IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 94,843

DIANE SAUL and DAVID SAUL
Appellants,

v.
DOMINICK BRUNETTI
Appellee.

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM 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,)	
v.)	4th DCA case no. 98-00256
)	LT case no. CD 96-7845 FY
DOMINICK BRUNETTI)	
)	
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 Mrs. Saul" or "the Sauls". 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".

STATEMENT OF TYPESETTING

This Reply Brief is typed with times new roman, 14 point font in Corel WordPerfect for windows format.

REBUTTAL ARGUMENT

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

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.

Without analyzing the facts of the instant case, Appellee primarily argues that ***Von Eiff v. Azicri***, 720 So. 2d 510 (Fla. 1998), extends to render § 752.01(1)(d) facially unconstitutional under the Florida and United States Constitutions (Answer Brief p. 14). Appellants disagree, and rest on their Initial Brief in this regard. Rebuttal to arguments that were not already addressed in Appellants' Initial Brief follow.

Pointing to the shared parental responsibility law, Appellee contends that the Sauls ask this Court to go backwards, and take away what has already been established (Answer Brief p. 19). Not so. There is no dispute that the shared parental responsibility law applies to non-married parents unless the right has been waived or terminated by a court. ***See Kent v. Burdick***, 591 So. 2d 994, 996 (Fla. 1st DCA 1991)(so stating). That children's best interests control visitation in dissolution or out of wedlock birth where there is shared parental responsibility is not a novel precept. ***See e.g., Wishart v. Bates,*** 531 So. 2d 955 (Fla. 1988) (approving

grandparent visitation on best interest test in dissolution); ***Brown v. Bray,*** 300 So. 2d 668 (Fla. 1974) (chapter 742 constitutional; paternity and dissolution on same footing); ***Spence v. Stewart***, 705 So. 2d 996 (Fla. 4th DCA 1998).

Arguing an equal protection violation, Appellee compares himself to a widow. Appellee is not a widow. Even if he was, Appellee effectively relinquished parental responsibility to the Sauls, who were found by the trial court to be Tyler's primary caretakers (Appendix to Initial Brief Exhibit 2 page 1 paragraphs 2 & 3). During the Sauls extended residential primary caretaker role, Tyler developed a significant attachment to the Sauls (T 285). Bonding for what has now passed four years must be relevant. One reason that Tyler was doing well at the time of trial was because the Sauls had taken the painful but necessary step to insure Tyler's continuity by securing regular visitation (T 305). Dr. Heller explained that Tyler's contact and bond with the Sauls saved Tyler from emotional turmoil, and prevented his devastation from Beth's death (T 288, 290, 291, 463). Dr. Heller explained that removal of visits would be harmful, detrimental, and cruel causing a second detrimental loss, as well as a loss of Tyler's sense of security (T 285, 289, 293, 295, 335, 336, 335-337, 460-461, 486). When asked about demonstrable adverse effects, Dr. Heller testified that tantrums indicate that Tyler is very upset to leave the Sauls (T 456). Dr. Heller also explained that visitation was helping Tyler cope (T 457), and that Tyler has

attachment issues with the Sauls that are very important in his life (T 459).

When Appellee's own expert was asked if he had received a full history about this case from Mr. Cohen, Dr. Alexander candidly testified that he probably did not (T 567). Thereafter, Dr. Alexander agreed that the grandchild's loss of contact with grandparent the child had lived with would be an undeniable loss that would probably be harmful (T 587), and as traumatic as the loss of the mother (T 575, 593).

In order to soften the experts' testimony, Appellee states that he has no objection to the Sauls seeing Tyler, and contends that they saw Tyler more often prior to the visitation order (Answer Brief p. 8). Although Appellee's position would be welcomed, the credibility of that assertion was weighed and rejected by the trial court. It rendered a contrary finding of concern that visitation would not continue absent its court order (Appendix to Initial Brief Exhibit 2 page 2 paragraph 14). Notably, the Fourth District stayed its mandate as well (Appendix to Initial Brief Exhibit 3).

Although Appellee relies on ***In re Guardianship of D.A.McW***, 429 So. 2d 699 (Fla. 4th DCA 1983), ***appv'd ,*** 460 So. 2d 368 (Fla. 1984), Appellee refrains from addressing the liberal grandparent visitation afforded to that grandmother under virtually identical facts. ***See id.*** (Answer Brief p. 18).

As to Appellee's suggestion that it is not proper to consider whether Tyler's parents were not married (Answer Brief p. 17), his own counsel elicited testimony of

no marriage (T 255), and Appellee conceded that he never planned to marry Beth (T 196). Contrary to Appellee's implication, the constitutionality of subsection (d) was squarely before the trial court, as well as the Fourth District (T 672, R 108-132, 133-348). As the trial court found Tyler born out of wedlock, and granted visitation, not only is it implicit that it found the subsection constitutional, it expressly ruled that the statute was constitutional as applied to other than intact families (R 449-452).

