IN THE SUPREME COURT OF FLORIDA
APPEAL NO. 94, 843

DIANE SAUL and DAVID SAUL

Appellants,

v.

DOMINICK BRUNETTI

Appellee

ANSWER BRIEF OF APPELLEE

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

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IN THE SUPREME COURT OF FLORIDA

DIANE SAUL and DAVID SAUL,
Appeal Case No. 94,843
Appellants,
4th DCA Case No. 98-00256

LT Case No. CD 96-7845 FY
v.

DOMINICK BRUNETTI,

Appellee
_____/

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Diane Saul

Petitioner's – Trial Court

David Saul

Appellers – Fourth District

Appellants – Supreme Court

Dominick Brunetti

Respondent – Trial Court

Appellant – Fourth District

Appellee – Supreme Court

Judge Catherine M. Brunson

Trial Judge

Judge Larry A. Klein

ppellate panel – 4th District

Judge William C. Owen

Judge George A. Shahood

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PRELIMINARY STATEMENT

References to the record are prefaced by the letter "R" and followed by a page number as assigned in the Index to the Record on appeal (R-). References to the trial transcript are prefaced by the letter "T" followed by a number representing the designated page of the transcript (T-).

Appellants herein, are referred to as "Appellants", "the Sauls", "maternal grandparents" or individually as "Mrs. Saul" or "Mr. Saul". The deceased daughter of the Appellants, is referred to as "Beth" or "Beth Saul". The Appellee's son and child of Beth Saul is called "Tyler" or Tyler Brunetti. The Appellee and father of Tyler is referred to as "Appellee" or "Nick". Appellee's parents and Tyler's paternal grandparents are referred to as "the Brunettis" or individually as "Mr. Brunetti" and "Mrs. Brunetti".

STATEMENT AS TO TYPESETTING

This Answer Brief is typed with Times New Roman, 14 point font in Microsoft Word 1998, for windows.

STATEMENT OF THE CASE AND FACTS

Nature of Case:

This case began in November, 1996 when the Sauls filed a petition for Grandparent Visitation against the Appellee, Dominick Brunetti (R 001). The Petition sought visitation pursuant Chapter 752, Florida Statutes (R 001).

A child, Tyler, was born to Nick Brunetti and Beth Sauls on October 9, 1994. Nick and Beth were not married at the time of birth and did not marry prior to her death on September 14, 1996. Upon the death of Beth, Tyler began to live with Nick on a full-time and permanent basis and was so residing as of the date of the filing of the Petition as well as at the time of the trial.

After a four day non jury trial, the Trial Court granted the Sauls' Petition for Visitation (R 449-452). A timely appeal was taken by Nick to the Fourth District Court of Appeal. The Fourth District reversed the decision of the Trial Court in ***Brunetti v. Saul***, 724 So.2d 142 (4th DCA 1998), relying on this Court's decision in ***Von Eiff v. Azicri***, 720 So.2d 510 (Fla.1998).

The Fourth District Court of Appeal stayed issuance of the mandate pending this appeal.

Statement of the Facts:

Nick and Beth were sweethearts. They began dating in 1990 (T 430). As of the date of Beth's death they had been involved for seven years (T 197). The Brunettis saw her with regularity (T 430). When Beth graduated from high school, she immediately moved out of her parents' home. She continued to live apart from her parents until she became pregnant (T 430).

Beth had an exceptional relationship with Mrs. Brunetti. Beth would call her for advise and would visit Mrs. Brunetti at Barton Elementary School, where Mrs. Brunetti was in charge of staff development (T 418, 431). Beth and Mrs. Brunetti saw each other with such frequency that Mrs. Brunetti's fellow teachers thought Beth was her daughter (T 431). Mrs. Brunetti helped Beth select her prom dress, not her own mother (T 251).

When Beth became pregnant, her parents raised the issue of abortion with Beth, but Beth rejected that as an alternative and they supported her in her position to have the baby (T 128).

Although Nick did not financially support Beth during the pregnancy, he was involved. For instance, Nick went with Beth to the gynecologist for an ultra sound (T 36). Nick was in the delivery room when Tyler was born (T 37). Nick was emotionally supportive. There is no contrary testimony on this point.

