginal efforts. For months, Nick did not see Tyler with any regularity (T 61, 82, 91). Providing no child support for the first eight months of Tyler's life, Nick was sued for paternity and child support (T 22-3, 34-37, 106, 191, 205, 274). There is certainly no united or shared parental opposition to visitation. Nick conceded that Beth encouraged Tyler's relationship with the Sauls (T 177). After Beth died, Nick instituted plenary guardianship proceedings (T 212-13, 274, 524, 670). The Sauls refrained from seeking custody, although entitled to, and instead, supported Nick's belated decision to bond with Tyler. The Sauls facilitated Tyler's transfer to the Brunetti home just four days after Beth's death, despite their concerns (T 48, 100, 180, 260).

At all times, the Sauls provided Tyler's primary care with Beth (T 31, 36, 104-106, 147, 165, 197; R 354-413). Tyler's bond with the Sauls is far more significant than a typical grandparent relationship (T 205, 288, 290-93, 295, 305). The Sauls were relied upon by Beth to care for Tyler's emotional and financial necessities of life, and did so. The Sauls were parent figures for Tyler during his first two years (T

285). Severance of Tyler's bond with the Sauls will have far-reaching affects on Tyler's well being (T 285, 289, 293, 295, 335-37, 460-61, 468, 575, 586-87, 593). Dr. Heller testified that taking the visits away from Tyler would be harmful, detrimental and cruel, and would cause Tyler's loss of security (***Id.)***. Appellee's own expert agreed that loss of the relationship with a grandparent that a child had lived with constitutes an undeniable loss that is probably harmful, and as traumatic as the loss of a parent. With Nick's repeated waivers of familial privacy during Beth's pregnancy, Tyler's infancy, and the paternity, child support and guardianship actions, the best interest of this grandchild must continue to govern.

Beth's death did not extinguish Tyler's right to have his best interests considered, and Tyler's best interests must not be irrelevant to this constitutional analysis. To so hold would elevate privacy beyond all reasonable bounds.

Subsection (d) of § 752.01(1) is *facially* constitutional. Strict scrutiny does not apply. Just like divorced parents, parents of children born out of wedlock often litigate paternity and child support issues. They often bitterly disagree about many things, including grandparent visitation. Further, akin to divorce, in out of wedlock situations, children are frequently deserted or abandoned by one parent. Just as in divorce, paternity and out of wedlock situations melt away or effectively waive any legitimate expectation of privacy. Therefore, strict scrutiny does not attach. Section 751.01(1)(d), Florida Statutes is reasonably related to its legitimate goal of fostering the grandparent/grandchild relationships of illegitimate children, and it passes the rational basis test.

Even if the compelling interest test applies, § 752.01(1)(d), passes *facial* constitutional muster under Article I, § 23 of the Florida Constitution. The state has a compelling interest and affirmative duty in protecting illegitimate children, and in fostering their relationships with their family members. This Court has held that the

state has a compelling interest in paternity and that privacy claims are collateral to the overriding concern of the child's best interest. ***See, HRS v. Privette***, 617 So. 2d 305, 309 (Fla. 1993). Further, this Court has also held, in the identical context of divorce, that the State is considered a third party to protect the public welfare. ***Baron v. Fla. Freedom Newspapers, Inc.,*** 531 So. 2d 113, 119 (Fla. 1988). Thus, privacy is lost. Subsection (d) is narrowly tailored to the least intrusive means of protecting an out of wedlock child's rights by setting forth multiple statutory factors that must be met by a grandparent. Further, all such visitation is modifiable. ***Fla. Stat. § 752.02.*** Passing *facial* muster under Florida's more restrictive right of privacy makes any analysis under the federal constitution unnecessary.

Under strict scrutiny or the rational basis test, § 752.01(1)(d) also passes constitutional muster *as applied* to the facts of this case. There is a vast difference between the fundamental rights of privacy of a natural parent in an intact family with no relevant court proceedings that is followed by death, remarriage and step-parent adoption, and the waived privacy present in this case. Unlike ***Von Eiff***, here, there is no *continuation* of privacy, despite the unfortunate death of a parent. In sharp contrast to ***Von Eiff,*** it was Beth's death that gave rise to Nick's belated assertion privacy, which privacy had been waived long ago. Further, a child's best interest overrides the right of privacy in the context of out of wedlock birth. It is also critical to note that here, unlike ***Von Eiff,*** the state certainly could have forced grandparent visitation *before* the death of this child's mother. ***Fla. Stat. § 61.13(2)(b)2.c; e.g., Spence v. Stewart***, 705 So. 2d 996 (Fla. 4th DCA 1998); ***Wishart v. Bates***, 531 So. 2d 955 (Fla. 1988), ***cert. den.***, 490 U.S. 1001, 109 S.Ct. 1633, 104 L.Ed.2d 149 (1989) (award of visitation rights to grandparents may be made if in best interest of child).

Dissolution and paternity are on the same footing. The best interest test

controls grandparent visitation in both contexts, and the visitation provisions of Chapter 61 apply. ***Spence***. With the best interest test controlling grandparent visitation in dissolution and paternity, it does not follow that § 752.01(1)(b) (dissolution) or (d) (wedlock) are *facially* unconstitutional merely because those subsections call for a best interest test. To so hold would elevate procedural form over constitutional substance.

The Sauls present more than an argument that visitation is a 'better' decision for this child. Tyler will be harmed if Nick can assert privacy to prevent visitation.

## ARGUMENT

### *I. The Guiding Principles and Standard of Review*

Review is *de novo*. ***Walter v. Walter***, 464 So. 2d 538, 539 (Fla. 1985) (appellate court not required to defer to trial court on issue of law). The trial court's findings of fact were not challenged at the Fourth District and, therefore, remain presumptively correct entitled to the same weight as a jury verdict. ***Marsh v. Marsh***, 419 So. 2d 629, 630 (Fla. 1982). This Court must defer to the trial court's evaluation of the credibility of the witnesses, and the weight to be given their testimony. ***Id.*** at 630.