As to Appellee's contention that any suggestion that an unwed father is less fit to raise a child than a married or divorced person is a denial of equal protection (Answer Brief p. 26), Appellee misses the point. Appellee has custody. In any event, equal protection does not bar rational distinctions between parents. ***E.g., Quilloin v. Walcott***, 434 U.S. 246, 254-56, 98 S. Ct. 549, 554-55, 54 L. Ed. 2d 511 (1978). That grandparents can secure beneficial visitation in paternity and dissolution -- but not in the identical contexts set forth in Chapter 752 poses an equal protection argument that cuts in favor of the Sauls.

Further, visitation under theories of continuing jurisdiction stemming from § 742.06, as well as the guardianship, is also available. See Initial Brief pp 22-23, 26 discussing statutory and inherent jurisdiction).

Although Appellee cites to ***Williams v. Spears***, 719 So. 2d 1236 (Fla. 1st DCA 1998) (Answer Brief p. 16), Appellee declines mention that ***Williams*** held

752.01(1)(b) (grandparent visitation in dissolution) *constitutional on its face*.

Appellee also contends that ***Spence v. Stewart***, 705 So. 2d 996 (Fla. 4th DCA 1998), is of dubious precedential value (Answer Brief p. 26). Appellants disagree. Waivers of familial privacy dictate that a child's best interests control. ***Spence*** correctly relied on ***Privette*** to reach that conclusion. ***Id.*** (relying on ***HRS v. Privette,*** 617 So. 2d 305, 309 (Fla. 1993) (child's best interest paramount in paternity)).

Appellee contends there is no testimony that he was not emotionally supportive of Beth during the pregnancy (Answer Brief page 3). Appellants disagree, and rest on their statement of facts in their Initial Brief in this regard.

Appellee also asserts that jurisdiction over Tyler ended when Beth died (Answer Brief page 25). Appellants disagree. Death of a parent does not divest a court of jurisdiction over the best interest of the child. Further, Appellee did not address continuing jurisdiction attendant to guardianship proceedings as to all matters that relate to this child's welfare. § 744.372, Fla. Stat.

Appellee also argues that his due process will be violated should visitation be considered under any theory other than chapter 752, (Answer Brief page 17-18). Appellants disagree. Waivers of privacy stem from the Appellee's conduct, Tyler's extended maternal grandparent residency, as well as the guardianship, child support and paternity proceedings. In addition to providing independent grounds to sustain

grandparent visitation, such facts constitute the precise reason why § 752.01(1)(d) is *facially* constitutional. These matters are highly relevant, were not required to be pled, and in any event, were tried by express and implied consent. ***See DiTeodoro v. Lazy Dolphin Dev. Co.***, 418 So. 2d 428 (3d DCA 1982), ***rev. den.***, 427 So. 2d 737 (Fla. 1983) (discussing Rule 1.190(b), Fla.R.Civ.P.). It was *Appellee* who requested judicial notice of the guardianship (T 212), and *no* objection was made to the trial court's judicial notice of the probate, paternity and child support cases (T 273-274). Further, the Fourth District should have affirmed visitation on any legal theory that upheld the trial court. ***E.g., Cohen v. Mohawk, Inc***., 137 So. 2d 222, 225 (Fla. 1962).

As to Appellee's retrospective assertion that no paternity adjudication was necessary (Answer Brief p. 19), it does not alter the fact that Beth was relegated to seek such a determination in order to secure some financial support for Tyler. As Tyler's paternity was adjudicated, there is continuing jurisdiction as a matter of law to enter any order that changing circumstances require (Appendix to Initial Brief Exhibit 2 page 2 paragraph 7); See § 742.06, Fla. Stat; (continuing jurisdiction after adjudication of paternity); ***In re J.M.***, 499 So. 2d 929, 931 (Fla. 1st DCA 1986) (death of parent change in circumstance); ***Anderson v. Garcia***, 673 So. 2d 111 (Fla. 4th DCA 1996) (after mother's death court retained jurisdiction over child providing

ongoing action and basis for grandmother to intervene in custody dispute).

Appellee misapplies this Court's statement in ***Von Eiff***:

> 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 children without unwarranted governmental interference.

(Answer Brief p. 21 citing ***Von Eiff***, 720 So. 2d at 516).

Von Eiff does not apply. The Sauls' case is unique. No familial privacy remains here. Government interference is warranted. Unlike any case cited by Appellee, this case involves a grandchild born out of wedlock who enjoyed extended maternal grandparent residency with a primary caretaker role, conduct that gave rise to the need for that grandparental role in the first instance, an unusually strong grandparent-grandchild bond, highly relevant paternity, child support and guardianship proceedings, death of a parent in the child's presence, the child's survival of the violent car accident that killed his mother, Appellee's belated assertion of waived familial privacy, and harm to this grandchild should visitation cease. Under these unique facts, one can conclude that it must hurt Tyler deeply to have lost his mother, and then be denied time with the grandparents who raised him with her prior to her untimely death. ***See In Re Guardianship of D.A.McW.*** (liberal grandparent

visitation under similar facts because harm to grandchild obvious).

WHEREFORE , the Sauls respectfully request this Court to quash the Fourth District's opinion, and reinstate visitation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of this Reply 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 3rd day of June, 1999.

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