After Tyler's birth, Beth developed a very close relationship with Mrs. Brunetti's mother (T 432). Their relationship was described as being

"buddies" (T 435). Beth would take Tyler to the nursing home where Mrs. Brunetti's father lived at least four or five times a week (T 434).

At the time of the birth of Tyler on October 9, 1994, Beth was nineteen years of age and Nick was twenty-three years of age. When Tyler was born, Nick was a part time student and a part time employee of Costco. He was making $6.50 per hour, working between thirty to thirty-five hours per week (T 202).

At first Nick would spend the mornings at Beth's home until he had to go to work or until the Sauls came home (T 252). Beth and Tyler spent much time at the Brunetti home (T 252). Nick saw them all the time (T 252).

Later Nick would cut class so he could be with Beth and Tyler as he had to visit them when the Sauls were not around (T 486). Beth and Tyler would periodically spend the night at the Brunetti home. These overnights increased after Tyler was about five to six months old (T 486). Generally, Beth would spend the weekends with Nick and his parents. Many times she would come on a Wednesday and remain through Sunday (T 487). Beth wanted to spend time with Nick and the Brunettis because her parents were not home on the weekends. Irrespective of sleepovers, Beth and Tyler would see Mrs. Brunetti at least five days a week (T 488). Beth was so

welcomed at Nick's home and was such a "regular" there, that she had a garage door opener to gain access at any time. Likewise she possessed the burglar alarm keys to turn off the system upon her entry (T 500, 501, 504).

While Nick and his parents were out of town to attend the funeral of Mrs. Brunetti's father, Beth was killed in an automobile accident coming home from celebrating her twenty-first birthday with the Sauls. Tyler, who was in the back seat, was miraculously, unhurt other than for a few stitches in his ear (T 44).

Although Beth and Tyler lived with the Sauls, Mrs. Saul had little knowledge of Tyler's eating habits (T 489 – 490). Mrs. Saul was not able to understand Tyler and Mrs. Brunetti had to "translate" for her shortly after Beth's death (T 490-491).

At the time of Beth's death, she and Mr. Brunetti were planning to go into a business venture together (T 503). Beth was for all intents and purposes a member of the Brunetti family (T 500). There were plans for her and Tyler to move in with the Brunettis (T 505). After the funeral, Nick as well as other relatives and friends went back to the Sauls' home. Tyler had remained home with a family friend. Upon seeing his father, Nick, Tyler made a beeline to him (T 218). At the same time, Nick discussed with the Sauls the fact that he wanted to take Tyler to live with him (T 45). To

transition Tyler and to allow the Sauls to grieve, Nick moved into the Sauls' house to be with Tyler (T 48). Mrs. Saul agreed that Tyler should be with his father and raised by his father (T 48). Tyler was baptized into the Catholic faith (T 50). The Sauls are Jewish. The Sauls attended the baptism of Tyler.

Prior to the institution of the visitation action by the Sauls, they were receiving more visitation than under the temporary visitation order (T 524). More meaning total days, not type of visitation. Prior to the institution of the instant action, the Sauls were never denied visitation (T 223).

The relationship between the Sauls and Nick was and is not good. Although the Sauls moved into a new home in a new neighborhood, and took Tyler for visitation, they never informed Nick of the move (T 53). The location of the Sauls' new home was disclosed for the **first** time during direct examination at **trial** (T 53). During the entire litigation the Sauls would communicate with Nick, only through counsel. They wanted no direct contact with Nick (T 214).

The Sauls agrees that Tyler is in fine health (T 58), doing fine (T 59), starting to talk intelligibly (T 59), always appears to be neat (T 60), never a behavioral problem and very well behaved (T 60). Mrs. Saul, who is a

school teach (T 62) never testified to anything which would indicate that Tyler had been taken care of in any fashion other than excellent (T 63).

Initially, the Sauls demanded visitation of several days per week. This was for the purpose of transitioning Tyler (T 64). Despite the fact that the Sauls were concerned about transitioning, there were no manifestations of any adverse effect upon Tyler because of the visitation allowed by Nick (T 65). Mrs. Saul agreed that the Brunettis could share in the credit for how well Tyler is doing (T 74). She further agreed that there has been no adverse effects upon Tyler to have been removed from their home and live with his father and that there was nothing wrong with Nick living with his parent (T 74).