### II. The Fourth District Erred in Holding § 61.13(2)(b)2.c, Florida Statutes unavailable to the Sauls

It was error to hold § 61.13(2)(b)2.c,[3] which applies in paternity and dissolution, unavailable to the Sauls. ***E.g., Spence***, 705 So. 2d at 998 (holding §

[3]Fla. Stat. § 61.13(2)(b)2.c provides in part:

> c. The court may award the grandparents visitation rights of a minor child if it is in the child's best interest. Grandparents shall have legal standing to seek judicial enforcement of such an award....

61.13(2)(b)2.c applicable in paternity and dissolution on best interest standard). ***Wishart v. Bates***, 531 So. 2d 955 (Fla. 1988) (approving grandparent visitation based on best interest of grandchild). Protecting the best interest of a child is unquestionably a proper exercise of police power. ***E.g., McAlister v. Shaver***, 633 So. 2d 494 (Fla. 5th DCA 1994) (discontinuity of parents' relationship allows court to determine visitation or custody based solely on child's best interests). Paternity and dissolution are on the same footing. ***Brown v. Bray,*** 300 So. 2d 668, 670 (Fla. 1974); ***Kochinsky v. Moore***, 698 So. 2d 397 (Fla. 4th DCA 1997) (custody in paternity and dissolution on same footing); ***McIntosh v. Archer,*** 652 So. 2d 920 (Fla. 4th DCA 1995) (in out of wedlock situation, child's best interest governs); ***Privette v. State of Florida, Dept. of Health and Rehabilitative Services***, 585 So. 2d 364 (Fla. 2d DCA 1991), ***appv'd,*** 617 So. 2d 305 (Fla. 1993) (in paternity, child's best interest controls).

In a determination of parentage action, § 742.06, Florida Statutes provides that the court retains continuing statutory jurisdiction *after* the determination of parentage to enter *future* orders:

> The court shall retain jurisdiction of the cause for the purpose of entering such other and further orders as changing circumstances of the parties in justice and equity require.

Beth's death is but a profound change circumstance in which equity and justice require a visitation order. Tyler resided and was cared for by the Sauls from birth until days after Beth's death. Dr. Heller testified that taking away Tyler's visits with the Sauls would be harmful, detrimental and cruel, causing his loss of security (T 285, 289, 293, 295, 335-37, 460, 461, 468). ***Consider HRS v. Privette***, 617 So. 2d 305, 309 (recognizing that the law does not require cruelty to children). Appellee's own expert even recognized that Tyler could be harmed if the grandparent relationship is severed (T 575, 587, 593). Appellee's expert further testified that the loss of a

relationship with a grandparent the child had lived with would pose and undeniable loss that would probably be harmful, and as traumatic as the loss of the child's mother (***Id.***). The trial court even noted its concern that visitation would not continue without a court order (R 449-452). It was right.

In the years prior to Beth's death, there was no practical reason for the Saul's to litigate visitation. The Sauls already enjoyed daily and extended residential visitation with Tyler. It is not sound public policy to limit the Sauls' right to seek visitation under chapter 61 to intervention *prior* to the adjudication of paternity. This is particularly so because our Legislature has deemed there to be continuing statutory jurisdiction to entertain any order that equity and justice requires *after* the determination of parentage. ***Fla. Stat. § 742.06.*** Such a limitation will foster unnecessary litigation where grandparents are primary caretakers of their grandchildren already.

With continuing statutory jurisdiction under chapter 742 *after* the determination of parentage (T 191, R 490) and Beth's death providing a profound change in circumstances affecting the lives of all parties here, it is appropriate to apply § 61.13(2)(b)2.c to reinstate visitation under a best interest standard. ***See e.g., In re J.M and S.D.M.***, 499 So. 2d 929, 931 (1st DCA 1986) (stating "the change in circumstances which affected the lives of all the parties involved herein was the death of the natural mother"; inherent and continuing jurisdiction to enter any order appropriate to child's welfare).

Moreover, courts have historically possessed both statutory *and* inherent authority to protect children. The circuit courts inherited the common law

jurisdiction of the courts of chancery, in which minors were wards of the court, and the court has inherent power to protect their best interests until age of majority. ***Cone v. Cone,*** 62 So. 2d 907 (Fla. 1953); ***Pollack v. Pollack***, 159 Fla. 224, 226, 31 So. 2d 253, 254 (1947). ***Brown v. Bray*** placed paternity and dissolution on the same footing; in both instances the child is a ward of the court until majority. ***Brown***, 300 So. 2d at 670 (Fla. 1974).

Death of a parent does not affect the court's jurisdiction to consider a child's best interests. In ***Cone***, in the identical context of dissolution, this Court held that dissolution proceedings abate upon the death of either party, but *jurisdiction over the child continues until majority*:

> the complaint itself, when children are involved, invokes the jurisdiction of the court as to **two separate and distinct matters;** it invokes the jurisdiction of the court on the question of divorce, which jurisdiction is completely and finally exercised when a decree on such question is entered, *and* it also invokes the *continuing jurisdiction of the court as to the welfare of the children, which jurisdiction is not completely exercised until the children reach their majority. . . . the jurisdiction of the court invoked and continuing in the original cause is not affected by the death of a party. . . .*

***Cone***, 62 So. 2d at 909 (emphasis supplied); ***Anderson v. Garcia***, 673 So. 2d 111 (Fla. 4th DCA 1996) (although wife's death terminated jurisdiction regarding dissolution, court retained jurisdiction over parties' child and, therefore, there was an ongoing action providing basis for maternal grandparents' motion to intervene in custody dispute); ***S.G. v. G.G.***, 666 So.2d 203 (Fla. 2d DCA 1995) (continuing jurisdiction to enter orders affecting children's best interests during their continuing disability); ***see also McRae v. McRae***, 52 So. 2d 908 (Fla. 1951) (courts of equity have inherent power to do <u>all</u> things necessary for administration of justice); ***Fisher v. Guidy***, 106 Fla. 94, 142 So. 818 (1932) (guardianship is a court of equity with

inherent jurisdiction to control and protect infants).