Although Mr. Saul believed some harm would befall Tyler if the Sauls did not see him several days a week, this harm never occurred (T 115). Mr. Saul could point to no tangible example of any detriment that befell Tyler by living with his father (T 122). Further, Mr. Saul testified that there was no adverse effect upon Tyler from the Sauls seeing him three hundred days a year to only seeing him fifty-two days a year (once a week) (T 122).

Within thirty days of Beth's death, the Sauls hired counsel to bring an action in their behalf as well as Tyler, for the death of Beth. A Guardian ad Litem was appointed by the Court at the request of Nick (T 208), who eventually renegotiated the settlement which gave Tyler a majority of the settlement proceeds (T 135). Nick was appointed guardian of the property of Tyler (T 212). All of the settlement proceeds for Tyler were placed into a

depository account which could only be accessed by Order of Court (T 136). Despite this, the Sauls brought an action to remove Nick so that they could control the money (T 136) and sought to have themselves appointed Tyler's guardian (T 185). This was done without any warning, discussion or prior notice to Nick (T 185).

Nick does not object to the Sauls seeing Tyler (T 238). Nick's objection is for State intrusion, ie., having an outside parties interfere with the raising of his son and mandating specific contact (T 238). From the week after Beth's death until the filing of the instant action, without objection by Nick, the Sauls saw Tyler each weekend (T 239).

The Sauls hired Philip Heller, Ph. D., a psychologist to testify as an expert on their behalf. Dr. Heller was the Sauls grief therapist from the time of Beth's death. Their relationship continued as of the time of trial (T 310). Dr. Heller testified that for the Sauls to have lessened visitation would be another loss to the (T 310, 311). Dr. Heller testified that a loss of visitation would be detrimental to Tyler (T 295). Dr. Heller also testified that despite the fact that the Sauls were his patients, still in therapy, and still in grief, that he would testify adversely to them if necessary, considering only the best interest of the child (T 313, 314). Dr. Heller believes that there should be Court ordered visitation until the child reaches majority (T 457, 458).

Although Dr. Heller was concerned about Tyler's ability to cope with the loss of his mother (T 290, 291), Tyler's step aunt testified that she had noticed no changes in Tyler from before Beth's death to the date of the trial (T 161). Tyler's "lack of change" was also confirmed by the Sauls life long friend of twenty-three years (T 154), Maureen Sopourm (T 155, 156).

Stephen Alexander, Ph.D., testified as Nick's expert witness. Dr. Alexander is a licensed psychologist. Dr. Alexander testified that there has been no literature written on the fact pattern of this case (T 534). Dr.

Alexander could find nothing in the psychological literature indicating that Court ordered visitation would be in the best interest of a child. Dr. Alexander opined that Court ordered grandparent visitation had negative implications (T 538). Dr. Alexander did not believe there would be any harm to Tyler if visitation was lessened or discontinued (T 542). He believed that intensification of the relationship between Tyler and Nick was very good (T 547).

Expert testimony by the Sauls expert notwithstanding, the entire case was summed up by Mrs. Saul when she stated that she wanted more visitation to develop the kind of relationship that she would like to see (T 84). She wanted court ordered visitation to insure visitation continuation (T 85). From Mr. Saul's point of view, the instant case was filed because Nick would not allow overnight visitation (T 101). Tyler is the only grandchild the Sauls will have (T 130).

The reason for bringing the case was revealed by the Sauls' counsel. The Sauls believed that they were loosing the rights that **Beth gave to them** (T 147). Further the Sauls counsel boldly asserted to the Court that "the case law is clear he (Mr. Saul) is given the rights Beth gave to him. This is the reason he filed his Petition." (T 148). Counsel further suggested that if circumstances changed, Nick could apply to the Court to have any visitation order modified (T 209).

Trial Court's Ruling:

The Trial Court ordered grandparent visitation every other Saturday, plus seven additional days per year which shall include overnight. The Trial

Court based its ruling solely upon the legal authority of ***Beagle v. Beagle***, 628 So. 2d 127 (Fla. 1996) (R451).

Fourth District's Ruling:

The Fourth District relied upon the Court's decision in ***Von Eiff v. Azicri***, and summarily reversed the decision of the Trial Court.