It is well settled that one can waive any fundamental right. ***E.g., Bellaire Sec. Corp. v. Brown***, 124 Fla. 47, 168 So. 625 (1936) (one can waive any contractual, statutory or constitutional right). When familial privacy has been abandoned before a court, such as in dissolution, paternity, child support enforcement, or guardianship, any legitimate expectation of privacy melts away, strict scrutiny cannot attach, and grandparent visitation cannot run afoul of privacy. When a child is born out of wedlock, and an extended grandparental residential relationship with the grandchild gives rise to a bond that would not ordinarily be present, no court should permit a parent who has waived privacy to deliberately harm the child by severing that bond after the child's mother dies. ***E.g., Bellaire*** (discussing waiver); ***Privette,*** 617 So. 2d at 309 (law does not require cruelty).

The Fourth District distinguished its wavier rationale of ***Spence*** on the basis of procedural posture. ***Brunetti***, 724 So. 2d at 143. The distinction is meaningless for purposes of constitutional analysis. Procedural posture does not diminish or vitiate the historical fact of wavier in this case -- or in any case where a determination of parentage and support is necessitated by a father's conduct. This Court has held that in paternity, the child's best interests are paramount and override privacy, ***Privette***, 617 So. 2d at 309, and that one can waive any constitutional right; ***Bellaire, supra.*** The intent of the parentage act is to protect the welfare of a child illegitimately conceived by converting a father's moral obligation to support the child into a legal obligation, and to relieve the public's need to support the child. ***Kendrick v. Everheart***, 390 So. 2d 53, 56 (Fla. 1980). The state's interest in protecting an illegitimate child's right to associate with putative family members, thereby reducing the stigma of out of wedlock birth, is no less compelling. ***See Privette***, 617 So. 2d at 307 (discussing stigma of out of wedlock birth). Further, this Court has also

recognized that the potential for invasion of privacy is inherent in the litigation process. ***Rassmussan v. South Florida Blood Serv.***, 500 So. 2d 533, 535 (Fla. 1988).

Thus, the Fourth District erred in elevating Appellee's right of privacy over Tyler's best interest, and failing to recognize Appellee's waiver of the right.

Enjoying an extended residential relationship with Tyler for two years, the Sauls developed a de facto parent-child relationship with Tyler through day-to-day interaction, companionship, and emotional caring for him. That relationship fulfilled Tyler's psychological needs, in addition to providing for his physical necessities of daily living. Once this type of bond forms, breaking up that relationship, psychologists believe, and common sense dictates, has serious and harmful effect on the child's emotional development. ***See Suzette M. Harris, Note, Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?***, 20 Ga. L.Rev. 705, 745 n. 3 (1986) (citing ***Goldstein, A. Freud & A Solnit, Beyond the Best Interests of the Child, 17-20 (1973))*** (hereinafter "Harris").

Courts should refrain from elevating form over substance when children's welfare is involved. In a variety of circumstances, entirely in the absence of statutory jurisdiction, non-parents have been permitted to litigate in their own right the question of custody. For example, intervention was permitted in modification proceedings by a third person caring for the child, ***Cone***, and a petition for modification filed by a person caring for the child of divorced parents was permitted in ***Grant v. Corbitt***, 95 So. 2d 25 (Fla. 1957).

The pending guardianship case initiated by Appellee (T 212, 213, 274, 524, 670) also provides continuing inherent and continuing statutory jurisdiction over the best interest of this child until he attains the age of majority. ***Fla. Sat. § 744.372*** (court retains jurisdiction over all guardianships); ***Fla. Stat. § 744.3735*** (court may require guardian to appear any time about any matter relating to well being of ward);

***McRae*** (courts of equity have inherent power to do all things necessary for administration of justice); ***Fisher***, 142 So. at 818 (guardianship court has inherent jurisdiction to protect infants).

The facts here are strikingly similar to those entitling the grandchild to liberal visitation with her grandmother in ***In re Guardianship of D.A. McW.***, 429 So. 2d 699, 702 (Fla. 4th DCA 1983), ***app'd***, 460 So. 2d 368 (Fla. 1984). Just as here, in ***D.A. McW.*** the child's parents had a long relationship, never married, the mother and grandchild lived with the maternal grandmother, and the mother was killed in an automobile accident. ***Id.*** The court explained that the fit father should have custody, but the maternal grandmother, with whom the child has resided with most of his life prior to his mother's untimely death, was entitled to have liberal visitation:

> [W]e also believe that the grandmother, *under the unique circumstances of this case, is entitled to liberal visitation privileges with the child*. An abrupt and complete severance of the child's relationship with his grandmother would ***obviously*** *be detrimental to the welfare of the child*. However, there is no reason why this problem cannot be resolved by granting visitation rights to the grandmother. . . .

***Id.*** at 702 (emphasis supplied).

Just as in ***D.A. McW,*** given Tyler's extended residency with his maternal grandparents for his entire life prior to his mother's untimely death, Tyler's visitation with the Sauls should continue. ***See id.*** Tyler's bond with the Sauls is far more significant than the typical grandparent relationship. ***Harris*** (citing Freud, A.). The Sauls were parent figures for Tyler's first and most important two years of life. ***Id.*** Tyler has lost his mother. Tyler survived the traumatic accident. Tyler's mother was killed in his presence. Tyler now faces losing the Sauls too. Severance of this grandparent bond will have far-reaching implications. Dr. Heller characterized the loss of visits as detrimental, harmful and cruel. Dr. Alexander characterized the loss of a relationship with grandparents that a child had lived with to be an undeniable

loss that is probably harmful and as traumatic as the loss of a parent. Loss of the grandparent relationship can cause depression and impairment of emotional development. Thus, harm is more than obvious. Harm is supported by this record. ***Jones v. State***, 640 So. 2d 1084, 1086 (Fla. 1994) (state has prerogative to safe guard its citizens, particularly children, from harm when harm outweighs interest of individual); ***Privette***, 617 So. 2d at 307 (law does not require cruelty to children).