SUMMARY OF ARGUMENT

Florida's grandparent visitation statute, Section 752.01(1)(d), Fla. Stat. (1993), violates Article I, Section 23 of the Florida Constitution. This section of the Florida Constitution provided to an individual greater privacy protection than does the United States Constitution. This being said, a parent has a fundamental and constitutional privacy right in raising his child without undue state interference. The compelling state interest must involve the prevention of harm to the child. Section 752.01(1)(d) permits the State to interfere with a parent's constitutional right of privacy without a demonstration of harm to the child. Therefore, the section is unconstitutional.

Additionally, Section 752.01(1)(d) violates the Fourteenth Amendment to the Untied States Constitution. A parent has a protected liberty and privacy interest as to the care, health, custody and upbringing of a child. To allow governmental intrusion into this constitutionally protected

area, there must be a powerful countervailing governmental interest. The Supreme Court of the United States has interpreted this interest to mean that before there can be governmental intrusion, there must first be a showing of **harm to the child**. Because Section 752.01(1)(d) allows the State to intrude upon a parent's right to raise a child, without any demonstration of harm, the statute is unconstitutional as it violates the Fourteenth Amendment.

Section 752.01(1)(d) is violative of an unwed father's right to equal protection under the Fourteenth Amendment. The Appellee herein argues that there should be no distinction concerning the denial or granting of grandparent visitation merely based upon one's marital status, or lack of same. The relationship between a father and his child, where the mother is deceased, is no less a protected relationship than between a child and a living mother and father or a divorced mother and father. The statute is therefore, unconstitutional.

Appellee urges that the fact that he was a participant in an action brought by the Florida Department of Revenue, is under no circumstances a waiver of privacy rights so as to allow validation of the referenced statute or to authorize visitation under some other statute.

ARGUMENT

I. ***Florida Statute 752.01(1)(d) Entitling Grandparents f***

Children Born Out of Wedlock to Reasonable Visitation is Unconstitutional as it violates Fundamental Rights Protected By The State and Federal Constitution.

A. Florida's Grandparent Visitation Statute

The present grandparent visitation statute, Section 752.01(1), grants any grandparent the right to seek visitation when it is in the best interests of the child if:

(a) One or both parents of the child are deceased;[1]

(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 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.[2]

Fla. Stat. Section 752.01(1)(a)-(e) (1993).

[1] This Court held subsection (a) unconstitutional in ***Von Eiff v. Azicri*** (supra).

[2] This Court held subsection (e) unconstitutional. ***Beagle v. Beagle***, 678 So.2d 1271 (Fla. 1996).

Since Section 752.01(1)(d) requires no showing of demonstrable harm to a child prior to the imposition of forced grandparent visitation, it violates the Appellee's rights under Article I, Section 23 of the Florida Constitution as well as the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

B. Section 752.01(1)(d), Fla. Stat., Violates Article I, Section 23 of the Florida Constitution

Article I, Section 23, of the Florida Constitution states that, except as otherwise provided, "[e]very natural person has the right to be left alone and free from governmental intrusion into his private life…." This court, in ***Winfield v. Division of Pari-Mutual Wagering***, 477 So.2d 544, 546-548 (Fla. 1985), has held that this "right of privacy is a fundamental right" which "is much broader in scope then that of the Federal Constitution", and provided a concise background of the significance of the right of privacy of Floridians.

> The United States Supreme Court has fashioned a right of privacy which protects the decision-making or autonomy zone of privacy interests of the individual. The Court's decisions include matters concerning marriage, procreation, contraception, relationships and child rearing, and education. (Id at page 545)

Historically, both Florida Courts and the United States Supreme Court have long recognized the fundamental nature as well as the constitutionally

protected rights of parents in the care, custody and management of their children without State interference, except under the most compelling circumstances. However, with the enactment of Article I of Section 23, Florida has increased that protection:

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.
>
> * * *
>
> We believe that the amendment should be interpreted in accordance with the intent of its drafters. *Winfield*, supra.

The privacy principle was clearly enunciated in ***Beagle***. The principle was further clarified, amplified, and made crystal clear in this Court's recent decision in ***Von Eiff***. In ***Beagle***, Section 752.01(1)(e) was declared unconstitutional. In ***Von Eiff***, Section 752.01(1)(a) was declared

unconstitutional. The rights of the Appellee are no less fundamental than the rights found so fundamental in ***Beagle*** and ***Von Eiff***.