Tyler is a ward of the guardianship court. A *plenary guardianship*, as opposed to limited guardianship over the property, is involved. The guardianship leaves no room for Nick's privacy to trump Tyler's best interests on any issue, including grandparent visitation. Visitation could have been affirmed by the Fourth District because Tyler will obviously be harmed if the relationship is severed. ***E.g., D.A. McW***, 429 So. 2d at 702 (severance of grandparent relationship obviously detrimental to welfare of grandchild); ***Padgett v. Pettis***, 445 So. 2d 633 (Fla. 1st DCA, ***dismissed***, 450 So. 2d 487 (Fla. 1984)) (circuit court's order awarding custody to paternal grandparents affirmed based on circuit court's *inherent and continuing jurisdiction* in matters appropriate to child's welfare, even though court lacked specific jurisdiction under Chapter 61 or 39).

In ***Clinebell v. Department of Children and Fam.***, 711 So. 2d 194 (Fla. 5th DCA 1998, ***reh'g den.*** (1998)), neither familial privacy nor ***Beagle*** was violated by awarding grandparent visitation under § 752.01(1)(c) *after* dependant children were restored to their parents. The parents objected to grandparent visitation on privacy grounds. ***Id.*** The Fifth District explained that § 752.01(1)(c), which permits grandparent visitation when a parent of a child has deserted the child, does not require physical desertion. ***Id.*** Despite the children's return to their parents, privacy did not apply. ***Id.*** at 196.

Just as in ***Clinebell***, the Sauls stepped up to the plate to insure Tyler's care

when Nick was unwilling to do so during the entire pregnancy and for the better part of Tyler's first year. Under the laws regarding dependency, conduct such as this constitutes abandonment. ***E.g., Fla. Stat.*** § ***39.01(30)(f)*** (defining harm to include neglect by failing to provide food, clothing, shelter or health care when able to do so); ***Fla. Stat.*** § ***30.01(30)(e)*** (defining harm to mean parent when able makes no provision to support or communicate with child); ***Fla. Stat.*** § ***39.01(1)*** (defining abandoned); ***Fla. Stat. 63.032(14)*** (defining abandonment where parent who is able makes no provisions for support or effort to communicate with child; when efforts are marginal, court may declare child abandoned); ***Fla. Stat.*** § ***63.072(1)*** (consent to adoption may be waived when parent abandons child)**.**

Nick's conduct in failing to support Tyler and Beth during the pregnancy and for the better part of Tyler's first year would have been sufficient to deny all parental rights had Beth opted to place Tyler for adoption. ***See In re Matter of Doe***, 543 So. 2d 741 (Fla.), ***cert. den.***, 110 S.Ct. 405 (1989); ***In Re Adoption of Baby EAW***, 647 So. 2d 918 (Fla. 4th DCA en banc), ***appv'd***, 658 So. 961 (Fla. 1995)***, rev. den. sub nom, GWB v. JSW,*** 516 U.S. 1051, 111 S. Ct. 719, 133 L.Ed.2d 672 (1996). Even though Nick has since assumed some parental responsibility, Nick's privacy should not elevate above Tyler's best interests.

The Fourth District erred by ruling that there is no proceeding in which to apply § 61.13(2)(b)2.c, Florida Statutes. Given the paternity and child support action, there is continuing statutory, as well as inherent, jurisdiction to apply § 61.13(2)(b)2.c here. ***See § 742.06, Florida Statutes***. Further, given the guardianship action, there is continuing statutory and inherent jurisdiction to make any ruling that is in the best interest of Tyler's welfare. ***See, e.g., D.A. McW.***, 429 So. 2d at 702 (approved by Supreme Court, and granting liberal visitation on identical facts).

## III. *The Statute Entitling Grandparents of Child Born Out Of Wedlock to Reasonable Visitation When it is in Best Interest of the Child does not*

***Violate Familial Privacy.***

The Fourth District extended ***Von Eiff v. Azicri***, 720 So. 2d 510 (Fla. 1998) to hold § 752.01(1)(d)[4] unconstitutional. That was error. ***Von Eiff*** was expressly limited to the facial validity of subsection (a) (death of one or both parents). ***Von Eiff*** does not address subsection (d) (child born out of wedlock).[5] ***Von Eiff's*** facts are materially distinguishable from the instant case.

There is no dispute that there is a fundamental interest of natural parents in the care, custody and management of their children, as well as a public policy in favor of the natural family unit. ***See Beagle.*** Our Legislature has also codified a strong public policy in favor of grandparents and grandchildren being included in that natural family unit for purposes of grandparent visitation. ***Fla. Stat. § 752.01 et seq.*** By doing so, our Legislature intended to abrogate the common law holding that grandparents are third party strangers to their grandchildren. ***Baker v. State***, 936 So. 2d 1342 (Fla. 1994) (discussing statutory enactments which supersede and, therefore,

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[4]Florida's Grandparent Visitation Statute, § 752.01(1), Florida Statutes (1995), provides:

> (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> (a) One or both the parents of the child are deceased;
> (b) The marriage of the parents of the child has been dissolved;
> (c) A parent of the child has deserted the child;
> **(d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in § 742.091**; *or*
> (e) The minor child is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.

(emphasis supplied).

[5]***See also Ocasio v. McGlothin,*** 719 So. 2d 918, ***as clarified***, (3rd DCA), ***reh'g den.***, (Fla. 1998) (affirming visitation under 752.01(1)(a) but stating 752.01(1)(d) unconstitutional).

abrogate common law); ***see also Fla. Stat. § 61.13(2)(b)2.c*** (grandparent visitation in dissolution and paternity); ***Fla. Stat. § 39.501*** (grandparent visitation in dependency).

In addressing grandparent visitation issues under § 752.01, ***Beagle*** and ***Von Eiff*** acknowledged that a parent's right to raise his or her children has constitutional protection in both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the privacy provision of the Florida Constitution, article I, § 23. ***Beagle***, 678 So. 2d at 1275; ***Von Eiff***, 720 So. 2d at 513 (applying strict scrutiny).