As this Court stated in ***Von Eiff***:

> …the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm… We determined that subsection (1)(e) did not survive the stringent standard of compelling state interest test because it did not require a showing of demonstrable harm to the child before the State's intrusion upon the parent's fundamental rights.
>
> Subsection (1)(a) suffers from the same infirmity…(Id at page 514)

The Appellants urge this Court to recede from ***Von Eiff***. The Fourth District found Section 752.01(1)(d) unconstitutional in ***Brunetti***, as a logical consequence of this Court's ruling in ***Von Eiff***. Without the benefit of ***Von Eiff***, two District Courts of Appeal have held portions of Section 752.01(1) unconstitutional. In ***Ocasio v. McGlothin***, 719 So.2d 918 (3rd DCA 1998), the Third District Court of Appeal held the questioned Section to be "facially unconstitutional". Id at page 917. Shortly thereafter, the First District Court of Appeal likewise held Section 752.01(1)(b) unconstitutional in ***Williams v. Spears***, 719 So.2d 1236 (1st DCA 1998).

It should be noted that the Petition as filed by the Sauls was filed as an Action For Grandparent Visitation pursuant to Florida Statutes Section 752

(R 001). There is no mention of under which subsection the visitation action was being brought. There is no mention in the Petition that Nick was not married to Beth (R 001-004). The District Court in ***Brunetti*** found that "the grandparents did not specify under which subsection of the statute they were asking visitation. Id at page 142. The Trial Court did not find that Section 752.01(1)(d) was constitutional. Rather, the Trial Court believed she was compelled to follow ***Beagle*** (R 436).

Appellants rely ***Clinebell v. Department of Children and Families***, 711 So.2d194 (5th DCA 1998) as authority for grandparent visitation. Unfortunately, a reading of the case clearly indicates that the matter initiated by the grandparents in ***Clinebell*** was a dependency action brought under Chapter 39, Florida Statutes. The case was not decided upon the basis of Section 752, and more importantly, was decided prior to ***Von Eiff***. ***Clinebell*** is therefore of no value or import to this Court.

Chapter 752 is a free standing statute. It confers standing. On it face it permits visitation without reference to or in conjunction with any other statute. The Sauls brought an action and litigated an action under Chapter 752. More importantly, the Appellee defended a Chapter 752 action. He did not defend a Chapter 61 action, a Chapter 39 action or for that matter any action other than as contained in the pleadings. For the Appellants to now

argue that there is a statute somewhere amongst the public laws of Florida to support their action is interesting but disingenuous. The Sauls' case must rise or fall upon the pleadings. Anything else would be a deprivation of due process to the Appellee.

Historically, the child of unwed parents was called *filius nullius,* a child of nobody. The era of the "bastard child" has long since past. The present day paternity action had it antecedent in the not so ancient "bastardy proceedings". Such proceedings are now mere historical relics. The children of unwed parents have constitutionally protected rights. For a more complete discussion, see ***In re The Guardianship of D.A. McW***., 429 So.2d 699 (4th DCA 1983).

In 1975, Section 744.301, Florida Statute was passed. This statute erased the historical prejudice and placed the unwed father on equal footing with the mother, making each the legal guardians of the child, irrespective of whether or not the parties were married. In ***DeCosta v. North Broward General Hospital***, 497 So.2d 1282 (4th DCA 1986), the Court held that an unwed father had the legal responsibility to pay for medical services rendered to a child born out of wedlock, even if those services were requested by the mother.

In ***Stepp v. Stepp***, 520 So.2d 314 (2nd DCA, 1988), the District court held that in custody issues as between an unwed father and unwed mother, the provision of the Shared Parental Responsibility Act (Section 61.13 Fla. Stat. 1985) equally applied. Appellants urge this court to go backwards twenty-five years, and take away that which has already been established.

This case is not a paternity case. The matter of paternity was never an issue. Appellee readily admitted he was the father and was so indicated on the birth certificate (R 004). No action was ever necessary to determine paternity.[3] In ***Persico v. Russo***, 721 So.2d 302 (Fla. 1998), this Court again stated in a rephrased certified question:

> IS SECTION 752.01(1)(a), FLORIDA STATUTES (1993), FACIALLY UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY INFRINGES ON PRIVACY RIGHTS PROTECTED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITION?
>
> For the reasons stated in ***Von Eiff***, we answer the rephrased question in the affirmative…

Thus the issue of whether Section 752.01 is facially unconstitutional has been determined once and for all. Despite the unambiguous pronouncement of this Court, Appellants continue to urge that Section 752.01(1)(a) is facially constitutional. See page 35 of Appellants' Initial Brief.