This Court has not addressed whether subsection (d), which applies when a child is born out of wedlock, is constitutional. In paternity, courts have an affirmative responsibility to consider and protect the interests of child before the court when entering an order in matters which will affect him. ***Kendrick v. Everheart***, 390 So. 2d 53, 59 n. 8 (Fla. 1980) (citing ***In re Block***, 157 Fla. 291, 25 So. 2d 659 (1946)). The state has always had an interest and affirmative duty to protect illegitimate children and foster their right to associate with and be recognized by their family members. ***See chap. 742, Florida Statutes; Kendrick***, 390 So. 2d at 59 (paternity act intended to protect welfare of illegitimate child, to convert father's obligations from moral to legal ones and to relieve the public of the need to support child); ***Privette***, 617 So. 2d at 307, 309 (child's best interests override the right to privacy and actually dictate whether putative father's privacy right can be successfully asserted; illegitimacy is stigma). As some events denominated in the Grandparent Visitation Act[6] (the "Act") that have not been addressed by this Court actually remove a parent's legitimate expectation of privacy in most contexts, the analytical framework of the remaining portions of the Act require a rational basis test as well as a *facial* and *as*

[6]Fla. Stat. § 752.01 et seq.

*applied* analysis of the various provisions, *i.e.,* dissolution, desertion, out of wedlock or paternity.

Courts are wisely reluctant to entertain facial attacks on statutes, *i.e.,* claims that a statute is invalid in all of its applications. The typical approach is to determine whether a law is unconstitutional *as applied* in the particular case before the Court. ***Brockett v. Spokane Arcades, Inc.***, 472 U.S. 491, 501-503, 105 S.Ct. 2794, 2800-2802, 86 L.Ed.2d 394 (1985). The tragic facts of this case indicate why that policy is prudent.

Although the United States Supreme Court has found certain rights to be protected from governmental intrusion by the penumbras of other constitutional guarantees, the right to limit grandparent visitation has not been recognized. Legislative enactments are presumed valid, and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. ***Metropolitan Dade Co. v. Bridges,*** 402 So. 2d 411, 413-14 (Fla. 1981), ***receded from on other gr***., ***Makemson v. Martin Count***y, 491 So. 2d 1109, 1115 (Fla. 1986). Whenever possible, courts must construe statutes in such a manner as to avoid conflict with the constitution. ***Id***. at 402 So.2d 413-14 (Fla. 1981). Even when a statute is reasonably susceptible of two interpretations, one of which would render it invalid and the other valid, the constitutional construction must be adopted. ***See Florida State Bd. of Architecture v. Wasserman***, 377 So. 2d 653 (Fla. 1979).

In a long line of cases, the United States Supreme Court has evaluated state regulations of fundamental rights with reference to the magnitude of the state's infringement on the particular fundamental right. For example, in ***City of Akron v. Akron Center for Reproductive Health, Inc.***, 462 U.S. 416, 103 S. Ct. 2481, 76 L.Ed.2d 687 (1983), Justice Acinar pointed out that not every regulation that a state

imposes must be measured against the state's compelling interest or examined with strict scrutiny. ***Id.*** (dissenting opinion, overruled in part, ***Planned Parenthood v. Casey***, 112 S.Ct. 2791, 2819-20 (1992)). The state must infringe substantially or heavily burden a right before strict judicial scrutiny applies. ***Id.*** at 40, 93 S. Ct. at 1300-01. When the impact of the regulation does not rise to the level appropriate for strict scrutiny, then the inquiry is limited to whether the state law bears some rational relationship to legitimate state purposes. ***Id; see Planned Parenthood v. Casey,*** 112 S. Ct. 2791, 2820 (1992) (plurality opinion) (applying undue burden test to determine constitutionality of state infringement on women's right to terminate pregnancy).

The impact of subsection (d) of § 752.01(1) does not rise to the level appropriate for strict scrutiny. Further, subsection (d) passes both *facial* and *as applied* constitutional muster. The legislative intent is to protect the interests of illegitimate children to associate and visit with their grandparents. ***See, generally, Griss v. Griss***, 526 So. 2d 697, 700 (Fla. 3d DCA 1988) (concurring opinion citing to Fla. H.R., Tape Recording of Proceedings (April 23, 1984)). There are many instances where grandparent visitation with a grandchild born out of wedlock will be constitutional. For example, the Fourth District correctly recognized that parents waived privacy, and therefore grandparent visitation did not even implicate a privacy issue when a mother brought the father to court to secure a determination of paternity and child support. ***Spence***. In ***Russo v. Persico***, a different panel of the same court unequivocally stated that ***Spence*** had upheld the constitutionality of § 752.01(1)(d). 706 So. 2d at 934 n. 1. ***Russo*** was expressly approved in ***Von Eiff*** and directly affirmed by this Court. 720 So. 2d 510 (Fla. 1998). Finally, when a child is born out of wedlock, the father may be no where to be found, leaving the child with no putative family connection except for visitation with a grandparent.

In paternity, many out of wedlock situations, dissolution, desertion, abuse,

neglect, or death of a parent in combination with *or after* any of the forgoing, parents cannot successfully claim that a statute providing for grandparent visitation runs *facially* afoul of privacy. With each aforementioned event, waivers melt away any legitimate expectation of privacy and, therefore, strict scrutiny simply does not attach. ***See Boykin v. Alabama***, 395 U.S. at 242, 89 S.Ct. at 1711, 23 L.Ed. 2d at 279 (1969) (discussing waivers of fundamental rights); ***Bellaire Sec. Corp. v. Brown***, 124 Fla. 47, 168 So. 625 (1936) (one can waive any contractual, statutory or constitutional right).

Paternity and many out of wedlock situations are no different than dissolution for purposes of grandparent visitation. As § 61.13(2)(b)2.c is available in paternity and in dissolution when visitation is in the grandchild's best interest, ***Spence, Wishart***, it simply does not follow that another statute, § 752.01(1), which provides those same grandparents a right to seek visitation, is *facially* unconstitutional merely because it calls for a best interest test. Subsection (d) can be constitutionally applied in the instant scenario, and in most scenarios. Therefore, it is *facially* constitutional. It is also critical to note that here, unlike ***Von Eiff,*** the state certainly could have forced grandparent visitation *before* the death of this child's mother. ***Fla. Stat. § 61.13(2)(b)2.c; e.g., Spence***, 705 So. 2d at 996; ***Wishart***, 531 So. 2d at 955 (award of visitation rights to grandparents may be made if in best interest of child).

Just as with § 61.13(2)(b)2.c, waiver serves as the theoretical underpinning of subsections (d) (out of wedlock), (c) (desertion) and (b) (dissolution) of § 752.01. In parallel areas of constitutional law, once a fundamental right is waived, the genie is out of the bottle. ***See Boykin*** (fundamental rights may be waived). There is no meaningful constitutional distinction in permitting grandparent visitation in some judicial forums and not in others based solely on the particular procedural vehicle used to effectuate that visitation. To hold grandparent visitation available in a divorce

*prior to* final adjudication of dissolution on the best interest test, but not available on the best interest test *after* the a final judgment of dissolution, reduces the constitutional analysis to one of mere timing. Children's rights are too important to be eliminated merely because the necessity for visitation arises *after* the final judgment of dissolution.

Similarly, to hold visitation does not violate privacy in paternity -- but does violate privacy when the child is born out of wedlock, elevates procedural form over constitutional substance. The fact that chapter 752 provides a free standing cause of action for visitation is irrelevant to the constitutional analysis of subsections (b), (c) or (d) of the Act. This is so because it is the parent's conduct and disruptive life cycle events set out in the Act, as opposed to procedure, that provide grandparents with standing to seek visitation under the Act. There is no proscription in the Act to preclude its application within any particular judicial forum, whether in Chapter 752, 61 or 39. Consider ***Clinebell*** (§ 752.01 applied after children restored in dependency); ***Williams v. Spears***, 719 So. 2d 1236, 1240 (Fla. 1st DCA 1998), ***reh'g den.,*** (Nov. 5, 1998) (after dissolution, § 752.01(1)(b) applied); ***Spence*** (visitation during 742 action).

In ***Williams***, the First District correctly applied a *facial* and *as applied* framework in the identical context of dissolution under § 752.01(1)(b), which provides for visitation when the parents' marriage has been dissolved. 719 So. 2d at 1240. The grandmother in ***Williams*** sought visitation under § 752.01(1)(b) *after* dissolution of the parents' marriage. ***Id.*** The First District recognized that paternity is *indistinguishable* from dissolution, and relied on the Fourth District's waiver analysis in ***Spence***. ***Id.*** ***Williams*** held subsection (b) *constitutional on its face* with no *facial* violation of privacy rights. The First District appreciated that divorced parents often bitterly disagree about everything involving their children, including

grandparent visitation. As *applied* to the facts, § 752.01(1)(b) was not constitutional because the divorced parents were *in agreement* that no grandparent visitation be permitted. ***Id.*** at 1242.

In sharp contrast to ***Williams***, here, there was never any sort of unity of parental belief that the maternal grandparents should not have visitation. Rather, Nick concedes (T 177), and the record clearly establishes, that Beth encouraged the relationship between the Sauls and Tyler. The Sauls play a laudable and integral role in Tyler's life. Beth, Tyler and Nick relied on the Sauls for emotional and financial support, and there is ample support that Tyler will be harmed if visitation is severed.

The special concurrence in the instant case recognizes incongruous treatment of grandparent visitation in paternity, and suggests that § 61.13(2)(b)2.c is also unconstitutional. ***Brunetti,*** 724 So. 2d at 143. Appellants disagree. This Court has long rejected the contention that an order granting visitation rights to grandparent of a child whose custody was awarded to a fit parent is unjustified and unenforceable. ***Wishart***, 531 So. 2d at 955 (visitation with grandparents based on best interest of grandchild). Further, the state is considered a third party that protects the public welfare in dissolution. ***Baron v. Florida Freedom Newspapers, Inc.***, 531 So. 2d 113, 119 (Fla. 1988). Thus, privacy is lost. This Court also cautioned in ***Beagle***, and again in ***Von Eiff***, that it did not change the best interest standard in other areas of family law. ***Beagle,*** 678 So. 2d at 1277; ***Von Eiff***, 720 So. 2d at 514 n. 3. Further, an illegitimate child is entitled to have his right to associate with his family protected by the state, the state has a compelling interest in paternity, and privacy is subordinate to children's best interests in paternity. ***See Privette***, 617 So. 2d at 309 (child's best interest must be determined before putative father's privacy interest can be resolved).

It is also critical to note that by holding:

> **No compelling state interest underlies subsection 752.01(1)(a)**, however well-meaning its purpose. Accordingly, we declare subsection

752.01(1)(a) facially unconstitutional.

this Court suggested that familial privacy can be violated even when both parents are deceased. ***Von Eiff*** at 516-517 (footnotes omitted, emphasis supplied). Parents expire in common accidents, and children are orphaned in other ways. Harm undeniably attaches to such an event, and there is no right of privacy to be disturbed when both parents are deceased. There can be as many as four grandparents desiring beneficial grandchild visitation when a child has been orphaned. Consequently, Appellants respectfully assert a good faith argument that there is a clearly a compelling state interest underlying § 752.01(a) -- the protection of orphan children, and preservation of their right to associate with surviving family members. Subsection (a) is *facially* constitutional because it can be constitutionally applied in the all too common circumstance of both parents deceased. Accordingly, ***Von Eiff*** should have assessed the provision as to whether it passed constitutionality *as applied* to the facts of the ***Von Eiff*** case.