[3] As will be discussed herein, the "paternity action" referred to by appellants was in fact, a support action brought by the Florida Department of Revenue. See Case No. CD 95-2582 FC, Fifteenth Judicial Circuit, Palm Beach County, Florida.

Appellants also urge this court to consider prebirth conduct as a possible method to avoid unconstitutionality. Appellants cite ***In Re Adoption of Baby EAW***, 658 So.2d 961 (Fla. 1995) to support this contention. First and foremost ***EAW*** was an adoption case which expanded the definition of abandonment pursuant to Section 63.032(14), Florida Statutes (1992). To attempt to compare the abusive relationship described in ***EAW*** to the relationship between Beth and Nick is a patent absurdity. Although the Trial Court allowed some testimony on this issue, over objection of trial counsel, the Trial Court made no negative findings regarding this non issue.

Appellants additionally urge that on the basis of ***EAW***, had Beth sought to place the child for adoption, Nick's rights would have been terminated. Unlike ***EAW***, this Court has the ability to review the totality of Nick's conduct and see through Appellants' transparent attempt to besmirch the Appellee.

It should be noted that at the time of Beth's pregnancy, Nick was an unemployed student. Support is relative to means and ability to pay. When ordered by a Court to pay support, he did so and was not in arrears. The argument that grandparents who have financial means vastly in excess of the father, obtain rights superior to the father is repugnant to public policy and is

without basis in the law and should be summarily disregarded. Are constitutional rights to be measured by the quantum of one's finances?

Tyler was the product of the relationship between Nick and Beth. Because Nick and Beth chose to live their lives as they did, does not "give" rights to the Sauls which they otherwise would not have.

The comment of the Court in ***Von Eiff*** is equally relevant here as Justice Pariente stated:

> …We recognize that it must hurt deeply for the grandparents to have lost a daughter and then be denied time with their granddaughter. We are not insensitive to their plight. However, familial privacy is grounded on the right to rear their children without unwarranted governmental interference. (Id at page 516).

C. Section 752.01(1)(a). Fla. Stat., Violates the Petitioners' right of Privacy Under the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court has also recognized parents' protected rights in the care, custody and management of their children without undue governmental interference. In fact, the "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982). The United States Supreme Court in ***Meyer v. Nebraska***, 262 U.S. 390, 399 (1923), stated that parents have the right to raise their children as

they see fit, free from unreasonable governmental intrusion as one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Many other United States Supreme Court cases affirmed this same premise. ***Pierce v. Society of Sisters***, 268 U.S. 510, 534-35 (1925) (addressing the unreasonable interference with the liberty of parents to direct the upbringing of their children); ***Prince v. Commonwealth of Massachusetts***, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first in the parents…it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter"); ***Ginsberg v. State of New York***, 390 U.S. 629, 639 (1968) ("the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); ***Stanley v. Illinois***, 405 U.S. 645, 651 (1972) (the integrity of the family unit has found protection under the Due Process Clause of the Fourteenth Amendment …the Equal Protection Clause of the Fourteenth Amendment…, and under the [privacy aspects of the] Ninth Amendment); ***Santosky v. Kramer***, (recognizing the historical right to freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); ***Roberts v. U.S. Jaycees***, 468 U.S. 609, 618-620 (1984) (child

raising entitled to a substantial measure of sanctuary from unjustified interference by the state). Accordingly, parental rights are protected under the Federal Constitution as both liberty rights and as privacy rights.

Section 752.01(1)(d), Fla. Stat. (1993), violates both of these protected rights under the United States Constitution. The effect of the Florida grandparent visitation statute is to interfere with parental rights to make decisions regarding the custody, care and management of their children, and it likewise intrudes upon their privacy in making such decisions.