Holding subsections (a) & (d) unconstitutional based on ***Von Eiff***, the Fourth District commingled death and out of wedlock birth, without analysis of ***Von Eiff's*** underlying facts or the state's interests in protecting illegitimate children. The Fourth District stated:

> if a father of a child born into a marriage has a right of privacy where the biological mother is deceased, it follows that the father of an out-of-wedlock child has that same right of privacy.

***Brunetti***, 724 So. 2d at 143. Not so. Closer analysis of ***Von Eiff*** does not support the Fourth District's reasoning. In ***Von Eiff***, the maternal grandparents petitioned for visitation following the death of the child's mother, with this Court explaining that the unfortunate death of the mother did not disrupt *continuing* privacy. ***Von Eiff***, 720 So. 2d at 515. Notably, this Court reasoned that the case was really no different than

***Beagle*** because had the mother of the child been alive, then under ***Beagle*** there could be no forced visitation. ***Id***. Always a responsible parent in an intact marriage raising a child with no relevant court proceeding at any time, Mr. Von Eiff had never waived privacy. Mr. Von Eiff's preexisting privacy continued, and he retained a reasonable expectation of privacy under the facts the case. In ***Von Eiff***, this court agreed that:

> "it appears to be an unassailable proposition that otherwise fit parents ... who have *neither abused, neglected, or abandoned their child*, have a *reasonable expectatio*n that the state will not interfere with their decision to exclude or limit the grandparents' visitation with their child." 699 So.2d at 781 (Green, J., dissenting).

***Id.*** (emphasis supplied).

Our laws regarding dependency include a definition of "abandonment" which provide that the person responsible for the child's welfare, while being able, makes no provision for the child's support. ***See Fla. Stat. 39.01(36)*** (1997); ***Fla. Stat. 63.032(14)*** (defining abandonment). Here, Appellee was responsible for Tyler's support, but made no effort to support the mother of his son during her pregnancy or to support his son for the better part Tyler's first year. This abandonment of Beth and Tyler is precisely what gave rise to the emotional bond Tyler now has with the Sauls. Consequently, Nick cannot now assert a belated legitimate expectation of privacy to prevent the minimal (if any) infringement visitation imposes). ***Consider In Re Adoption of Baby EAW***, 647 So. 2d 918 (Fla. 4th DCA en banc), ***appv'd***, 658 So. 961 (Fla. 1995)***, rev. den. sub nom, GWB v. JSW,*** 516 U.S. 1051, 111 S. Ct. 719, 133 L.Ed.2d 672 (1996) (discussing pre-birth abandonment of mother as sufficient to *terminate* parental rights in out-of-wedlock birth).

In order for strict scrutiny to apply to any statute, there must *first* be a reasonable expectation of privacy. ***Winfield v. Division of Pari-Mutual Wagering, Dept of Bus. Reg.***, 477 So. 2d 544, 547 (Fla. 1985). This Court has held that a

reasonable expectation of privacy under a particular set of circumstances depends upon one's expectation of privacy as well as whether society is prepared to recognize the expectation as reasonable. ***State v. Inciarrano***, 473 So. 2d 1272, 1275 (Fla. 1985). In ***Winfield***, this Court characterized the interest protected as "an individual's legitimate expectation of privacy." ***Winfield***, 477 So. 2d at 547. Therefore, the zone of privacy covered by Article I, section 23, can be determined only by reference to the expectations of each individual, and those expectations are protected only when not spurious or false. ***Shaktman v. State***, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., specially concurring).

The grandparent visitation provisions applicable here are *facially* constitutional and constitutional *as applied*. When a parent fails to take parental responsibility to the extent of necessitating a paternity or child support action, has deserted the mother or child, or has been embroiled in divorce litigation, each of which waives privacy, there can be no legitimate expectation of privacy that attaches. Appellee's conduct resulted in a wavier of privacy that cannot be reconstituted through death, payment of arrearages or assumption of some parental responsibility. The Act is rationally related to its legitimate goal of providing for and protecting grandchild/grandparent relationships when children are illegitimate.

Here, there is a rational distinction between widows and unwed fathers. Differences in treatment pass constitutional challenge, even when *termination* of parental rights is at issue. When a child is born out of wedlock, the failure of a parent to assume parental responsibility constitutes abandonment sufficient deny *all* parental rights. ***Matter of Doe***, 543 So. 2d 741, 749 (Fla. 1989), ***cert. den.,*** 493 U.S. 964, 110 S.Ct. 405, 107 L.Ed.2d 371 (1989) (citing ***Quilloin v. Walcott***, 98 S.Ct. 549 (1978) (equal protection does not bar rational distinctions between parents); ***EAW***, 647 So. 2d at 918 (parental rights based on biological relationship are inchoate).

Nick's pre-birth and immediate post birth conduct was sufficient to deny him *all* parental rights had Beth opted for adoption. ***See id***. at 647 So. 2d at 929-930 (Parent, J. (now Justice) specially concurring) (accompanying mother to sonogram and prenatal appointment, placing a picture of sonogram on refrigerator and purchasing the mother a pair of stretch pants during pregnancy do not evince an understanding or appreciation of the magnitude of the parental role, nor do such actions constitute any evidence of affirmative assumption of parental responsibilities).

It should follow that when an unwed parent's prolonged failure to assume parental responsibility gives rise to the child's significant attachment to his grandparents, the best interests of the child become relevant, and the state can protect the child's right to have beneficial visitation with the grandparents who raised him during that time. Bonding for two years must be relevant. Further, bi-monthly visitation is a very minimal (if any) intrusion. ***See Clinebell*** (grandparent visitation does not violate privacy after children are restored to parents); ***consider also EAW***, 658 So. 2d at 975 (Kogan J. concurring in part, dissenting in part) (children's best interests become more relevant as the period of time increases between birth and father's assertion of rights).