There must be a countervailing interest to permit such interference. ***Santosky,*** supra, at 607. Indeed, the United States Supreme Court has interpreted this to mean that there must first be a showing of harm to the child. Id.; ***Stanley***, supra; see, e.g., ***Wisconsin v. Yoder***, 406 U.S. 205, 234 (1972) ("if it appears that parental decision will jeopardize the health or safety of the child, or have a potential for significant social burdens," the power of the parent may be curtailed). Thus, the states, which have the reserved power to regulate family life, have legitimate interests which, in certain circumstances such as those showing harm to the child, may override parental rights. ***Wisconsin v. Yoder***, Id.

While the constitutional rights of parents to raise their children as they choose, although recognized as fundamental, is not absolute, neither is the States' power to regulate for the perceived good of its citizens absolute. As stated repeatedly by the Supreme Court, when the States' actions burden the fundamental rights of citizens, a heightened degree of judicial review is require. ***Roe v. Wade***, 410 U.S. 113, 155 (1973). The standard of review, sometimes called "strict scrutiny", requires that for state action to be justified, the action must serve a compelling state interest. ***Yoder***. In summary of the United States Supreme Court cases mentioned above, state interference is justifiable only where the state acts in its police power to protect the child's health or welfare and where parental decisions would result in harm to the child.

Absent findings of harm to Tyler, and there was no such finding by the Trial Court, the governmental intrusion upon the parents' fundamental rights is a violation of the Fourteenth Amendment to the United States Constitution.

II. *Was Privacy Waived.*

Appellants urge that Appellee lost his constitutional right to privacy by being involved in a paternity action. As indicated in the testimony, the action was a support action brought by the Florida Department of Revenue.

All payments as ordered by the Court were paid directly to Beth, until her death.

Participation in such a case does not equate to a waiver of a constitutional right and no case authority has been cited for such a proposition.

At the time of the filing of this case, November 11, 1996, there was no pending case. The support action expired as a matter of law upon the death of the mother. Nick assumed **total** responsibility for Tyler within days of Beth's untimely death.

While Appellants cite ***Spence v. Stewart***, 705 So.2d 996 (4th DCA 1998) to stand for proposition that any litigation between a father and mother vitiates famial privacy, such is not the case. A careful reading of ***Spence*** clearly indicates that the constitutionality of Section 752.01(1)(d) was not addressed citing the proposition that "Florida courts must avoid passing on the constitutionality of a statute if at all possible to resolve the case on other grounds". Id. at page 998. In ***Spence***, there was an ongoing case between the father and mother in which the paternal grandmother sought to intervene. In the instant case, there was no pending paternity/support case. There was no case pending of any kind in which the Sauls could intervene.

The above fact was discussed by Judge Klein in his concurring opinion in ***Brunetti***. He opined his belief that the ***Spence*** case was incorrectly decided. Of course, the ***Spence*** Court did not have the benefit of ***Von Eiff*** decision by this Court and ***Spence*** is of dubious precedential value. This is especially true as the entire Fourth District was given the opportunity to review Judge Klein's opinion and disagree with it. However, the Appellants' Motion for Rehearing En Banc was denied. See Order of Fourth District Court of Appeal, dated January 26, 1999, Document No. 2 as contained in Appellants' Appendix to Jurisdictional Brief.

In ***Fitts v. Poe***, 699 So. 2d 348 (5th DCA 1997), the District Court declared Section (1)(a) of the statute unconstitutional because it was unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of a widowed parent. ***Fitts*** was specifically approved by this Court in ***Von Eiff***. Id at page 516. Appellee would urge this Court that there is no difference between the fundamental privacy rights of an unwed custodial father and the fundamental privacy rights of a widowed parent. Any suggestion that an unwed father is somehow less fit to raise his child than a married person or a divorced person, would be a clear denial of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

It is the position of the Appellee that cases cited under the dependency statute, the guardianship statute, or the paternity statute are simply not relevant or applicable to the instant discussion in light of ***Von Eiff***.

CONCLUSION

Based upon the argument present and the legal authorities cited, Dominick Brunetti respectfully requests this Court to Affirm the decision of the Fourth District Court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished via U.S. Mail, postage prepaid to Jeanne C. Brady, Esquire, Appellants' counsel, 370 West Camino Gardens Boulevard, Suite 200 C, Boca Raton, Florida 33432 and to Steven Pesso, Esquire, Appellants' co-counsel, 370 West Camino Gardens Boulevard, Suite 336-337, Boca Raton, Florida 33432 this 17th day of May, 1999.

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