It is also important to note that most state courts considering grandparent visitation statutes have done so in the context of intact married parents in united opposition to visitation. For example, in ***Brooks v. Parkerson***, 265 Ga. 189, 454 S.E. 2d 769 (Ga.), ***cert. den.***, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995) under both the Georgia and Federal Constitution, visitation over the parents' *united* objection could be imposed only when harmful to the child not to do so. ***See Beagle*** (intact family); ***Williams v. Williams***, 24 Va.App. 778, 485 S.E.2d 651 (1997), ***aff'd as modified***, 501 SE 2d 417 (Va. 1998) (united opposition); ***Hawk v. Hawk***, 855

S.W. 2d 573, 579 (Tenn. 1993) (intact, nuclear family with fit married parents who were *never* the subject of judicial concern objected).

In sharp contrast, in ***Michael v. Hertzler,*** 900 P.2d 1144 (Wy. 1995), the court upheld grandparent visitation under the state constitution, finding that a compelling state interest exists in maintaining the right of association of grandparents and grandchildren in situations of divorce, death, *or extended residence with a grandparent.* ***Id.*** The Wyoming statute made no provision for grandparental visitation rights in an intact family. ***See also Spradling v. Harris***, 778 P.2d 365, 367 (Kan. App., ***rev. den.*** (1989)) (parents' rights subordinate to State's parens patriae powers); ***Ridenour v. Ridenour***, 120 N.M. 352, 901 P.2d 770 (App.), ***cert. den.***, 120 N.M. 68, 898 P.2d 120 (1995) (upholding grandparent visitation, finding no substantial interference, and an appropriate mechanism to balance parties' *competing* interests); ***accord Herndon v. Tuhey***, 857 S.W. 2d 203 (Mo. 1993) (grandparent visitation minimal intrusion on family relationship protecting interest of parents and children); ***Bailey v. Menzie***, 542 N.E.2d 1015 (Ind.Ct. App. 1989) (visitation interferes with parent's liberty interest only to observe state's parens patriae duty to promote best interest of child).

As paternity litigation abandons privacy, ***Spence***, it follows that any statute that confers the same grandparent with standing to seek visitation with their out of wedlock child cannot run facially afoul of familial privacy. Further, should the framework of ***Von Eiff*** plug in here, then grandparent visitation provisions contained within chapters 61 and 39 would also be facially unconstitutional because just like § 751.01, chapter 61 and 39 grandparent visitation provisions do not textually call for detriment before assessing the best interest of the grandchild. ***Fla. Stat.*** § ***39.509*** (grandparent visitation when in grandchild's best interest); ***Fla. Stat. § 61.13(2)(b)2.c*** (court may award grandparent visitation rights if in the child's best interest).

Even if the strict scrutiny applies, the State has a compelling interest and affirmative duty to protect an illegitimate child's right to associate with and be recognized by his or her family members. This Court has recognized the state's compelling interest in paternity, and has held that consideration of the illegitimate child's best interests actually control whether privacy attaches. ***Privette***, at 309. Thus, privacy analysis in the context of out of wedlock birth is in stark contrast to the privacy analysis in ***Beagle*** and ***Von Eiff*** (neither of which involved out of wedlock birth), where the child's best interests were deemed irrelevant to the constitutional privacy analysis. ***Von Eiff***, 720 So. 2d at 516. Consequently, it is not appropriate to extend the analysis of ***Beagle*** or ***Von Eiff*** to § 752.01(1)(d), as the Fourth District did.

When a putative father is no where to be found, there may be grandparents who desire beneficial visitation with the out of wedlock child. The Act effectuates the out of wedlock child's best interest in maintaining a relationship with other family members in the least intrusive way by requiring multiple statutory factors to be met as a condition to obtaining visitation. ***Fla. Stat.*** § ***752.01(2).***

The Fourth District was required to affirm on any theory or principle of law supporting the trial court's order of visitation. ***Cohen v. Mohawk, Inc.,*** 137 So. 2d 222, 225 (Fla. 1962). Accordingly, the Fourth District should have affirmed the trial court by recognizing that statutory and inherent jurisdiction insure equity and justice by providing for visitation.

Further, as § 752.01(1)(d) passes muster under Florida's Constitution, it necessarily passes challenge under the Federal Constitution. ***Winfield,*** at 547-548 (Florida right to privacy broader in scope than that in Federal Constitution). Assuming that this Court agrees § 752.01(1)(d) is *facially* constitutional, it should reverse the Fourth District. Appellee did not raise an *as applied* challenge of

subsection (d) below or on appeal to the Fourth District. ***Alexander v State***, 450 So. 2d 1212 (Fla. 4th DCA 1984) (*facial* unconstitutionally of statute may be raised for first time on appeal, unconstitutionality of statute's *application to facts* of particular case must first have been raised at trial level). In any event, § 752.01(1)(d) *as applied* to the facts of this case passes constitutional muster.

## CONCLUSION

This case is legally and factually dissimilar to both ***Beagle*** and ***Von Eiff***. The Sauls respectfully request this Court to quash the Fourth District's opinion and reinstate visitation.

Respectfully submitted,

Brady & Brady, P.A.
Attorneys for Appellant
370 W. Camino Gardens Blvd.
Suite 200C
Boca Raton, FL 33432
Phone: (561) 338-92565

By:_____
Jeanne C. Brady, Esq.
Florida Bar No. 0997749

By:_____
Frank R. Brady, Esq.
Florida Bar No. 0588024

_____
Steven Pesso, Esq.
Fla Bar No. 0880140
Attorney for Appellants
370 W. Camino Gardens Blvd.
Suites 336 & 337
Boca Raton, Florida 33432
(561) 395-4046

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and authentic copy of this Initial Brief of Appellants has been furnished via U.S. Mail, postage prepaid, to Bennett Cohen, Esq., Appellee's Counsel, P.O. Box 240, Tesque, NM 87574-0240; and Renick, Singer & Kamber, Appellee's co-counsel, 1530 N. Federal Highway, Lake Worth, Florida 33460, attn: Kenneth Renick, Esq., this 8th day of March, 1999.

Brady & Brady, P.A.
Appellants' counsel
370 W. Camino Gardens Blvd.
Suite 200C
Boca Raton, FL 33432
Phone: (561) 338-92565

By:_____
Jeanne C. Brady, Esq.
Florida Bar No. 0997749